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*Editor*

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## REFERENCES

These reports contain references to the following major works of legal reference described in the manner indicated below.

### **Halsbury's Laws of England**

The reference 26 *Halsbury's Laws* (4th edn) para 577 refers to paragraph 577 on page 296 of volume 26 of the fourth edition of *Halsbury's Laws of England*.

The reference 15 *Halsbury's Laws* (4th edn reissue) para 355 refers to paragraph 355 on page 283 of reissue volume 15 of the fourth edition of *Halsbury's Laws of England*.

The reference 7(1) *Halsbury's Laws* (4th edn) (1996 reissue) para 9 refers to paragraph 9 on page 24 of the 1996 reissue of volume 7(1) of the fourth edition of *Halsbury's Laws of England*.

### **Halsbury's Statutes of England and Wales**

The reference 26 *Halsbury's Statutes* (4th edn) 734 refers to page 734 of volume 26 of the fourth edition of *Halsbury's Statutes of England and Wales*.

The reference 40 *Halsbury's Statutes* (4th edn) (1997 reissue) 269 refers to page 269 of the 1997 reissue of volume 40 of the fourth edition of *Halsbury's Statutes of England and Wales*.

### **The Digest**

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The reference 37(2) *Digest* (Reissue) 424, 2594 refers to case number 2594 on page 424 of the reissue of green band volume 37(2) of *The Digest*.

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### **Halsbury's Statutory Instruments**

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<b>Williams v Natural Life Health Foods Ltd</b>	..	..	..	..	..	..	..	..	..	<b>HL</b>	<b>577</b>
<b>CONFLICT OF LAWS</b> – Contract – Proper law of contract											
<b>Sierra Leone Telecommunications Co Ltd v Barclays Bank plc</b>	..	..	..				<b>Cresswell J</b>	<b>821</b>			
—Foreign government – Recognition											
<b>Sierra Leone Telecommunications Co Ltd v Barclays Bank plc</b>	..	..	..				<b>Cresswell J</b>	<b>821</b>			

<b>CONFLICT OF LAWS – Foreign proceedings – Restraint of foreign proceedings – Circumstances in which court will restrain prosecution of foreign proceedings</b>		
<b>Airbus Industrie GIE v Patel.</b>	.. .. .	HL 257
<b>CONFLICT OF LAWS – Jurisdiction – Exclusive jurisdiction</b>		
<b>Hough v P &amp; O Containers Ltd (Blohm + Voss Holding AG and ors, third parties)</b>		Rix J 978
— Jurisdiction – Time for establishing jurisdiction for joinder of further defendants – Whether date of issue of writ or date of joinder		
<b>Petrotrade Inc v Smith</b>	.. .. .	Thomas J 346
<b>CONTRACT – Illegality – Whether contract with firm of solicitors for payment of share of fees in consideration for introduction of clients enforceable</b>		
<b>Mohamed v Alaga &amp; Co (a firm)</b>	.. .. .	Lightman J 720
— Performance bond – Breach of contract by plaintiffs – Defendant not suffering loss to extent of value of bond – Whether plaintiffs entitled to recover overpayment		
<b>Cargill International SA v Bangladesh Sugar and Food Industries Corp</b>	.. .. .	CA 406
— Restitution – Interest rate swap agreement fully performed – Claim for repayment of net amount received under void agreement – Whether distinction to be drawn between open swap and closed swap agreements		
<b>Guinness Mahon &amp; Co Ltd v Kensington and Chelsea Royal London BC</b>	.. .. .	CA 272
<b>COSTS – Order for costs – Discretion – Medical negligence action</b>		
<b>Oksuzoglu v Kay</b>	.. .. .	CA 361
— Order for costs – Payment of costs by non-party – Whether insurers liable to pay plaintiffs' costs		
<b>T G A Chapman Ltd v Christopher</b>	.. .. .	CA 873
— Order for costs – Pre-emptive order – Conditional fee agreement		
<b>Hodgson v Imperial Tobacco Ltd</b>	.. .. .	CA 673
— Taxation – Solicitor – Contentious business agreement		
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<b>COUNTY COURT – Practice – Striking out – Automatic directions</b>		
<b>Figgett v Davies</b>	.. .. .	CA 356
— Practice – Striking out – Striking out default action after 12 months where admission delivered but no judgment entered – Meaning of admission		
<b>Watkins v Toms (1996).</b>	.. .. .	CA 534
— Practice – Striking out – Whether court able to strike out action on expiry of 12-month period where defendant not admitting both liability and quantum		
<b>Limb v Union Jack Removals Ltd (in liq)</b>	.. .. .	CA 513
— Practice – Whether court having jurisdiction to strike out notice of discontinuance for abuse of process		
<b>Gilham v Browning</b>	.. .. .	CA 68
— Practice – Whether party having unfettered right to be nonsuited		
<b>Gilham v Browning</b>	.. .. .	CA 68
<b>CRIMINAL EVIDENCE – Application for production of special procedure material – Test to be applied</b>		
<b>R v Crown Court at Southwark, ex p Bowles</b>	.. .. .	HL 193
— Exclusion of evidence		
<b>R v Chalkley, R v Jeffries</b>	.. .. .	CA 155

<b>CRIMINAL EVIDENCE</b> – Order for production of material – Power to make order		
<b>R v Crown Court at Southwark, ex p Bowles</b> .. .. .	HL	193
<b>CRIMINAL LAW</b> – Appeal – Appeal following plea of guilty		
<b>R v Chalkley, R v Jeffries</b> .. .. .	CA	155
— Bail – 24-hour time limit – Jurisdiction to remand in custody where person arrested for breach of bail conditions brought before justices out of time		
<b>R v Governor of Glen Parva Young Offender Institution, ex p G (a minor)</b> .. .. .	QBD DC	295
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<b>Re Gilligan, R v Crown Court at Woolwich, ex p Gilligan</b> .. .. .	QBD DC	1
— Costs – Prosecution costs – Order for payment – Enforcement of order		
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<b>Chamberlain v Linton</b> .. .. .	QBD DC	538
— Murder – Concerted action – Degree of foresight required by secondary parties		
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<b>Neal v Bingle</b> .. .. .	CA	58
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<b>R v Secretary of State for the Environment, ex p Billson</b>	..	..	..	..	Sullivan J	587
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**IMMIGRATION – Leave to enter – Refugee – Whether current well-founded fear of persecution necessary**

<b>Adan v Secretary of State for the Home Dept</b>	..	..	..	..	..	..	HL	453
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**INJUNCTION – Family proceedings – Interim care order or emergency protection order – Attachment of power of arrest to exclusion requirement – Procedure**

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**—Husband and wife – Domestic violence – Attachment of power of arrest to occupation or non-molestation order**

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**—Reinsurance – Whether insurers entitled to claim indemnity in respect of settlement under reinsurance policies**

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**—Costs of application – Pre-emptive order for costs – Principles to be applied in exercise of court's discretion**

<b>R v Lord Chancellor, ex p Child Poverty Action Group, R v DPP, ex p Bull</b>	..	..	Dyson J	755
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**—Permitted hours – Special hours certificate – Whether possible in law for two or more special hours certificates to co-exist in respect of same premises**

<b>R v Crown Court at Stafford, ex p Chief Constable of the Staffordshire Police</b>	..	Laws J	812
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**MAGISTRATES – Indorsement of Irish warrant – Order for return – Whether offences specified in Irish warrants corresponding with English offences**

<b>Re Gilligan, R v Crown Court at Woolwich, ex p Gilligan</b>	..	..	..	..	..	QBD DC	1
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**MORTGAGE – Sale – Duty of mortgagee where security including business**

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<b>PENSION</b> – Maladministration of pension scheme – Jurisdiction of Pensions Ombudsman – Exercise		
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— Service – Substituted service – Defendant solicitor's whereabouts unknown – Whether power to order substituted service on Solicitors' Indemnity Fund		
<b>Abbey National plc v Frost (Solicitors' Indemnity Fund Ltd intervening)</b> ..	<b>Carnwath J</b>	<b>321</b>
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<b>R v Secretary of State for the Home Dept, ex p Simms, R v Governor of Whitemoor Prison, ex p Main</b> .. .. .	<b>CA</b>	<b>491</b>
— Visits – Visits by journalists – Whether condition that journalists sign undertaking not to use information gained for professional purposes ultra vires		
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<b>RACE RELATIONS</b> – Discrimination – Employment – Discrimination on racial grounds		
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<b>Nessa v Chief Adjudication Officer</b> .. .. .	<b>CA</b>	<b>728</b>
<b>TOWN AND COUNTRY PLANNING</b> – Breach of condition notice – Whether defendant entitled to challenge validity of notice and validity of planning condition in criminal proceedings		
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<b>TRUST AND TRUSTEE</b> – Creation of trust – Declaration of trust – Whether ineffective assignment at law of chose in action capable of being effective in equity as declaration of trust		
<b>Don King Productions Inc v Warren</b> .. .. .	<b>Lightman J</b>	<b>608</b>
<b>UNFAIR DISMISSAL</b> – Right to claim unfair dismissal – Exclusion of right by agreement – Agreement by person employed under contract for fixed term of one year or more		
<b>BBC v Kelly-Phillips</b> .. .. .	<b>CA</b>	<b>845</b>



<b>VALUE ADDED TAX – Supply of goods or services – Supply in course of a business – Whether society campaigning to oppose legislation against field sports to be treated as carrying on a business</b>									
<b>Customs and Excise Comrs v British Field Sports Society</b>	..	..	..	..	..	..	..	CA	1003
<b>—Supply of goods or services – Supply of services for a consideration – Whether direct link between subscriptions to society campaigning to oppose legislation against field sports and benefit to members of campaigning activities</b>									
<b>Customs and Excise Comrs v British Field Sports Society</b>	..	..	..	..	..	..	..	CA	1003

# House of Lords petitions

This list, which covers the period 24 March to 8 June 1998, sets out all cases which have formed the subject of a report in the All England Law Reports in which an Appeal Committee of the House of Lords has, subsequent to the publication of that report, refused leave to appeal. Where the result of a petition for leave to appeal was known prior to the publication of the relevant report a note of that result appears at the end of the report.

**Kelley v Corston** [1997] 4 All ER 466, CA. Leave to appeal refused 2 April 1998 (Lord Slynn of Hadley, Lord Clyde and Lord Hutton)

**National Trust for Places of Historic Interest or Natural Beauty v Knipe** [1997] 4 All ER 627, CA. Leave to appeal refused 2 April 1998 (Lord Slynn of Hadley, Lord Clyde and Lord Hutton)

**R v Arnold** [1997] 4 All ER 1, CA. Leave to appeal refused 25 March 1998 (Lord Browne-Wilkinson, Lord Nolan and Lord Hoffmann)

**R v North West London Mental Health NHS Trust, ex p Stewart** [1997] 4 All ER 781, CA. Leave to appeal refused 14 May 1998 (Lord Steyn, Lord Hope of Craighead and Lord Clyde)



## Re Gilligan

### **R v Crown Court at Woolwich, ex parte Gilligan**

QUEEN'S BENCH DIVISION

MAY LJ AND ASTILL J

18, 19 DECEMBER 1997, 12 JANUARY 1998

*Magistrates – Indorsement of Irish warrant – Order for return – Irish warrants indorsed for execution in England charging applicant with various offences – Whether offences specified corresponding with English offences – Whether magistrate having sufficient material to conclude that they did – Backing of Warrants (Republic of Ireland) Act 1965, s 2(2).*

*Criminal law – Committal – Remand in custody – Custody time limits – Custody time limit expiring before conclusion of extradition proceedings – Whether ‘good and sufficient cause’ for extending custody time limit – Whether prosecution having acted with ‘with all due expedition’ – Prosecution of Offences Act 1985, s 22(3)(b).*

Following his arrest at Heathrow Airport the applicant was charged with offences under the Drug Trafficking Act 1994 and his trial in the Crown Court was fixed for 8 September 1997. On 29 August 1997, however, the Special Criminal Court in Dublin granted 18 warrants for the arrest of the applicant on charges of murder, and drug and firearm related offences, and the warrants were later indorsed for execution in the United Kingdom. Thereafter, the Irish government applied to a stipendiary magistrate in England under s 2<sup>a</sup> of the Backing of Warrants (Republic of Ireland) Act 1965 for an order for the return of the applicant to Ireland. On 8 September the Crown Court, on the application of the prosecution, adjourned the English trial on the ground that the application to return the applicant to Ireland should take precedence, the prosecution indicating that there would be no English trial whatever the outcome in Ireland. The stipendiary magistrate held that he had no jurisdiction in proceedings brought under the 1965 Act to consider allegations of abuse of process, and that, for the purposes of s 2(2) of the 1965 Act, the offences specified in the Irish warrants corresponded with English offences, and he accordingly ordered the applicant to be delivered up to Ireland. The Crown Court subsequently granted an extension of the custody time limit until 2 January 1998 in the English proceedings but refused to fix an effective date for trial. The applicant applied for a writ of habeas corpus to review the magistrate's decision, contending, inter alia, that there was insufficient material before the magistrate to enable him to conclude that the offences specified in the Irish warrants corresponded with English offences, and that he should have been allowed to contend that the proceedings should be stayed for abuse of process. He also applied for leave to move for judicial review

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<sup>a</sup> Section 2, so far as material, is set out at p 6 *d* to *f*, post

of the Crown Court's decision to extend the custody time limit, contending, *inter alia*, that there were no proper grounds for the extension and that the prosecution were not acting with all due expedition, as required by s 22(3)(b)<sup>b</sup> of the Prosecution of Offences Act 1985, but deliberately obstructing the process of the trial and prolonging the applicant's time in custody.

**Held** – (1) Having regard to the words 'if it appears to the court' in the first limb of s 2(2) of the 1965 Act, evidence was not required for the court to consider if there was a correspondence between Irish offences charged and English offences. All the court had to do was to read the warrant and find what offence was specified in it so that, except for the strictly limited purpose of explaining technical language in the warrant or words which an English court would not understand, no other evidence was admissible to determine 'the offence specified in the warrant'. Furthermore the word 'any' used in connection with the English offence in s 2(2) meant that the court was not necessarily looking for an English offence which was identical with the offence specified in the warrant, nor one whose juristic elements were the same, but for a sufficiently serious offence (ie an indictable offence or one punishable on summary conviction with imprisonment for six months) with which the offence in the warrant would correspond if it had occurred in England. In the instant case, the offences specified in 16 of the Irish warrants did correspond with sufficiently serious offences under English law but two did not. Accordingly, the magistrate's order on those two warrants would be quashed. However, since the magistrate had correctly decided that he had no jurisdiction to entertain submissions about abuse of process, the application for habeas corpus would otherwise be dismissed (see p 10 c g to p 11 a, p 15 j to p 17 b, p 19 h, p 21 b and p 22 f, post); *Re Arkins* [1966] 3 All ER 651, *Keane v Governor of Brixton Prison* [1971] 1 All ER 1163, *Government of Canada v Aronson* [1989] 2 All ER 1025 and *Schmidt v Federal Government of Germany* [1994] 3 All ER 65 applied.

(2) The requirement under s 22(3)(b) of the 1985 Act for the prosecution to have acted with all due expedition referred to the time up to the making of the application to extend the custody time limit, not to whether acceding to an application would cause future delay. Furthermore, extending the custody time limit, which was academic because the applicant was in custody anyway, so as to keep alive the possibility of a trial in England if the applicant was not returned to Ireland, was a good and sufficient cause for doing so. Moreover, the judge had properly exercised his discretion in deciding to defer the English trial so as to retain the possibility that it might take place if the defendant were not returned to Ireland. Accordingly, although the court would grant leave to move, the substantive application for judicial review would be dismissed (see p 21 j and p 22 b to f, post); *R v Birmingham Crown Court, ex p Bell*, *R v Birmingham Crown Court, ex p Brown* [1997] 2 Cr App R 363 approved.

## Notes

For the arrest and return of persons convicted or accused of offences against the laws of the Republic of Ireland found in the United Kingdom, see 18 *Halsbury's Laws* (4th edn) paras 281–300.

<sup>b</sup> Section 22(3) is set out at p 21 e, post



a For the Backing of Warrants (Republic of Ireland) Act 1965, s 2, see 17 *Halsbury's Statutes* (4th edn) (1993 reissue) 538.

For the Prosecution of Offences Act 1985, s 22, see 12 *Halsbury's Statutes* (4th edn) (1997 reissue) 920.

### Cases referred to in judgments

b *Arkins, Re* [1966] 3 All ER 651, sub nom *R v Metropolitan Police Comr, ex p Arkins* [1966] 1 WLR 1593, DC.

*Atkinson v US Government* [1969] 3 All ER 1317, [1971] AC 197, [1969] 3 WLR 1074, HL.

*Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138, [1994] 1 AC 42, [1993] 3 WLR 90, HL.

c *Government of Canada v Aronson* [1989] 2 All ER 1025, [1990] 1 AC 579, [1989] 3 WLR 436, HL.

*Government of Denmark v Nielsen* [1984] 2 All ER 81, [1984] AC 606, [1984] 2 WLR 737, HL.

*Keane v Governor of Brixton Prison* [1971] 1 All ER 1163, [1972] AC 204, [1971] 2 WLR 1243, HL.

d *Lawlor, Re* (1977) 66 Cr App R 75, DC.

*Lindley, Re* (29 October 1997, unreported), DC.

*Metropolitan Police Comr v Hammond* [1964] 2 All ER 772, [1965] AC 810, [1964] 3 WLR 1, HL.

*Ng (alias Wong) v R* [1987] 1 WLR 1356, PC.

e *Nobbs, Re* [1978] 3 All ER 390, [1978] 1 WLR 1302, DC.

*R v Birmingham Crown Court, ex p Bell, R v Birmingham Crown Court, ex p Brown* [1997] 2 Cr App R 363, DC.

*R v Sheffield Justices, ex p Turner* [1991] 1 All ER 858, [1991] 2 QB 472, [1991] 2 WLR 987, DC.

f *Schmidt v Federal Government of Germany* [1994] 3 All ER 65, [1995] 1 AC 339, [1994] 3 WLR 228, HL.

*Sinclair v DPP* [1991] 2 All ER 366, [1991] 2 AC 64, [1991] 2 WLR 1028, HL.

*State (Furlong) v Kelly* [1971] IR 132, Ir SC.

### Cases also cited or referred to in skeleton arguments

g *Collins v Loisel* (1922) 259 US 309, US SC.

*Cotroni v A-G of Canada* [1974] 1 FC 36, Can Fed Ct.

*O'Shea v Conroy* [1995] 2 ILRM 527, Ir SC.

*R v Crown Court at Norwich, ex p Parker* (1992) 96 Cr App R 68, DC.

*R v Governor of Winchester Prison, ex p Roddie* [1991] 2 All ER 931, [1991] 1 WLR 303, DC.

h *R v Worcester Magistrates, ex p Bell* [1994] Crim LR 133, DC.

*Riley v Commonwealth of Australia* (1985) 159 CLR 1, Aust HC.

*State of Washington v Johnson* (1988) 40 CCC (3d) 546, Can SC.

### j Applications for writ of habeas corpus and for leave to move for judicial review

By notice dated 11 November 1997, John Joseph Gilligan applied for a writ of habeas corpus ad subjiciendum directed to the Governor of Belmarsh Prison, into whose custody he had been committed. He also applied by notice dated 3 December 1997 for leave to move for judicial review by way of an order of certiorari to quash the order made by Judge Rucker in the Crown Court at

Woolwich on 30 October 1997 extending the custody limit in his case until 2 January 1998 without fixing an effective date for trial. The facts are set out in the judgment of May LJ.

*Clare Montgomery QC and James Lewis* (instructed by *Stokoe Partnership*) for the applicant.

*Nigel Peters QC and Shane Collery* (instructed by the *Crown Prosecution Service*) for the respondent.

*Cur adv vult*

12 January 1998. The following judgments were delivered.

### MAY LJ.

#### INTRODUCTION

John Gilligan, the applicant, was arrested on 6 October 1996 at Heathrow Airport attempting to board a flight for Amsterdam. He had on him approximately £330,000 in cash, mostly in Irish and Northern Irish currency. He was charged by HM Customs and Excise with an offence contrary to s 49(1) of the Drug Trafficking Act 1994 and remanded in custody. Further offences were charged before his committal proceedings, which were contested and took place during January and February 1997. On 20 February 1997 he was committed on three charges to the Crown Court at Woolwich. He took judicial review proceedings of the decision to commit. These proceedings were heard on 14 and 16 May 1997 and two of the three charges were quashed, leaving a third charge of an offence contrary to s 50(1)(a) of the 1994 Act. Mr Gilligan appeared on a number of occasions after his committal for pre-trial directions. The trial was fixed for 8 September 1997. On 3 July 1997 Kay J granted leave to prefer a voluntary bill of indictment covering the original charges and in addition a charge of conspiracy to conceal or carry drugs on ships to the Republic of Ireland between 1 January 1994 and 30 October 1996. The voluntary bill was preferred on 11 July 1997.

On 29 August 1997 the Special Criminal Court in Dublin granted 18 arrest warrants against Mr Gilligan. These charge him with: (a) murder of Veronica Guerin; (b) five charges of unlawfully importing cannabis resin into Ireland; (c) six charges of possessing cannabis resin for the purpose of selling or supplying; (d) two charges of possession or control of firearms with intent to endanger life; (e) two charges of possession or control of ammunition with intent to endanger life; (f) one charge of unlawful possession or control of firearms; (g) one charge of unlawful possession or control of ammunition. These arrest warrants were indorsed on 3 September 1997. Proceedings were then taken for the warrants to be executed in England for Mr Gilligan's return to Ireland.

On 8 September 1997 the prosecution in the English proceedings before the Crown Court at Woolwich made a successful application for an adjournment of the English trial. The court accepted the prosecution's contention that the application to return Mr Gilligan to Ireland should take precedence over the English trial. The prosecution made clear that, if Mr Gilligan were returned to Ireland and tried there, there would be no English trial whatever the outcome in Ireland.

Also on 8 September 1997 Mr Gilligan appeared at Belmarsh Magistrates' Court before a metropolitan stipendiary magistrate, Mr Riddle. These were

a proceedings under s 2 of the Backing of Warrants (Republic of Ireland) Act 1965. The hearing was preliminary. Mr Gilligan was identified by Det Insp O'Connell from the Garda Síochána. Miss Montgomery QC, who appeared for Mr Gilligan, asked for and obtained an adjournment. The court was told that there would be a preliminary issue to determine whether the court had jurisdiction to consider allegations of abuse of process. In his affidavit before this court, Mr Gilligan states  
b that he wanted to contend that he had been improperly arrested for domestic proceedings in the United Kingdom in an effort to hold him in custody while the extradition request from Ireland could be perfected and that the extradition request was made in bad faith and was a manipulation of the court process.

c On 24 September 1997 Mr Gilligan, represented this time by Mr Lewis, appeared before a second metropolitan stipendiary magistrate, Mr Wallis. The magistrate heard legal argument and held that a submission of abuse of process could not be made upon proceedings under the 1965 Act. The available time was spent on this and the matter was again adjourned.

d On 22 October 1997 Mr Gilligan, again represented by Mr Lewis, appeared before a third metropolitan stipendiary magistrate, Mr Cooper. The Irish government called evidence of Irish law from Mr Tom O'Connell, a practising member of the Irish Bar. Little or no notice of the intention to do this had been given to those representing Mr Gilligan. Det Insp O'Connell was recalled and cross-examined. A further witness, Det Sgt O'Neill, was called to identify Mr Gilligan. Mr Lewis applied for an adjournment to consider the new evidence of Irish law and to apply for legal aid to instruct an Irish law expert. The magistrate  
e adjourned the hearing to 28 October 1997, despite submissions that this was too short a period and that Mr Lewis would not then be available. Cross-examination of Mr Tom O'Connell was reserved.

f On 28 October 1997 Mr Gilligan, represented by Mr Knowles, again appeared before Mr Cooper. There was no application to cross-examine Mr Tom O'Connell and no application for a further adjournment. Mr Knowles made submissions that the offences specified in the Irish warrants were not shown to correspond with English offences (see below). Mr Cooper rejected these submissions and Mr Gilligan was ordered to be delivered up.

g On 30 October 1997 the prosecution in the English Crown Court proceedings successfully applied for an extension of the custody time limit on the ground that Mr Gilligan was applying for a writ of habeas corpus following his committal in the 1965 Act proceedings and that the outcome of that application was not known. The court extended the custody time limit to 2 January 1998 and refused a defence application to fix an effective date for trial.

h On 11 November 1997 Mr Gilligan applied for a writ of habeas corpus to review the decision of the Woolwich Magistrates Court to order him to be delivered up. On 3 December 1997 Mr Gilligan applied for leave to move for judicial review of the decision of the Crown Court at Woolwich to extend the custody time limit. Jowitt J adjourned the application for leave to this court. We granted leave during the hearing to enable the substantive matter to be  
j determined. We heard submissions on both matters on 18 and 19 December 1997.

#### THE HABEAS CORPUS APPLICATION

Miss Montgomery on behalf of Mr Gilligan contends that: (a) there was insufficient material before the magistrate to enable him to conclude that the offences specified in the Irish warrants correspond with English offences; (b) Mr

Gilligan should have been allowed to contend that the proceedings should be stayed for abuse of process; (c) it was unlawful for the proceedings to take place before three magistrates; and (d) it was wrong or unfair for the prosecution to be allowed to call evidence of Irish law or for the defence to be given only six days to deal with it.

*The Backing of Warrants (Republic of Ireland) Act 1965*

Section 1 of the 1965 Act provides for the indorsement by a justice of the peace in the United Kingdom of—

‘a warrant ... issued by a judicial authority in the Republic of Ireland ... for the arrest of a person accused or convicted of an offence against the laws of the Republic, being an indictable offence ...’

Section 2 provides:

‘(1) So soon as is practicable after a person is arrested ... he shall be brought before a magistrates’ court and the court shall, subject to the following provisions of this section, order him to be delivered at some convenient point of departure from the United Kingdom into the custody of a member of the police force (Garda Síochána) of the Republic, and remand him until so delivered.

(2) An order shall not be made under subsection (1) of this section if it appears to the court that the offence specified in the warrant does not correspond with any offence under the law of the part of the United Kingdom in which the court acts which is an indictable offence ... nor shall an order be made if it is shown to the satisfaction of the court—(a) that the offence specified in the warrant is an offence of a political character, or an offence under military law which is not also an offence under the general criminal law ...’

Section 2(2) of the Suppression of Terrorism Act 1978 added a para (e) to these exceptions. For the purposes of the 1965 Act, s 1(2) of the Suppression of Terrorism Act 1978 provides for offences which are not to be regarded as offences of a political character. By s 1(1), the section applies to—

‘any offence of which a person is accused or has been convicted outside the United Kingdom if the act constituting the offence, or the equivalent act, would, if it took place in any part of the United Kingdom ... constitute one of the offences listed in Schedule 1 to this Act.’

Schedule 1 lists a large number of English offences including murder and certain offences under the Firearms Act 1968. Where a magistrates’ court makes an order under s 2(1), s 3 provides a moratorium of 15 days during which the applicant may apply for a writ of habeas corpus. Such an application may be, as in this case, in the nature of an application for judicial review of the magistrate’s decision.

Section 6A of the 1965 Act (as inserted by s 72 of the Criminal Justice Act 1993) together with the Backing of Warrants (Republic of Ireland) (Rule of Speciality) Order 1994, SI 1994/1952, provide that an order under s 2(1) of the 1965 Act may not be made if it is shown that no provision is made in the law of Ireland preventing the person delivered up from being dealt with there for an offence other than that for which he was delivered up.



a Section 7 of the 1965 Act contains evidential provisions including provision that evidence of Irish law may be given by affidavit—

b 'but a certificate purporting to be issued by or on behalf of the judicial authority in the Republic by whom the warrant was issued, or another judicial authority acting for the same area, and certifying that the offence specified in the warrant can be dealt with under the laws of the Republic in the manner described in the certificate shall be sufficient evidence of the matters so certified ...'

c The Schedule to the Act provides that proceedings shall be heard by at least two justices, but may be heard by a single stipendiary magistrate. [Proceedings are not confined to metropolitan stipendiary magistrates, as are those under the Extradition Act 1989.] The Schedule also empowers the court to adjourn the case and to remand the person arrested and provides that the proceedings shall be conducted as if the court were acting as examining justices inquiring into an alleged indictable offence.

d Before 1965, arrangements for executing arrest warrants between Ireland and the United Kingdom depended on s 12 of the Indictable Offences Act 1848 and s 27 of the Petty Sessions (Ireland) Act 1851. Under the 1848 Act, Irish warrants were to be indorsed by an English justice and this was provided to be sufficient authority for the person named in the warrant to be arrested and brought before the Irish justice who granted the warrant. The indorsement by the English magistrate was administrative only. The English magistrate had to be satisfied as to the authenticity of the signature of the issuing Irish magistrate but there was no English judicial intervention. The 1851 Act was largely an Act which applied only to Ireland but it provided for Irish warrants to be indorsed by the Irish inspector general or either of the deputy inspectors general. These procedures continued to be used after Ireland became independent in 1922 and after it ceased to be a member of the dominions and commonwealth in 1949. The Royal Irish Constabulary ceased to exist in 1922 but warrants continued to be indorsed by a deputy commissioner or other officer of the Garda Síochána.

e In *Metropolitan Police Comr v Hammond* [1964] 2 All ER 772, [1965] AC 810 arrest in England upon an Irish warrant indorsed by a deputy commissioner of the Garda Síochána (and then by an English magistrate) was held to be unlawful. Section 12 of the 1848 Act could not stand alone in the face of s 27 of the 1851 Act, which remained in force. The office of inspector general and his deputies, necessary for the operation of s 27, had ceased to exist and there was no provision in English law for indorsement by a deputy commissioner of the Garda Síochána. The opinions in the House of Lords include passages which refer to the procedure which existed before 1922 and which continued (by oversight) until *Hammond's* case was heard in 1964. Lord Reid said ([1964] 2 All ER 772 at 776, [1965] AC 810 at 827):

j 'Normally persons resident in this country who are accused of an offence in a foreign country are dealt with under the Extradition Act, 1870, which contains elaborate safeguards. If they are accused of an offence in another part of Her Majesty's dominions they are dealt with under the Fugitive Offenders Act, 1881, which contains very considerable safeguards. Even under the modified scheme for contiguous groups of British possessions under Part 2 of the Act of 1881 the accused must be brought before a magistrate in the place where he is arrested, and s. 19 allows the court to take

into account the trivial nature of the case or whether it would be unjust or oppressive to put the warrant into operation immediately or at all. I realise that the Republic of Ireland has always been treated as a special case, and it is quite clear that neither the Extradition Act, 1870, nor the Fugitive Offenders Act, 1881, can be applied as they stand to cases such as the present. So it would seem that if your lordships agree that the present appeal must be dismissed it will be necessary to give urgent consideration to the whole matter of sending accused persons from this country to the Republic of Ireland, and in particular to the case of British subjects who have never resided in that part of Ireland or caused anything to be done there.'

Lord Morris of Borth-y-Gest said ([1964] 2 All ER 772 at 780, [1965] AC 810 at 833–834):

'It can truly be said that as s. 12 of the Act of 1848 remains in force ... and as s. 25, s. 26 and s. 27 (inter alia) of the Act of 1851 remain in force, there is a recognition both in this country and in the Republic of Ireland of a continuing confidence in each other's institutions. Indeed, I have no doubt that, though the system of backing warrants began when there was a common legislature for the two countries, some appropriate machinery for the backing of warrants is still desirable in the interests of justice in both countries.'

Lord Morris said of the position before 1965 ([1964] 2 All ER 772 at 782–783, [1965] AC 810 at 837):

'It is to be observed, however, that no procedure is established under which a magistrate in England can inquire into the alleged offence or can inquire as to the circumstances under which the person against whom the warrant was issued has come to be within the jurisdiction of the English magistrate.'

Lord Hodson said ([1964] 2 All ER 772 at 783, [1965] AC 810 at 837):

'There can be no doubt that in so doing the magistrate was performing a merely ministerial act, and was not acting judicially in the sense that he was performing a duty to ascertain whether there was a *prima facie* case for the arrest of the respondent ... This procedure, which is essentially domestic in character, is in marked contrast to that provided by the Fugitive Offenders Act, 1881, which though also of a semi-domestic character takes into account the hardship which would be involved in executing the warrants in this country issued in a distant part of the world without any check on the process in this country.'

The 1965 Act was the product of *Hammond's* case, which made legislation essential if Irish warrants were to have any effect at all in the United Kingdom. The Act retains the procedure of an English magistrate indorsing Irish warrants. The warrant has to comply with s 1. A person arrested under the indorsed warrant has to be brought before a magistrates' court. Subject to certain safeguards, the court has to order him to be delivered to Irish authorities. The safeguards relevant to these proceedings are those in s 2(2).

(a) Correspondence of offences in s 2(2) of the 1965 Act

By s 2(2) of the 1965 Act an order for delivery up is not to be made—



a 'if it appears to the court that the offence specified in the warrant does not correspond with any offence under the law of the part of the United Kingdom in which the court acts which is an indictable offence ...'

b Miss Montgomery on behalf of Mr Gilligan submits that the critical question is what is meant by 'offence' in this subsection. There are, she suggests, three possibilities. 'Offence' may mean (a) the acts or omissions of the accused generally (conduct), (b) the elements of the crime as defined by the laws of each country (juristic elements), or (c) the acts or omissions charged in the Irish warrant (the warrant). She submits that 'offence' should be construed to mean the conduct which is alleged to amount to the offence specified in the warrant. The magistrate has to inquire into the conduct alleged and then see whether it would add up to a corresponding indictable offence in England. Mr Cooper undertook no such inquiry and therefore the proceedings before him were not in accordance with the 1965 Act. The basis of his decision was not clear, but it was not based on conduct if only because there was no such material before him. Miss Montgomery submitted that there should be put before the court a statement of the conduct alleged. She did not contend that the magistrate should consider the strength of the case nor that there should be cross-examination about the statement of conduct on behalf of the applicant. Her submission was, I think, inconsistent here, but inferentially she recognised that no other submission was open to her in the light of House of Lords authority to which I shall refer.

e Miss Montgomery recognised, I think, that the meaning of the relevant words of s 2(2) for which she contended might be seen as requiring a strained construction. But she urged us to adopt what she called a purposive construction, not least because she contended that a conduct based test has a near universal approval as the appropriate test in extradition cases. She referred here to the provisions of the Extradition Act 1989 (see below); to Lord Diplock's reference in f *Government of Denmark v Nielsen* [1984] 2 All ER 81 at 84, [1984] AC 606 at 614 in the context of an extradition crime under s 10 of the Extradition Act 1870, to 'the way in which human beings have conducted themselves' and to 'the wicked things that people do in real life'; to the European Convention on Extradition (Paris, 13 December 1957; TS 97 (1991); Cm 1762); and to a selection of cases in other jurisdictions, including the Irish case of *State (Furlong) v Kelly* [1971] IR 132, g a decision under the Irish counterpart of the English 1965 Act. (It seemed to me that *Kelly's* case did not provide clear support for Miss Montgomery's contention.) She submitted that the construction for which she contended had the advantage that the test would be easy to apply and would not require the magistrate to spend time analysing Irish law. Any test other than a conduct test h would be unworkable. The construction was also in the public interest since a conduct test would enable a fugitive to be tried for the wicked things that he had done in the requesting state where that would also be a crime in the state where he is found.

j Mr Peters QC, who appeared on behalf of both the Irish and English prosecuting authorities, submitted that the relevant words in the 1965 Act mean that the magistrate has to look for correspondence with an offence under English law from the terms of the Irish warrant. He submitted that it is and is intended to be a simple and speedy process and one which may be the task of any magistrates' court, not only that of specialist stipendiary magistrates. The 1965 Act is to be seen in its historical context. Before 1965, indorsing Irish warrants was a purely administrative process. Since 1965, there is some judicial

intervention but no more than that provided by the Act, which still places Ireland in a special position. Having the opportunity to provide for a conduct based inquiry, such as that now to be found in the Extradition Act 1989, Parliament did not do so and for understandable reasons.

I shall first consider the meaning of s 2(2) without reference to authority, historical context or subsequent legislation. Section 2(1) provides for an appearance before a magistrates' court. Provided that the formalities of s 1 are fulfilled, the court is obliged to order delivery up unless one of the provisions of s 2(2) applies. There are two limbs of s 2(2)—that which concerns correspondence and that which concerns offences of a political character and so forth. The first limb is introduced by the words 'if it appears to the court', the second limb by the words 'if it shown to the satisfaction of the court'. This obviously intentional distinction suggests that evidence may be needed for the court to consider the second limb but is not needed and may not be admissible for the first limb. It is understandable that evidence may be needed for the second limb, since (subject to s 1 of the Suppression of Terrorism Act 1978) an offence may be of a political character but that fact may not be apparent from the terms of the warrant. The different wording also suggests that the court has to consider the first limb whether or not it is invited by one or both of the parties to do so, but that the second limb needs one of the parties to take an initiative.

The first limb refers to 'the offence specified in the warrant'. In my view, the meaning of this expression is clear. It means quite simply that the court has to read the warrant to find the offence which is there specified. The expression appears also in s 2(2)(a) and significantly in s 7(b), where the certificate there referred to is part of the material upon which the requirements of s 1(a) may be shown to be fulfilled. Section 1(a) itself thus contemplates a warrant specifying an offence. Miss Montgomery in effect asks us to construe the word 'offence' as meaning 'the conduct alleged to constitute the offence'. But her submission ignores the words 'specified in the warrant' and takes no account of the fact that the words 'if it appears to the court' require judicial consideration irrespective of any initiative by the parties. Her construction requires the parties to put before the court additional material.

The court therefore has to read the warrant and find what offence is there specified in whatever form it is specified. Habitually a warrant may specify an offence in a form equivalent to that used in indictments by giving a label and saying that the offence so stated is contrary to a statute or common law and then giving short particulars of what is alleged. But however the warrant is drawn, that is what the court has to look at. No other material is admissible to determine 'the offence specified in the warrant', except that exceptionally evidence might be admissible for the strictly limited purpose of explaining technical language in the warrant or words which an English court would not otherwise understand. But such evidence would not extend to explaining the legal components in Irish law of any label given to the offence in the warrant. A warrant with short particulars will to that extent specify conduct. It is to that extent a conduct based inquiry. But the conduct is to be derived from the warrant, not from external material or evidence.

The offence specified in the warrant has to 'correspond with any offence under ... [English] law ... which is an indictable offence or is punishable on summary conviction with imprisonment for six months'. The word 'any' shows that the court is not necessarily looking for an English offence which is identical with the offence specified in the warrant nor one whose juristic elements are the same—

a rather for a sufficiently serious offence which what is specified in the warrant would correspond with in English law if what is specified in the warrant had occurred in England. (Sufficiently serious is defined as an indictable offence or one punishable on summary conviction with imprisonment for six months.) The scheme is, not that the court has to find identical Irish and English offences, but that the offence specified in the warrant is a sufficiently serious Irish offence and  
b that what is specified in the warrant would amount to some sufficiently serious English offence. This construction does not, in my view, run into difficulties with s 6A. There have to be arrangements in force to see that the person delivered up is not dealt with for an offence other than that for which he was delivered up. But the offence for which he is delivered up will always be the offence specified in the warrant. The English offence, which may not be an identical offence, is not the  
c offence specified in the warrant but a putative offence with which the offence specified in the warrant has to correspond.

Turning now to authority, *Re Arkins* [1966] 3 All ER 651, [1966] 1 WLR 1593 was a decision of the Queen's Bench Divisional Court presided over by Lord Parker CJ soon after the passing of the 1965 Act upon an application for a writ of  
d habeas corpus. An Irish arrest warrant recited a complaint that the applicant had willfully neglected his children, who were in Eire, in a manner likely to cause them unnecessary suffering or injury to health contrary to certain statutes. It was contended on behalf of the applicant that the magistrate had no power to make an order because the Irish offence charged in the warrant was only indictable whereas the corresponding English offence was also triable summarily. Of this  
e Lord Parker CJ said ([1966] 3 All ER 651 at 654, [1966] 1 WLR 1593 at 1597–1598):

‘In my judgment there is a clear fallacy in this argument in that the words  
f “correspond with any offence” are referring to the ingredients of the offence, whether it be murder, grievous bodily harm, child neglect or whatever it may be, and in no sense dealing with the classification of “offence” according to whether it is indictable or both summary and indictable, or summary only. Here, as it seems to me, on the facts presented to the court there was clearly jurisdiction to make the order.’

It is clear that in *Re Arkins* there was no evidential inquiry into the conduct  
g alleged and that the ‘ingredients of the offence’ were derived from what was recited in the warrant. The applicant also contended that para 3 of the Schedule to the 1965 Act had not been complied with because the magistrate had not inquired into the merits of the allegation against him. Of that submission Lord Parker CJ said ([1966] 3 All ER 651 at 655–656, [1966] 1 WLR 1593 at 1597–1599):

h ‘As regards that, it is clear in my judgment that no provision whatever here is made for an inquiry to be held on the merits. Section 2(1) ... makes no provision for any inquiry whether there is a strong and probable presumption of guilt at all. That section does provide undoubtedly certain safeguards which appear in sub-s. (2), because the magistrate is not able to  
j make an order if the offence specified is of a political character or an offence under military law which is not also an offence under the general criminal law or an offence under an enactment relating for instance to exchange control and matters of that sort. Accordingly, he may well have to inquire into certain matters in order to be certain that he is not debarred from making an order, but there is no provision for his holding an inquiry and hearing evidence whether there is what one can put quite generally as a



prima facie case. It seems to me that those words in para. 3 of the Schedule are dealing with what one may call truly procedural matters ... and that they are not providing for matters of substantive law such as that the magistrate must be satisfied that there is a prima facie case. That in my judgment results from the plain wording of the Act of 1965, but of course the matter does not end there because for years it has been the practice in regard to warrants from the Republic of Ireland that subject to certain safeguards a magistrate must indorse the warrant in the first instance, and then must make an order. That has been recognised, as I see it, by the House of Lords in the recent case of *Metropolitan Police Comr. v. Hammond* ([1964] 2 All ER 772, [1965] AC 810) on appeal from this court ... It was, of course, as a result of that decision that the present Act of 1965 was passed and, while it is notable that additional safeguards have been provided ... [w]hat is significant is that Parliament, with full knowledge of that decision in the House of Lords, and of course with full knowledge of the wording of the Fugitive Offenders Act, 1881, and the Extradition Acts, 1870 to 1895, has chosen the wording which now appears in this Act of 1965. In my judgment no provision is made for an inquiry as to whether there is a strong or probable presumption of guilt of the alleged offence, and, accordingly there was no obligation or indeed power in the magistrate to go into the matter.'

This part of the decision of the Divisional Court was unanimously approved in the House of Lords in *Keane v Governor of Brixton Prison* [1971] 1 All ER 1163 at 1167, [1972] AC 204 at 214. Lord Pearson, with whom the other four members of the Appellate Committee agreed, said ([1971] 1 All ER 1163 at 1166, [1972] AC 204 at 214):

'... it is correct to say that the magistrates' court made no inquiry into the merits of the charges, and the only question is whether they had any duty to do so. In my opinion, on the proper construction of s 2 and the Schedule they had no such duty. The scheme of s 2 is that under sub-s (1) the court is "subject to the following provisions of this section" obliged to make the order; under sub-s (2) the order is not made if something "appears to the court" or if something "is shown to the satisfaction of the court"; the issues which the court may have to try are those provided by sub-s (2); and there is no provision for the court to try any issue, or make any inquiry, as to the merits of the charges.'

Lord Pearson then considered the Schedule and agreed with the decision of the Divisional Court in *Re Arkins*.

In *Re Nobbs* [1978] 3 All ER 390, [1978] 1 WLR 1302 a Queen's Bench Divisional Court presided over by Lord Widgery CJ held that in proceedings before magistrates under the 1965 Act, whether the offence specified in the warrant was a political offence and whether the applicant was liable to be prosecuted or detained for a political offence if he was returned to Ireland were both matters which, under s 2(2), had to be shown to the satisfaction of the justices. Fresh or additional evidence was not admissible on those matters on an application for habeas corpus. Lord Widgery CJ said ([1978] 3 All ER 390 at 391, [1978] 1 WLR 1302 at 1303):

'As is well known, the provision for extradition between this country and the Republic of Ireland are much more simple and domesticated than the extradition proceedings which apply in the rest of the Commonwealth, or

a even the rest of the world. For current purposes Ireland is almost treated as part of England and vice versa for the purposes of extradition.’

In *Re Lindley* (29 October 1997, unreported) Kennedy LJ referred to the 1965 Act as operating in such a way that it has a degree of informality and at local level. The 1965 Act, which concerns Ireland only, may be seen in the context of statutory provisions for extradition to other jurisdictions.

b For England, Wales, Scotland and Northern Ireland, a warrant issued in one jurisdiction may be executed without any indorsement or judicial intervention in another jurisdiction and there are cross-border powers of arrest by constables from one jurisdiction in another—see ss 136 and 137 of the Criminal Justice and Public Order Act 1994.

c For the Isle of Man and the Channel Islands, s 13 of the Indictable Offences Act 1848 remains in force. This has arrangements equivalent to those in force for Ireland under s 12 of the 1848 Act but without the additional provisions of s 27 of the Petty Sessions (Ireland) Act 1851, ie administrative indorsement of the warrant by a magistrate is sufficient authority for arrest and delivery to the requesting jurisdiction.

d In *Government of Canada v Aronson* [1989] 2 All ER 1025, [1990] 1 AC 579, the Canadian Government made a request to the Secretary of State under s 5 of the Fugitive Offenders Act 1967 for the return of the applicant to Canada. A provisional warrant contained details of 78 offences of dishonesty. The magistrate heard factual evidence and determined that there was sufficient evidence to commit the applicant for 77 of the offences. The Divisional Court held that the magistrate was restricted to considering the ingredients of the Commonwealth offences as disclosed in the particulars in the Canadian warrant. The definitions of these Canadian offences lacked ingredients which United Kingdom law treated as essential. The Divisional Court quashed the magistrate’s order for 69 of the offences. In the House of Lords, Lord Bridge of Harwich summarised the issue and his opinion on it ([1989] 2 All ER 1025 at 1027, [1990] 1 AC 579 at 589):

e ‘My Lords, this appeal turns upon the construction of s 3(1)(c) of the Fugitive Offenders Act 1967. When a designated Commonwealth country seeks the return from the United Kingdom of a person who is accused or has been convicted of an offence against the law of that country (a Commonwealth offence), that offence is only a “relevant offence” if—“the act or omission constituting the offence ... would constitute an offence against the law of the United Kingdom if it took place within the United Kingdom ...” What does this phrase mean? Does it mean that the ingredients of the Commonwealth offence, as disclosed by the particulars of the offence in the charge, would, if proved, establish guilt of a corresponding United Kingdom offence (the narrow construction)? Or does it mean that [the] totality of the evidence relied on to prove the Commonwealth offence would, if accepted, prove guilt of a corresponding United Kingdom offence (the wide construction)? I have reached the clear conclusion that the narrow construction is to be preferred.’

j This was the opinion of the majority (Lord Bridge, Lord Elwyn-Jones and Lord Lowry) and the decision of the Divisional Court was upheld. Lord Lowry said ([1989] 2 All ER 1025 at 1042, 1044, [1990] 1 AC 579 at 609, 611):

“The “act or omission constituting the offence” cannot in my opinion mean “the conduct, as proved by evidence, on which the charge is grounded”, because the evidence of such conduct could prove something more than what has been charged ... The words “constituting the offence” must be read as “constituting the offence of which the person is accused” ... I would further suggest that consideration of the case of a person unlawfully at large after conviction of an offence provides a strong argument for the narrower and more definite construction of s 3(1)(c). The court is not there dealing with *prima facie* evidence of a United Kingdom offence, but is asking whether a person convicted of a Commonwealth offence has been convicted of a *relevant* offence. Assuming that the act or omission constituting that offence would not constitute an offence in the United Kingdom, it would be pointless to rake over the evidence given at the trial, assuming that this was practicable, in order to find material which, if proved, would constitute an offence against the law of the United Kingdom. It would be impossible to amend the particulars of the Commonwealth offence of which the fugitive had been convicted or to predicate what facts the jury had found against the accused beyond the facts necessary to convict him of the Commonwealth offence with which he had been charged.’ (Lord Lowry’s emphasis.)

Lord Bridge was also influenced by the application of the section to a convicted offender (see [1989] 2 All ER 1025 at 1027, [1990] 1 AC 579 at 589). Lord Griffiths and Lord Jauncey of Tullichettle both dissented. Each of them had no hesitation in construing the words ‘act or omission constituting the offence’ as a reference to the conduct of the accused (see [1989] 2 All ER 1025 at 1030 and 1032, [1990] 1 AC 579 at 593 and 596 respectively). Lord Griffiths said ([1989] 2 All ER 1025 at 1030, [1990] 1 AC 579 at 593):

‘To adopt the alternative construction is to look for exact correspondence between the definition of the crimes in the two countries and no scheme of extradition based on such a premise will ever be workable as has been recognised since the early days of the operation of extradition laws.’

The Extradition Act 1989 consolidated the main statutes then relating to extradition including Extradition Acts going back to that of 1870 and the Fugitive Offenders Act 1967 and Pt I of the Criminal Justice Act 1988. The statutory scheme in outline now is that extradition procedures under Pt III of the 1989 Act are available for a person in the United Kingdom who is accused of an extradition crime or is alleged to be unlawfully at large after conviction of such an offence in a foreign state for which an Order in Council under s 4 of the Act has been made or in a designated Commonwealth country or a colony. ‘Extradition crime’ is defined in s 2 as—

‘conduct ... which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment, and which, however described in the law of the foreign state, Commonwealth country or colony, is so punishable under that law.’

Section 8 provides for an arrest warrant to be issued for the purpose of committal. Section 9 provides for a person arrested to be brought (in England) before a metropolitan magistrate, who if certain conditions are satisfied shall commit him to await the Secretary of State’s decision as to his return. The first such condition is that the court of committal has to be ‘satisfied, after hearing any



a representations made in support of the extradition request or on behalf of that person, that the offence to which the authority relates is an extradition crime ...' (s 9(8)). Thus the magistrate has to inquire into the conduct alleged to see whether it would constitute an offence under English law punishable at least with a term of imprisonment of 12 months. To this extent s 3(1) of the Fugitive Offenders Act 1967 as construed by the majority of the House of Lord in *Aronson's* case has been altered by statute.

b The former law under the Extradition Acts 1870 to 1932 continues in force as provided in Sch 1 to the 1989 Act and applies to extradition between the United Kingdom and countries with whom the United Kingdom has an extradition treaty but for which no Order in Council under s 4 of the 1989 Act has been made. The relevant condition for committal is also based on evidence of the conduct  
c alleged—Sch 1, para 7.

In my view, this review of statute and authority, supports the construction which I defined earlier in this judgment and gives no support for Miss Montgomery's construction. Before 1965, Ireland had special treatment. Neither the Extradition Acts nor the Fugitive Offenders Act applied. There was no  
d judicial inquiry into the alleged offence. The magistrate performed an essentially domestic, ministerial function. There was a recognition both in United Kingdom and in Ireland of a continuing confidence in each other's institutions. It was appreciated that some appropriate machinery for the backing of warrants was desirable in the interests of justice in both countries. In this context and in the light of *Hammond's* case, the 1965 Act is to be seen as introducing certain specific  
e safeguards into a system which in other respects was essentially retained. This view is supported by the passages in *Re Arkins* which I have quoted. *Re Arkins* in particular held that there was to be no evidential inquiry into the conduct alleged and the 'ingredients of the offence' were to be derived from what was recited in the warrant with no provision whatever for an inquiry to be held on the merits.  
f *Re Arkins* was approved in *Keane's* case. A similar approach is exemplified by *Re Nobbs* and *Re Lindley*.

There are other indications which support the construction of s 2(2)(a) of the 1965 Act which I favour. Miss Montgomery accepted that the expression 'the act constituting the offence' in s 1(1) of the Suppression of Terrorism Act did not support her construction. The expression 'the act or omission constituting the  
g offence' in s 3(1)(c) of the Fugitive Offenders Act 1967 was construed by the majority of the House of Lords in *Aronson's* case as denoting the offence disclosed by the particulars of the offence charged. This resulted in legislative change to a conduct based test which is now to be found in the Extradition Act 1989. But Ireland is specifically excluded from the definition of 'foreign state' in s 3 of the  
h Extradition Act 1989. Additionally, Ireland remains in a special position generally in the law of the United Kingdom. As Mr Peters pointed out, although Ireland ceased to be part of the United Kingdom dominions in 1949, s 2 of the Ireland Act 1949 provides that Ireland is not a foreign country for the purposes of any then past or future United Kingdom law. There are no United Kingdom immigration  
j controls between Ireland and the United Kingdom (see s 1(3) of the Immigration Act 1971).

I would therefore reject Miss Montgomery's submission. In my judgment, under s 2(2) of the 1965 Act, the magistrate has to read the warrant and find what offence is there specified in whatever form it is specified. The question then is whether there is a sufficiently serious English offence which what is specified in the warrant would correspond with if it had occurred in England. Although this

could cause problems with particular warrants, it should not do so if warrants are drawn with sufficient particularity to state clearly what is alleged. a

In this case, there are 18 Irish warrants. The offence specified in warrant A, to which I shall return, is murder. The offence specified in each of warrants B to F inclusive is unlawfully importing into Ireland a controlled drug contrary to Irish regulations and statutes. The specified particulars of the offences are that between particular dates Mr Gilligan 'did unlawfully import into the State a controlled drug, to wit, cannabis resin.' Those facts would amount in England to indictable offences of importing a controlled drug under s 170 of the Customs and Excise Management Act 1979 and s 3 of the Misuse of Drugs Act 1971. Miss Montgomery advanced no serious argument to the contrary. The offence specified in each of warrants G to L inclusive is possessing a controlled drug for the purpose of selling or otherwise supplying it to another contrary to Irish regulations and statutes. The specified particulars of the offence are that between particular dates Mr Gilligan 'did have in your possession a controlled drug, to wit, cannabis resin for the purpose of selling or otherwise supplying it to another'. Those facts would amount in England to indictable offences of possessing a controlled drug with intent to supply under s 170 of the Customs and Excise Management Act 1979 and s 5(3) of the Misuse of Drugs Act 1971. Miss Montgomery advanced no serious argument to the contrary. The offence specified in each of warrants M to P inclusive is possession or control of firearms (2 warrants) or ammunition (2 warrants) with intent to endanger life (2 warrants) or with intent to enable another person to endanger life contrary to Irish statutes. Those facts would amount in England to indictable offences of under s 16 of the Firearms Act 1968. Miss Montgomery advanced no serious argument to the contrary. In my judgment, submissions on other matters apart, the magistrate was obliged to order Mr Gilligan to be delivered up on each of the warrants B to P inclusive. b  
c  
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The offence specified in each of warrants Q and R is possession or control of firearms (warrant Q) or ammunition (warrant R) 'in such circumstances as to give rise to a reasonable inference that you had not got them in your possession or under your control for a lawful purpose' contrary to Irish statutes. In my judgment, those facts alone would not amount to a sufficiently serious offence under English law. Mr Peters tried to squeeze them into offences under s 1(1) or s 18(1) of the Firearms Act 1968 (having a firearm without holding a firearm certificate or having a firearm with intent to commit an indictable offence etc) or under s 1(1) of the Prevention of Crime Act 1953 (having an offensive weapon in a public place without lawful authority or reasonable excuse). But what is specified in these warrants does not, in my view, without more amount to any of those offences. There is no mention of the absence of a certificate nor of an intent to commit an indictable offence nor of being in a public place and so forth. Accordingly in my view the magistrate should not have made an order under these two warrants. f  
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The offence specified in warrant A is murder contrary to common law and Irish statute. The specified particulars of the offence are that Mr Gilligan on a specified date and at a specified place murdered Veronica Guerin. For present purposes therefore what is specified in the warrant is contained in the single word 'murder'. Apart from legal definition, murder is an ordinary English word meaning unlawful intentional killing. No ordinary person would think twice before concluding that there is a sufficiently serious English offence which what is specified in this warrant would correspond with in English law if it had j

a occurred in England, ie murder. I have indicated that in my view extraneous  
evidence is not admissible to determine 'the offence specified in the warrant',  
except that exceptionally evidence might be admissible for the strictly limited  
purpose of explaining technical language in the warrant or words which an  
English court would not otherwise understand. In my view, there is no such  
technical language here nor is 'murder' in the particulars a word which an English  
b court would not otherwise understand. In my judgment, submissions on other  
matters apart, the magistrate was plainly obliged to order Mr Gilligan to be  
delivered up on this warrant.

Evidence of Irish law was in fact admitted before Mr Cooper. This included  
evidence that by Irish statute the offence of murder requires a specific intent to  
kill or cause serious injury. This accords with murder in English law. The statute  
c however also provides that 'the accused person shall be presumed to have  
intended the natural and probable consequences of his conduct but this  
presumption may be rebutted'. This rebuttable presumption does not accord  
with English law. Thus murder in Ireland is (as you would expect) in substance  
the same as murder in England, but the evidential process of deciding whether  
d the accused had the necessary intent may in particular cases not be the same.  
This could result in circumstances where evidence which would establish the  
necessary intent in Ireland would not do so in England. I emphasise that, in my  
view, this is not a legitimate inquiry in the first place since the evidence was not  
admissible. However, even if it were, it remains the case that there is a  
sufficiently serious English offence which what is specified in warrant A would  
e correspond with if it had occurred in England, ie murder, since the Irish and  
English offences are in substance the same. The identified difference is in an  
evidential presumption. If (contrary to my view) this difference was to be taken  
into account, the necessary conditions of s 2(2) of the 1965 Act are still fulfilled,  
since, in a case where upon the evidence a defendant would be convicted of  
f murder in Ireland but acquitted of murder in England, the defendant in England  
would still be convicted of an indictable offence, ie manslaughter. I have already  
indicated my view that the word 'any' in s 2(2) shows that the court is not  
necessarily looking for an English offence which is identical with the offence  
specified in the warrant nor one whose juristic elements are the same: rather for  
a sufficiently serious offence which what is specified in the warrant would  
g correspond with in English law if what is specified in the warrant had occurred in  
England.

(b) Abuse of process

In *Schmidt v Federal Government of Germany* [1994] 3 All ER 65, [1995] 1 AC 339  
h the House of Lords held that in proceedings under the Extradition Act 1989 the  
magistrate hearing the application for committal had no power to refuse to  
commit the fugitive on the ground that the proceedings might be an abuse of  
process; and that the High Court had no jurisdiction to intervene in the  
proceedings but only such discretion as was conferred on it by s 11(3) of the 1989  
j Act. The safeguard for the fugitive in the case of an alleged abuse of power was  
in the general discretion of the Secretary of State under s 12(1) as to the making  
of an order for his return. The single substantive opinion was that of Lord  
Jauncey of Tullichettle with whom the other four members of the Appellate  
Committee agreed.

It was submitted in *Schmidt's* case that *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138, [1994] 1 AC 42 applied in all proceedings including



extraditions where an individual was brought before English courts in circumstances involving breach of the rule of law resulting from violations of international, foreign or domestic law and that *Atkinson v US Government* [1969] 3 All ER 1317, [1971] AC 197 and *Sinclair v DPP* [1991] 2 All ER 366, [1991] 2 AC 64 should no longer be followed. This submission was rejected. Lord Jauncey said that the principal safeguard for the subject of extradition proceedings remains in the general discretion conferred upon the Secretary of State by Parliament under s 12 of the 1989 Act (see [1994] 3 All ER 65 at 77, [1995] 1 AC 339 at 379). This safeguard was referred to by Lord Reid in *Atkinson v US Government* [1969] 3 All ER 1317 at 1322, [1971] AC 197 at 232, where he said there were—

‘cases where it would clearly be contrary to natural justice to surrender a man although there is sufficient evidence to justify committal ... Parliament can never have [intended that such a person be surrendered] when the Act of 1870 was passed. But the Act does provide a safeguard. The Secretary of State always has power to refuse to surrender a man committed to prison by the magistrate. It appears to me that Parliament must have intended the Secretary of State to use that power whenever in his view it would be wrong, unjust or oppressive to surrender the man.’

There is no equivalent discretion in the Secretary of State under the 1965 Act for Ireland. Miss Montgomery accordingly submits that the English court should in cases such as this have jurisdiction to consider questions of abuse of process. She relied on Lord Reid’s opinion in *Atkinson’s* case [1969] 3 All ER 1317 at 1322–1323, [1971] AC 197 at 233 that, if there had been no safeguard in the Secretary of State’s discretion, he ‘would think it necessary to infer that the magistrate has power to refuse to commit if he finds that it would be contrary to natural justice to surrender the man’.

Mr Peters submitted that Ireland remains in a special position in that Parliament has provided specific limited safeguards where formerly there had been no judicial intervention at all. In *Metropolitan Police Comr v Hammond* [1964] 2 All ER 772 at 782–783, [1965] AC 810 at 837 Lord Morris said that there was no procedure under which a magistrate in England could inquire as to the circumstances under which the person against whom the warrant was issued had come to be within the jurisdiction of the English magistrate. Mr Peters submitted that the 1965 Act obliges the magistrate to order delivery up unless one of the limited conditions of s 2(2) applies, but that there is no scope for further judicial intervention. In *Keane v Governor of Brixton Prison* [1971] 1 All ER 1163 at 1167, [1972] AC 204 at 214 Lord Pearson said that the proper construction of s 2 of the 1965 Act was that the magistrate made no inquiry into the merits and that the scheme of s 2 limited the inquiry to the matters there specified. Lord Pearson did not there also refer to abuse of process, but the sense of what he said would encompass it. The provisions for extradition to Ireland remain such as Lord Widgery CJ described them in *Re Nobbs*.

In *Schmidt’s* case [1994] 3 All ER 65 at 76–77, [1995] 1 AC 339 at 377–378 Lord Jauncey said in rejecting the submission that *Bennett v Horseferry Road Magistrates’ Court* should apply to extradition proceedings before magistrates:

‘In my view the position in relation to a pending trial in England is wholly different to that in relation to pending proceedings for extradition from England. In the former case the High Court in its supervisory jurisdiction is the only bulwark against any abuse of process resulting in injustice or

a oppression which may have resulted in the accused being brought to trial in  
England. In the latter case, not only has the Secretary of State power to  
b refuse to surrender the accused in such circumstances but the courts of the  
requesting authority are likely to have powers similar to those held to exist  
in *Bennett v Horseferry Road Magistrates' Court*. An accused fugitive is thus  
likely to have not one but two safeguards against injustice and oppression  
c before being brought to trial in the requesting state. It must also be  
remembered that the extradition procedures to which this appeal relates  
flow from the European Convention and are designed to facilitate the return  
of the accused or convicted person from one contracting state to another.  
The removal of the requirement that the requesting state should provide  
prima facie evidence of the alleged crime demonstrates that extradition  
d proceedings between contracting states were intended to be simple and  
speedy, each state accepting that it could rely upon the genuineness and bona  
fides of a request made by another one. The advantages of bringing an  
accused person to trial while evidence on both sides is fresh are obvious. To  
confer on the High Court a power such as the applicant contends for would  
inhibit the carrying out of this intention.'

In my view, this passage may be applied analogously to Ireland in two respects.  
Firstly, extradition between the United Kingdom and Ireland under the 1965 Act  
is obviously intended to be simple and speedy. Indeed the omission from the  
1965 Act of a discretion in the Secretary of State may be seen as an indication that  
e the procedure was to remain simple, speedy and essentially domestic. Secondly  
and more specifically, one of Lord Jauncey's safeguards against abuse of process  
obviously applies to Ireland, ie 'the courts of the requesting authority are likely  
to have powers similar to those held to exist in [Bennett]' (see *Schmidt v Federal  
Government of Germany* [1994] 3 All ER 65 at 76, [1995] 1 AC 339 at 378). Ireland  
f remains in a special position and in my judgment the 1965 Act is to be construed,  
as Mr Peters submits, as itself circumscribing the permissible extent of judicial  
intervention. That may include for instance specific consideration under s 1(3),  
as in *Re Lawlor* (1977) 66 Cr App R 75, to be satisfied that the purpose of a  
convicted applicant's arrest is that he should be sentenced in Ireland or should  
undergo imprisonment. But a general jurisdiction to consider abuse of process is  
g not to be inferred. In the different context of the Extradition Act 1989 and its  
predecessors, one of the bulwark's against oppression is the Secretary of State's  
discretion for which that legislation provides. I do not consider that its absence  
from the 1965 Act leads to the inference which Lord Reid postulated for  
proceedings under the Extradition Acts. On the contrary, the speed and  
simplicity of the essentially domestic relations between the United Kingdom and  
h Ireland would be hampered if the jurisdiction existed and the United Kingdom  
can be confident that Irish institutions will themselves sufficiently guard against  
abuse. In my judgment therefore the magistrate correctly decided that he had no  
jurisdiction to entertain submissions about abuse of process.

j (c) and (d) Procedural issues

(c) Three magistrates

It is submitted on behalf of Mr Gilligan that it was unlawful for the proceedings  
to take place before three different magistrates. Miss Montgomery refers to *Ng  
(alias Wong) v R* [1987] 1 WLR 1356, a Privy Council appeal from the Supreme  
Court of Mauritius. That was a case which was divided into three parts. During



the first part, the prosecution called its evidence and the court reserved judgment on a submission of no case to answer. During the second part, the submission was rejected and defence evidence was heard. During the third part, decisions were given. For each part there were two magistrates. One magistrate participated in all three parts, but his colleague on each occasion was different. The appeal to the Privy Council turned in part on Mauritian legislation, but it was held generally (at 1358–1359):

‘In a criminal trial, whether before a jury or before magistrates, it is a fundamental requirement of justice that those called upon to deliver the verdict must have heard all the evidence. The evaluation of oral evidence depends not only upon what is said but how it is said. Evidence that may ultimately read well in a transcript may have carried no conviction at all when it was being given. Those charged with returning a verdict in a criminal case have the duty cast upon them to assess and determine the reliability and veracity of the witnesses who give oral evidence, and it is upon this assessment that their verdict will ultimately depend.’

Without in any way qualifying or detracting from this principle, in my view it simply does not apply to the facts of Mr Gilligan’s case, since Mr Cooper, the third magistrate, in substance heard all the evidence on which decisions of fact had to be made. For practical purposes nothing happened before Mr Riddle on 8 September 1997. Mr Gilligan was identified by Det Insp O’Connell and cross-examination was reserved. The hearing on 24 September 1997 was concerned with legal argument and Mr Wallis made no decision of fact at all. The two hearings before Mr Cooper on 22 October 1997 and 28 October 1997 were self-contained. Det Insp O’Connell was recalled and cross-examined. A further witness, Det Sgt O’Neill, was called to identify Mr Gilligan. The identification, although not formally admitted, was not in substance challenged. In effect no evidence from Mr Riddle’s hearing was carried through to Mr Cooper’s hearings. Miss Montgomery accepted that Mr Cooper in effect heard all the evidence. She also accepted that no point was taken at the time that his or Mr Wallis’ hearings were irregular or unlawful. In my judgment there is nothing in this point and it should be rejected.

(d) Admitting evidence of Irish law

Miss Montgomery submits that the prosecution closed its case on 24 September 1997 and should not have been permitted to reopen it to call evidence of Irish law. She further submits that the defence were given inadequate time to respond to the evidence of Irish law both because Mr Lewis was not available on the date six days later to which Mr Cooper adjourned the hearing and because there was inadequate opportunity to apply for legal aid to obtain expert evidence of Irish law.

Mr Cooper in fact held that the prosecution had not closed its case. Even if this were wrong, in my view it was well within his discretion to allow the prosecution to reopen the case, if evidence of this kind were needed. I have expressed the view earlier in this judgment that evidence of Irish law was unnecessary and inadmissible. In the event, Mr Gilligan has suffered no prejudice whatever from the calling of the evidence and the submission therefore falls away. Had it been necessary to do so, I would have held that the six-day adjournment was adequate, not least since we were told that no urgent effort was made to obtain legal aid

a quickly and when no application for further time was made to Mr Cooper on 28 October 1997.

#### CONCLUSION ON HABEAS CORPUS APPLICATION

b In my judgment, therefore, the magistrate's decision to order Mr Gilligan to be delivered up on warrants Q and R should be quashed, but otherwise this application for habeas corpus fails.

#### JUDICIAL REVIEW

c Mr Gilligan seeks judicial review of the decision of Judge Rucker in the Crown Court at Woolwich on 30 October 1997 to extend custody time limits for the English Crown Court proceedings and not to fix a date for trial. Since Mr Gilligan is now and was on 30 October 1997 in custody for the Irish warrants, the custody time limit question appears to me to be academic. Miss Montgomery did not agree with this, but did not explain why. The question whether the English Crown Court proceedings should be adjourned is not academic. The position of the English prosecution is that, provided that Mr Gilligan is returned to Ireland under the Irish warrants, they will not proceed with the English prosecution d whatever the outcome in Ireland.

The 112-day custody time limit for Mr Gilligan was about to expire on 30 October 1997. By s 22(3) of the Prosecution of Offences Act 1985:

e 'The appropriate court may, at any time before the expiry of a time limit imposed by the regulations, extend, or further extend that limit if it is satisfied—(a) that there is good and sufficient cause for doing so; and (b) that the prosecution has acted with all due expedition.'

f Miss Montgomery submits that no proper grounds for the extension of the custody time limits were made out in this case. The prosecution did not envisage Mr Gilligan's case ever being tried in England. Far from acting with due expedition, the prosecution were deliberately obstructing the process of trial and prolonging Mr Gilligan's time in custody. She referred to *R v Sheffield Justices, ex p Turner* [1991] 1 All ER 858, [1991] 2 QB 472, where it was said that the clear purpose of laying down specific time limits for custody at specific stages of the criminal process was to prompt the prosecution to act with expedition and to avoid the accused being kept in custody for an excessive period at any specific stage of the proceedings. Miss Montgomery further submits that due expedition g should be judged objectively and that delay resulting from the prosecuting authorities being placed in a difficult position was nevertheless delay. Accordingly she submits that Judge Rucker's decision to extend the custody time h limit for the collateral purpose of ensuring that Mr Gilligan remained in custody until the extradition proceedings were concluded was unlawful.

Mr Peters submits that the prosecution were entitled to take the decision that the charges in Ireland were so serious that Mr Gilligan should in the interests of justice be returned to Ireland and that the English proceedings should be j subordinated to the Irish proceedings. The prosecution acted with all due expedition. These exceptional circumstances amount to a good and sufficient cause to extend the custody time limits.

In my view, Mr Gilligan's case here is misdirected in two related respects. Firstly, it is in my view clear that the requirement in s 22(3)(b) 'that the prosecution has acted with all due expedition' refers to the time up to the making of the application to extend the custody time limit. This accords with the decision

in *R v Birmingham Crown Court, ex p Bell*, *R v Birmingham Crown Court, ex p Brown* [1997] 2 Cr App R 363 that the matter has to be considered at the time to which the custody time limit relates. In a standard case the prosecution will be seeking an extension because for some reason they are not ready for trial. The inquiry will be about whether they have nevertheless been acting with due expedition. In this case no reason was advanced to us that the prosecution had not acted with due expedition up to 30 October 1997 other than the submission that the time between 8 September 1997 and 30 October 1997 constituted delay. But the adjournment obtained on 8 September 1997 was sought on the same ground as that upon which the custody time limit was extended. The essential case before us was that acceding to the application would cause future delay. Thus in my view the main question does not concern due expedition which in the terms envisaged by the statute is not in issue, but whether there was good and sufficient cause for extending the time limit. Secondly and relatedly, extending the custody time limit was academic because Mr Gilligan was in custody anyway. The real question was whether the English trial should be adjourned.

In my judgment, the decision of the English prosecuting authorities to subordinate the English prosecution to the Irish proceedings was fully justified. There was good reason for Mr Gilligan to be tried in one jurisdiction only. Equally in my view the prosecution were justified, so long as the Irish extradition proceedings were contested and unresolved, in seeking to keep alive the possibility of a trial in England if Mr Gilligan was not returned to Ireland, thus taking the line that it was in the interests of justice that he should be tried somewhere. For the academic purpose of custody time limits, this was a good and sufficient cause for extending them. On the substantive question (which is technically not before us) of whether it was a proper exercise of discretion to defer the English trial so as to retain the possibility that it might take place if Mr Gilligan was not returned to Ireland, in my view it was. I consider that Judge Rucker reached proper conclusions on each of these questions and that neither is amenable to judicial review.

**ASTILL J.** I have nothing to add.

*Applications refused. Leave to appeal to the House of Lords refused.*

Dilys Tausz Barrister.

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# Halki Shipping Corp v Sopex Oils Ltd

COURT OF APPEAL, CIVIL DIVISION

HIRST, HENRY AND SWINTON THOMAS LJJ

11, 12 NOVEMBER, 19 DECEMBER 1997

b

*Arbitration – Stay of court proceedings – Matter agreed to be referred to arbitration – Parties agreeing to refer any ‘dispute’ arising in connection with charterparty to arbitration – Plaintiff issuing proceedings in High Court claiming demurrage from defendant for breach of charterparty – Defendant not admitting liability and applying to court to stay proceedings in order to refer to arbitration – Whether ‘dispute’ between*

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*parties – Whether court should stay proceedings – Arbitration Act 1996, s 9.*

The plaintiff was the owner of a vessel which was chartered to the defendant under a charterparty for the carriage of goods from the Far East to Europe. By cl 9 of that agreement, the parties agreed to refer any dispute arising from or in connection with the charterparty to arbitration in London to be determined in accordance with English law. In the event, the plaintiff alleged that the defendant had failed to load and discharge the vessel within the agreed laytime and issued proceedings in the High Court claiming demurrage in respect of that breach. The defendant, which did not admit liability, applied to stay the proceedings under s 9<sup>a</sup> of the Arbitration Act 1996, contending that there was a ‘dispute’ between the parties for the purposes of cl 9, which the plaintiff was bound to refer to arbitration. The plaintiff submitted that as the defendant had no arguable defence, there was no dispute within the meaning of the arbitration clause and that it was not therefore bound to refer the claim to arbitration. The judge stayed the proceedings, holding that where the parties to a contract agreed to refer any dispute arising thereunder to arbitration, any subsequent claim made by one of the parties in relation to that contract, which the other party refused to admit, was a dispute which the claimant was both entitled and bound to refer to arbitration. The plaintiff appealed.

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**Held** – (Hirst LJ dissenting) Section 9 of the Arbitration Act 1996 introduced a significant restriction on the previous power of the court to exclude the RSC Ord 14 jurisdiction by omitting the words in s 1 of the Arbitration Act 1975 whereby the court could order a stay ‘unless satisfied ... there is not in fact any dispute between the parties with regard to the matter agreed to be referred’. Accordingly, once the court was satisfied that there was a dispute under an arbitration agreement which governed the contract between the parties, it was not open to a plaintiff to bring Ord 14 proceedings to enforce a claim to which the defendant had no arguable defence, and the court had to grant a stay unless it found the arbitration agreement to be null and void. In the instant case, there was a dispute which arose once the plaintiff claimed damages for breach of the charterparty and therefore, until the defendant admitted that the sum was due and payable, the matter had to be referred to arbitration for determination (see p 43 j to p 44 g, p 45 e to p 46 a, p 48 a to g, p 56 j and p 57 f to h, post).

*Ellerine Bros (Pty) Ltd v Klinger* [1982] 2 All ER 737 and *Hayter v Nelson* [1990] 2 Lloyd’s Rep 265 considered.

Decision of Clarke J [1997] 3 All ER 833 affirmed.



## Notes

For the court's statutory jurisdiction to stay legal proceedings, see 2 *Halsbury's Laws* (4th edn reissue) para 616, and for cases on the subject, see 3(1) *Digest* (2nd reissue) 825–847.

For the Arbitration Act 1975, s 1, see 2 *Halsbury's Statutes* (4th edn) (1992 reissue) 644.

## Cases referred to in judgments

*A/S Gunnstein & Co K/S v Jensen, The Alfa Nord* [1977] 2 Lloyd's Rep 434, CA.

*Acada Chemicals Ltd v Empresa Nacional Pesquera SA* [1994] 1 Lloyd's Rep 428.

*Associated Bulk Carriers Ltd v Koch Shipping Inc, The Fuohsan Maru* [1978] 2 All ER 254, CA.

*Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 1 All ER 664, [1993] AC 334, [1993] 2 WLR 262, HL.

*Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357, CA.

*Ellerine Bros (Pty) Ltd v Klinger* [1982] 2 All ER 737, [1982] 1 WLR 1375, CA.

*Ellis Mechanical Services Ltd v Wates Construction Ltd* [1978] 1 Lloyd's Rep 33, CA.

*First Steamship Co Ltd v CTS Commodity Transport Shipping Schiffahrtsgesellschaft mbH, The Ever Splendor* [1988] 1 Lloyd's Rep 245.

*Hayter v Nelson* [1990] 2 Lloyd's Rep 265.

*Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd (in liq)* [1989] 3 All ER 74, [1990] 1 WLR 153, CA.

*Hume v AA Mutual International Insurance Co Ltd* [1996] LRLR 19.

*Jacobs v London CC* [1950] 1 All ER 737, [1950] AC 361, HL.

*Mayer Newman & Co Ltd v A1 Ferro Commodities Corp SA, The John C Helmsing* [1990] 2 Lloyd's Rep 290.

*Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 2 All ER 463, [1977] 1 WLR 713, HL.

*SL Sethia Liners Ltd v Naviagro Maritime Corp, The Kostas Melas* [1981] 1 Lloyd's Rep 18.

*SL Sethia Liners Ltd v State Trading Corp of India Ltd* [1986] 2 All ER 395, [1985] 1 WLR 1398, CA.

*Tradax Internacional SA v Cerrahogullari TAS, The M Eregli* [1981] 3 All ER 344.

## Cases also cited or referred to in skeleton arguments

*Andria, The* [1984] 1 All ER 1126, [1984] QB 447, CA.

*Cap Bon, The* [1967] 1 Lloyd's Rep 543.

*Slough Estates Ltd v Slough BC* [1967] 2 All ER 270, [1968] Ch 299.

*Tuyuti, The* [1984] 2 All ER 545, [1984] QB 838, CA.

## Appeal

The plaintiff, Halki Shipping Corp, appealed from the decision of Clarke J ([1997] 3 All ER 833, [1997] 1 WLR 1268) on 7 July 1997 whereby he granted an application by the defendant, Sopex Oils Ltd, for a stay of the plaintiff's action for demurrage claimed as a result of failure to load and discharge the vessel Halki within the laytime provided for in a tanker voyage charterparty and ordered, pursuant to s 9 of the Arbitration Act 1996, that the dispute between the parties be referred to arbitration under cl 9 of the charterparty. The facts are set out in the judgment of Henry LJ.



- Nicholas Hamblen QC (instructed by Dorman & Co) for the plaintiff.*  
*a Richard Waller (instructed by Clifford Chance) for the defendant.*

*Cur adv vult*

19 December 1997. The following judgments were delivered.

*b* **HIRST LJ.**

*Introduction*

This case raises an important question under s 9 of the Arbitration Act 1996, namely whether it is still open to a plaintiff to bring RSC Ord 14 proceedings to enforce a claim to which the defendant has no arguable defence, where the claim  
*c* arises under a contract which contains an arbitration clause.

Section 9 of the Arbitration Act 1996 provides, so far as relevant, as follows:

‘(1) *Stay of legal proceedings.*—A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter ...’

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed ...’  
*e*

This section replaced s 1 of the Arbitration Act 1975, which provided:

‘*Staying court proceedings where party proves arbitration agreement.*—(1) If any party to an arbitration agreement to which this section applies ... commences any legal proceedings in any court against any other party to the agreement ... in respect of any matter agreed to be referred any party to the proceedings may ... apply to the court to stay the proceedings; and the court, unless satisfied that ... there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings ...’  
*f*

*g* Under the 1950 and 1975 Arbitration Acts there was a well-established practice that a defendant’s applications for a stay and a plaintiff’s application for summary judgment were heard together, and treated as opposite sides of the same coin.

The usefulness of this practice has frequently been recognised judicially, for example by Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 1 All ER 664 at 680–681, [1993] AC 334 at 356, in a speech with which the other members of the Appellate Committee agreed:  
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‘In recent times, this exception to the mandatory stay has been regarded as the opposite side of the coin to the jurisdiction of the court under RSC Ord 14, to give summary judgment in favour of the plaintiff where the defendant has no arguable defence. If the plaintiff to an action which the defendant has applied to stay can show that there is no defence to the claim, the court is enabled at one and the same time to refuse the defendant a stay and to give final judgment for the plaintiff. This jurisdiction, unique so far as I am aware to the law of England, has proved to be very useful in practice, especially in times when interest rates are high, for protecting creditors with  
*j*

valid claims from being forced into an unfavourable settlement by the prospect that they will have to wait until the end of an arbitration in order to collect their money. I believe however that care should be taken not to confuse a situation in which the defendant disputes the claim on grounds which the plaintiff is very likely indeed to overcome, with the situation in which the defendant is not really raising a dispute at all. It is unnecessary for present purposes to explore the question in depth, since in my opinion the position on the facts of the present case is quite clear, but I would indorse the powerful warnings against encroachment on the parties' agreement to have their commercial differences decided by their chosen tribunals, and on the international policy exemplified in the English legislation that this consent should be honoured by the courts, given by Parker LJ in *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd (in liq)* [1989] 3 All ER 74 at 78, [1990] 1 WLR 153 at 158–159 and Saville J in *Hayter v Nelson and Home Insurance Co* [1990] 2 Lloyd's Rep 265.' a  
b  
c

The basis on which this jurisdiction has been exercised is that, in respect of the claim or some part of the claim to which there is no defence, there is no dispute to be referred to arbitration. Thus in one of the leading cases, *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357 at 362, Goff LJ stated that the first question that the court had to consider was the application for summary judgment under Ord 14, for if indeed there was no genuine dispute it would hardly seem logical to consider whether the alleged dispute should be determined by the court or by an arbitrator. d  
e

The crucial questions at issue are the meaning of the word 'dispute' in an arbitration agreement, and the effect of s 9 of the 1996 Act in the light of the omission from the new section of the qualification 'unless satisfied ... there is not in fact any dispute between the parties with regard to the matter agreed to be referred', which had appeared in its counterpart in the 1975 Act (the 1975 qualification). f

The plaintiff's case before the judge under Ord 14 was that the defendant has no arguable defence to the claim or at least to no more than a very small part of it. However, Clarke J ([1997] 3 All ER 883, [1997] 1 WLR 1268) held that, short of any admission by a defendant, there remained a dispute between the parties which they had agreed to refer to arbitration, even if the defendant had no arguable defence to all or any part of the claim, and that therefore the defendant was entitled to a stay and there was no scope for an Ord 14 judgment in the plaintiff's favour. It is from this ruling that the plaintiff presently appeals. g

The background to the case is that the plaintiff, Halki Shipping Corp, is the owner of the motor tanker Halki, which was chartered to the defendant, Sopex Oils Ltd, under a tanker voyage charterparty dated 20 June 1995 for the carriage of palm oil and coconut oil from various ports in the Far East to various ports in Europe. As it turned out the vessel loaded cargo at five ports in the Far East and discharged at four ports in Europe, and it is the plaintiff's case that the defendant failed to load and discharge the vessel within the lay time provided by the charterparty, with the result that it claims demurrage in the sum of \$US517,473.96; the claim is thus in essence a claim for liquidated damages for breach of the charterparty. The defendant does not admit liability. h  
j

Clause 9 of the charterparty provided as follows:

'General Average and Arbitration to be London, English Law to apply. For Arbitration the following clause to apply: Any dispute arising from or in

a connection with this Charter Party shall be referred to Arbitration in London. The Owners and Charterers shall each appoint an Arbitrator experienced in the shipping business. English law governs this Charter Party and all aspects of the Arbitration.'

b On 9 April 1997 the plaintiff issued a specially indorsed writ claiming demurrage, and the defendant countered by seeking an order staying the action under s 9 of the 1996 Act, which, as is common ground, applies in the present case.

c In addition to the main point of principle, the defendant by respondent's notice seeks to raise a further issue arising from the fact that in August 1997, after Clarke J had given judgment, the plaintiff commenced arbitration proceedings pursuant to the arbitration clause, on the footing that the arbitrator had concurrent jurisdiction; the defendant contends that, in consequence, whatever the outcome of the point of principle, the plaintiff has now waived its right to object to the arbitrator's jurisdiction and/or is now estopped from denying such jurisdiction.

d On behalf of the defendant, Mr Richard Waller urged us to decide this point ourselves at the present juncture: however, seeing that it only arose for the first time after the judgment under appeal, and since it turns to a substantial degree on some rather intricate points of construction of the very extensive correspondence exchanged between solicitors since August, we decided to accede to the submission of Nicholas Hamblen QC, on behalf of the plaintiff, that it was more appropriate that the point should be remitted to the judge.

e *The submissions in outline*

f Mr Hamblen submitted that the critical question is what is meant by 'dispute', which, as here, and as in most arbitration clauses, is under s 9 the 'matter which under the agreement is to be referred to arbitration'. Relying on the decision of the House of Lords in *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 2 All ER 463, [1977] 1 WLR 713, and on a number of subsequent Court of Appeal decisions, he submitted that it is settled by well-established and binding authority that 'dispute' means a genuine or real dispute, and that a claim which is indisputable because there is no arguable defence does not create a dispute at all. It follows, he submitted, that claims to which there is no arguable defence are outwith the scope of s 9, and are therefore properly the subject matter of court proceedings under Ord 14, notwithstanding the omission from s 9 of the 1975 qualification.

g Mr Waller, on the other hand, submitted that 'dispute' means any disputed claim, and therefore covers any claim which is not admitted as due and payable, h thus leaving no scope whatsoever for court proceedings under Ord 14 save where the defendant has made a positive admission. He relied primarily on a decision of Saville J (as he then was) in *Hayter v Nelson* [1990] 2 Lloyd's Rep 265, which he portrayed as a landmark decision; in that case it was held that the word 'dispute' in an arbitration clause should be given its ordinary meaning, and was not j confined to cases where it could not then and there be determined whether one party or the other was in the right, so that the fact that a person has no arguable grounds for disputing something does not mean in ordinary language that he is not disputing it. Mr Waller noted that this decision had been followed in subsequent cases at first instance, and submitted that it was also in line with the decision of the Court of Appeal in *Ellerine Bros (Pty) Ltd v Klinger* [1982] 2 All ER 737, [1982] 1 WLR 1375.



So far as s 9 itself is concerned, Mr Waller submitted that the omission of the 1975 qualification was crucial, since, as he contended, it was the basis of the Ord 14 jurisdiction prior to 1996; and he relied on the terms of para 55 of the report of the Departmental Advisory Committee on Arbitration Law (the DAC) under the chairmanship of Saville LJ, which it is common ground is relevant to the construction of the Act, and which stated as follows in explanation of s 9:

'The Arbitration Act 1975 contained a further ground for refusing a stay namely where the court was satisfied that *'there was not in fact any dispute between the parties with regard to the matter agreed to be referred.'* These words do not appear in the New York Convention and in our view are confusing and unnecessary, for the reasons given in *Hayter v. Nelson* [1990] 2 Lloyd's Rep 265.'

### *The authorities*

In *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* a partnership agreement between the English and German companies contained an arbitration clause providing for arbitration in Germany under German law. The German company dishonoured a number of bills of exchange which they had given to the English company, whereupon the English company commenced an action in England claiming payment of the bills. The German company sought a stay of the action, which was refused by the House of Lords (Lord Wilberforce, Viscount Dilhorne, Lord Fraser of Tullybelton and Lord Russell of Killowen, Lord Salmon dissenting) on two grounds namely: (i) on the evidence of German law the arbitration agreement did not extend to the claims on the bills of exchange: and (ii) there was no dispute between the parties with regard to the matters agreed to be referred within s 1(1) of the Arbitration Act 1975, and accordingly there was no jurisdiction to stay the court proceedings.

In the leading judgment Lord Wilberforce, having dealt with the first (and presently irrelevant) point, stated that it was sufficient to enable the English company to succeed, but that he would none the less deal with the second point, where he took it to be clear law that unliquidated cross-claims cannot be relied upon by way of set off against a claim on a bill of exchange (see [1977] 2 All ER 463 at 467, [1977] 1 WLR 713 at 718).

Having considered a number of cases where the cross-claim was for an amount which was both ascertained and liquidated, he held that the amount claimed was certainly neither ascertained nor liquidated, with the result that 'there would seem to be no basis for denying the appellants' claim that, as regards the bills there is no dispute'. He concluded with a reference to 'the established rule that unliquidated claims must be the subject of a cross-action and cannot be used to create a "dispute" in a bill of exchange' (see [1977] 2 All ER 463 at 469, 470, [1977] 1 WLR 713 at 720, 721).

Viscount Dilhorne said that he agreed with Lord Wilberforce's speech entirely, as did Lord Fraser of Tullybelton, though the latter then proceeded to deliver a speech which focused mainly on the first point.

Lord Russell of Killowen did not deal expressly with the second point, and Lord Salmon dissented.

In *Ellis Mechanical Services Ltd v Wates Construction Ltd* [1978] 1 Lloyd's Rep 33 the Court of Appeal (Lord Denning MR, Lawton and Bridge LJJ) considered an arbitration clause in a large building contract. Lord Denning MR stated (at 35):



a 'There is a general arbitration clause. Any dispute or difference arising on  
the matter is to go to arbitration. It seems to me that if a case comes before  
the Court in which, although a sum is not exactly quantified and although it  
is not admitted, nevertheless the Court is able, on an application of this kind,  
to give summary judgment for such sum as appears to be indisputably due,  
and to refer the balance to arbitration. The defendants cannot insist on the  
b whole going to arbitration by simply saying that there is a difference or a  
dispute about it. If the Court sees that there is a sum which is indisputably  
due, then the Court can give judgment for that sum and let the rest go to  
arbitration, as indeed the Master did here. So much for the point of  
procedure.'

c Bridge LJ stated (at 37):

'The question to be asked is: is it established beyond reasonable doubt by  
the evidence before the Court that at least £x is presently due from the  
defendant to the plaintiff? If it is, then judgment should be given for the  
plaintiff for that sum, whatever x may be, and in a case where, as here, there  
d is an arbitration clause, the remainder in dispute should go to arbitration.  
The reason why arbitration should not be extended to cover the area of the  
£x is indeed because there is no issue, or difference, referable to arbitration  
in respect of that amount.'

e Lawton LJ concurred, and said that in order to avoid the injustice to  
sub-contractors in building contracts (such as the plaintiffs in that case), where  
arbitrations may drag on and on and where cash flow is held up, a robust  
approach to the Ord 14 jurisdiction was appropriate.

f That decision was of course in the case of a domestic arbitration, where the  
court had an open discretion under s 4 of the Arbitration Act 1950 to grant a stay,  
but in *Associated Bulk Carriers Ltd v Koch Shipping Inc, The Fuohsan Maru* [1978] 2 All  
ER 254 the Court of Appeal (Lord Denning MR, Browne and Geoffrey Lane LJJ)  
held that it laid down the correct principle in cases under the 1975 Act, though  
they disagreed as to the application of the principle to the facts then in issue.

g In *SL Sethia Liners Ltd v State Trading Corp of India Ltd* [1986] 2 All ER 395, [1985]  
1 WLR 1398 the Court of Appeal considered counter applications for an Ord 14  
judgment and a stay in a contract governed by the 1975 Act.

Kerr LJ, giving the leading judgment with which Ralph Gibson LJ and Sir  
Denys Buckley agreed, stated ([1986] 2 All ER 395 at 396–397, [1985] 1 WLR 1398  
at 1401):

h 'The submissions of both parties have proceeded on the basis that the  
summonses under Ord 14 and s 1 are the reverse sides of the same coin, and  
we have been referred to *Mustill and Boyd on Commercial Arbitration* (1982)  
pp 90–92. Without expressing any concluded view on everything which is  
stated there, it seems to me that the position can be summarised as follows.  
If a point of law is raised on behalf of the defendants, which the court feels  
j able to consider without reference to contested facts simply on the  
submissions of the parties, then it is now settled that in applications for  
summary judgment under Ord 14 the court will do so in order to see  
whether there is any substance in the proposed defence. If it concludes that,  
although arguable, the point is bad, then it will give judgment for the  
plaintiffs. This course will also be adopted where there is a  
counter-application for a stay of the action. If the contract between the

parties contains an arbitration clause to which s 1 of the 1975 Act applies, then the court is not thereby precluded from considering whether there is any arguable defence to the plaintiffs' claim. If the court concludes that the plaintiffs is clearly right in law then it will still give judgment for the plaintiffs. In the same breath, as it were, it will then have decided that in reality there was not in fact any dispute between the parties. If the court is satisfied that the plaintiffs are clearly right in law, and that the defendants have no arguable defence, then it will not avail the defendants to have raised a point of law which the court can see is in fact bad. In those circumstances the defendants cannot be heard to say that there was a dispute to be referred to arbitration. But if the court concludes that the plaintiffs are not clearly entitled to judgment because the case raises problems which should be argued and considered fully, then it will give leave to defend, and is therefore then bound to refer the matter to arbitration under s 1 of the 1975 Act.'

The relevant passage in the current edition of *Mustill and Boyd* (2nd edn, 1989) pp 123–124 is as follows, under a general heading “Disputes” and “Differences”:

‘(b) *A genuine dispute* Theoretical problems of some difficulty may arise where the defendant does put forward an answer to the claim, but the claimant asserts that the answer does not raise a genuine dispute. Such an assertion may take two forms. First, where it is said that the defendant does not believe what he is saying, and it merely looking for an expedient to avoid or postpone payment. Second, where the defence is put forward with apparent good faith, but can nevertheless be seen to have no substance. Plainly, it may be difficult in certain instances to be sure into which of these categories a defence can properly be assigned.

When dealing with defences of this kind, three questions may arise—  
 1 Does the arbitrator have jurisdiction to entertain the claim, and to make a valid award in respect of it? 2 Must the Court grant a stay in respect of any action brought in respect of the claim, if the matter falls within section 1 of the 1975 Act, and may it grant a stay if it is within section 4(1) of the 1950 Act? 3 If an action is brought in respect of the claim, should the Court grant summary judgment for the amount claimed? Whatever might be the position as regards a defence which is manifestly put forward in bad faith, there are strong logical arguments for the view that a bona fide if unsubstantial defence ought to be ruled upon by the arbitrator, not the Court. This is so especially where there is a non-domestic arbitration agreement, containing a valid agreement to exclude the power of appeal on questions of law. Here the parties are entitled by contract and statute to insist that their rights are decided by the arbitrator and nobody else. This entitlement plainly extends to cases where the defence is unsound in fact or law. A dispute which, it can be seen in retrospect, the plaintiff was always going to win is none the less a dispute. The practice whereby the Court pre-empt the sole jurisdiction of the arbitrator can therefore be justified only if it is legitimate to treat a dispute arising from a bad defence as ceasing to be a dispute at all when the defence is very bad indeed. The correctness of this approach is not self-evident. Moreover, in all but the simplest of cases the Court will be required not merely to inspect the defence, but to enquire into it; a process which may, in matters of any complexity, take hours or even days. When carrying out the enquiry, the Court acts upon affidavits rather than oral evidence. The defendant might well object that this kind of

a trial in miniature by the Court is not something for which he bargained, when making an express contract to leave his rights to the sole adjudication of an arbitrator.

b Whatever the logical merits of this view, the law is quite clearly established to the contrary. Where the claimant contends that the defence has no real substance, the Court habitually brings on for hearing at the same time the application by the claimant for summary judgment, and the cross-application by the defendant for a stay, it being taken for granted that the success of one application determines the fate of the other.'

c The proposition in the first sentence of the third paragraph is supported by a footnote, stating: 'This proposition must now be treated as firmly and finally recognised by *Nova (Jersey)* ...'

d In *Tradax Internacional SA v Cerrahogullari TAS, The M Eregli* [1981] 3 All ER 344 Kerr J, having cited as authority the *Nova (Jersey)* case, the *Ellis Mechanical Services* case and *The Fuohsan Maru*, held that the legal position was clear, and that the fact that arbitration proceedings are pending between parties is clearly not in itself any ground for preventing the courts from becoming seized of the same dispute in an action: that the current practice was for claims which are covered by an arbitration clause, but which are said to be indisputable, are frequently put forward in an arbitration, and then also pursued concurrently by an attempt to obtain summary judgment in the courts; and that a claimant can, and in Kerr J's view should be able to, obtain an order for payment in such cases by either means, the co-existence of both avenues towards a speedy payment of an amount which is indisputably due being well recognised.

e However in *Ellerine Bros (Pty) Ltd v Klinger* [1982] 2 All ER 737, [1982] 1 WLR 1375, which also concerned an arbitration clause under the 1975 Act, the Court of Appeal (Templeman, Watkins and Fox LJ) held, in the words of Templeman LJ giving the leading judgment, that there was a dispute until the defendant admitted that a sum is due and payable; he continued ([1982] 2 All ER 737 at 741, [1982] 1 WLR 1375 at 1381):

g 'Again by the light of nature, it seems to me that s 1(1) is not limited either in content or in subject matter, that if letters are written by the plaintiff making some request or some demand and the defendant does not reply, then there is a dispute. It is not necessary, for a dispute to arise, that the defendant should write back and say, "I don't agree." If, on analysis, what the plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the arbitration agreement, then the applicant is entitled to insist on arbitration instead of litigation.'

h In support of this conclusion Templeman LJ cited another passage from Kerr J's judgment in *The M Eregli* [1981] 3 All ER 344 at 350 as follows:

j 'Where an arbitration clause contains a time limit barring all claims unless an arbitrator is appointed within the limited time, it seems to be that the time limit can only be ignored on the ground that there is no dispute between the parties if the claim has been admitted to be due and payable. Such admission would, in effect, amount to an agreement to pay the claim, and there would then clearly be no further basis for referring it to arbitration or treating it as time-barred if no arbitrator is appointed. But if, as here, a claim is made and is neither admitted nor disputed, but simply ignored, then I think that the



time limit clearly applies and that the claimant is obliged (subject to any possible extension of time) to appoint an arbitrator within the limited time.’ a

I now come to *Hayter v Nelson* [1990] 2 Lloyd’s Rep 265, which is the lynchpin of Mr Waller’s argument. This was an application for summary judgment, countered by an application for a stay under the 1975 Act: the arbitration clause provided that ‘any differences arising out of the agreement which cannot be settled amicably shall be referred to arbitration’, and Saville J, assumed for the purposes of his judgment that the word differences and the word disputes bore the same meaning. b

Saville J (at 267–268) opened his analysis by referring to ‘some cases [where] the suggestion seems to be made that if it can be shown that a claim under a contract is indisputable, i.e. a claim that simply cannot be resisted on either the facts or the law, then there is no dispute’. He then proceeded to cite the passage quoted above from Bridge LJ’s judgment in the *Ellis Mechanical Services* case, and said that to the extent that such observations are intended to define what is or is not a dispute within the meaning of an arbitration clause, he was unable to agree, because they seemed to be in conflict with the *Ellerine* case. He then said (at 268–269): c

‘The proposition must be that if a claim is indisputable then it cannot form the subject of a “dispute” or “difference” within the meaning of an arbitration clause. If this is so, then it must follow that a claimant cannot refer an indisputable claim to arbitration under such a clause; and that an arbitrator purporting to make an award in favour of a claimant advancing an indisputable claim would have no jurisdiction to do so. It must further follow that a claim to which there is an indisputably good defence cannot be validly referred to arbitration since, on the same reasoning, there would again be no issue or difference referable to arbitration. To my mind such propositions have only to be stated to be rejected—as indeed they were rejected by Mr. Justice Kerr (as he then was) in *The M. Eregli* ([1981] 3 All ER 344), in terms approved by Lords Justices Templeman and Fox in *Ellerine v. Klinger*. As Lord Justice Templeman put it ([1982] 2 All ER 737 at 743, [1982] 1 WLR 1375 at 1383):—“There is a dispute until the defendant admits that the sum is due and payable.” In my judgment in this context neither the word “disputes” nor the word “differences” is confined to cases where it cannot then and there be determined whether one party or the other is in the right. Two men have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that that dispute did not in fact exist. Because one man can be said to indisputably right and the other indisputably wrong does not, in my view, entail that there was therefore never any dispute between them. In my view this ordinary meaning of the word “disputes” or the word “differences” should be given to those words in arbitration clauses. It is sometimes suggested that since arbitrations provide great scope for a defendant to delay paying sums which are indisputably due, the Court should endeavour to avoid that consequence by construing these words in arbitration clauses so as to exclude all such cases, but to my mind there are at least three answers to such suggestions. In the first place the assumption is made that arbitrations are necessarily slow processes, but whatever the d

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a position in the past, I cannot accept that as a general or universal truth today. As Mr. Justice Robert Goff (as he then was) pointed out in *The Kostas Melas* ([1981] 1 Lloyd's Rep 18) arbitrators have ways and means (in particular by making interim awards) of proceeding as quickly as the Courts—indeed in that particular case quicker than any Court could have acted. If a claimant can persuade the arbitral tribunal that in truth there is no defence to his claim  
b (ex hypothesi not on the face of it a difficult task if the claim is truly indisputable) then there is no good reason why that tribunal cannot resolve the dispute in his favour without any delay at all. In the second place, and perhaps more importantly, it must not be forgotten that by their arbitration clause the parties have made an agreement that in place of the Courts, their disputes should be resolved by a private tribunal. Even assuming that this  
c tribunal is likely to be slower or otherwise less efficient than the Courts, that bargain remains—and I know of no general principle of English law to suggest that because a bargain afterwards appears to provide a less satisfactory outcome to one party than would have been the case had it not been made or had it been made differently, that bargain can be simply put on one side and ignored. In the third place, if the Courts are to decide whether  
d or not a claim is disputable, they are doing precisely what the parties have agreed should be done by the private tribunal. An arbitrator's very function is to decide whether or not there is a good defence to the claimant's claims—in other words, whether or not the claim is in truth indisputable. Again, to my mind, whatever the position in the past, when the Courts tended to view arbitration clauses as tending to oust their jurisdiction, the modern view (in line with the basic principles of the English law of freedom of contract and indeed International Conventions) is that there is no good reason why the Courts should strive to take matters out of the hands of the tribunal into which the parties have by agreement undertaken to place them. For these  
e reasons I am satisfied that the present proceedings are in respect of a matter agreed by the parties to be referred within the meaning of s. 1(1) of the Arbitration Act, 1975. A difference exists between them in respect of their rights and obligations arising out of the agreement to which the arbitration clause refers.'

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g Saville J (at 269–270) then considered the origins of the key phrase in the 1975 Act, in a passage which echoes the reasoning of *Mustill and Boyd* in the first of the three paragraphs quoted above:

h 'There seems little doubt that the phrase "or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred" was inserted into the 1924 Act by later amendment as a result of a recommendation by the MacKinnon Committee on The Law of Arbitration whose report was presented to Parliament in March 1927—see Russell on Arbitration ((12th edn, 1931) p 519). The recommendation in question is to be found in par. 434 of this Report (Cmd. 2817) in the following terms: "Our  
j attention has been called to a point that arises under the Arbitration Clauses (Protocol) Act 1924. Section 1 of that Act in relation to a submission to which the Protocol applies deprives the English court of any discretion as regards granting a stay of an action. It is said that cases have already not infrequently arisen, where (e.g.) a writ has been issued claiming the price of goods sold and delivered. The defendant has applied to stay the action on the grounds that the contract of sale contains an arbitration clause, without being able or

condescending, to indicate any reason why he should not pay for the goods, or the existence of any dispute to be decided by arbitration. It seems absurd that in such a case the English court must stay the action, and we suggest that the Act might at any rate provide that the court shall stay the action if satisfied that there is a real dispute to be determined by arbitration. Nor would such a provision appear to be inconsistent with the protocol.”

I have not been able to find any report of the cases to which the Committee referred, so that it is not possible to examine the grounds on which a stay was ordered in these cases. On the face of it, if indeed the applicant for a stay could not or did not indicate “the existence of any dispute to be decided by arbitration” then the claims made in the legal proceedings could hardly be “in respect of any matter agreed to be referred” within the meaning of the 1924 Act, so no question of a stay could arise at all, since (under an ordinary arbitration clause) it is only disputes (or differences) that the parties have agreed to refer. What therefore the Committee may have had in mind (though this is speculation) were cases where there was a dispute (or difference) within the meaning of the arbitration clause, so that the legal proceedings were “in respect of a matter agreed to be referred”, but where the party disputing the claim put forward no good grounds for doing so. In such cases, as the Committee put it, there was no “real dispute” in the sense of there being nothing disputable about the claim.

The words inserted into the 1924 Act are, as a matter of pure construction, very difficult to understand. On their face the words appear to indicate that there can be a matter agreed to be referred even though there is not in fact any dispute between the parties—but as I have already pointed out, if there is in fact no dispute between the parties then there is very likely indeed to be nothing agreed to be referred, since it is only disputes (or differences) that the parties have agreed to refer. In the end I have concluded that this apparent absurdity can only be resolved by treating the word “dispute” in this context as indeed meaning something different from the word used in ordinary arbitration clauses, so that reading the phrase as a whole the words “there is not in fact any dispute” mean “there is not in fact anything disputable”. To my mind this reading alone fits with the recommendation made by the Committee and the fact that it was the problem identified by the Committee which Parliament, as it would appear, was intending to resolve when adding the phrase under consideration to the 1924 Act by the amendment made in 1930. There are to my mind no good grounds for suggesting that the words used in the 1975 Act were inserted for any different purpose; and accordingly it seems to me that the same meaning must be given to them.

Finally Saville J had to address the *Nova (Jersey)* case, which he explained (at 271):

“The reasoning of the House of Lords was in the context of considering the appellants’ second argument, that there was not in fact any dispute, within the meaning of s. 1 of the 1975 Act—see, for example, the speech of Lord Wilberforce ([1977] 2 All ER 463 at 467, [1977] 1 WLR 713 at 718). Thus although the speeches themselves do not seek to distinguish between the meaning of the word “dispute” in that Act, and its meaning in what in the light of the first holding was necessarily a hypothetical (but unformulated) arbitration clause, I read them as referring to the former, rather than the

a latter. If this is not the correct approach, then it is difficult to see how the Court of Appeal decision in *Ellerine v. Klinger* can stand.'

I should note at this stage that it seems that the *Nova (Jersey)* case was not cited in the *Ellerine* case; indeed the only one of the earlier cases there referred to was *The M Eregli*.

b Subsequently, Colman J followed the *Ellerine* case in *Acada Chemicals Ltd v Empresa Nacional Pesquera SA* [1994] 1 Lloyd's Rep 428, and Clarke J followed *Hayter v Nelson* in *Hume v AA Mutual International Insurance Co Ltd* [1996] LRLR 19.

c Mr Waller also relied on a decision of Phillips J (as he then was) in *First Steamship Co Ltd v CTS Commodity Transport Shipping Schiffahrtsgesellschaft mbH, The Ever Splendor* [1988] 1 Lloyd's Rep 245, which concerned the Centrocon arbitration clause which specifically refers to 'any claims': Phillips J held that the clause applied to any claim unless the respondent had made a binding admission that such claim was valid. It does not seem to me, however, that this case is of great assistance, in view of the form of the Centrocon clauses, and in any event Phillips J also held that if there was an arguable defence, he could decline to stay the action under the 1975 Act and give judgment under Ord 14.

d Finally in *Mayer Newman & Co Ltd v A1 Ferro Commodities Corp SA, The John C Helmsing* [1990] 2 Lloyd's Rep 290 Bingham LJ, with whom Nourse LJ and Sir George Waller agreed, considered *Hayter v Nelson* in the context of the earlier cases and of the statements in *Mustill and Boyd*, and concluded (at 296) that if the matter was free of authority he would be much impressed by Saville J's arguments of logic and principle, but that there was a body of authority on the other side: he then said that the question did not need to be resolved in that case, but observed (prophetically) that a 'case may well arise in which this divergence in the authorities may have to be resolved'.

f *The judgment under appeal*

g Clarke J carefully considered all the authorities cited above, concentrating first on *Hayter v Nelson*, which he said was regarded as the leading case on the point in the last ten years or so, and which he himself had followed in *Hume's* case. He then noted that Saville J had followed the *Ellerine* case, and said that that case was of considerable importance, while the *Nova (Jersey)* case, might have been obiter. h He then turned to the passage quoted above from Bridge LJ in the *Ellis Mechanical Services* case, and said that this was obiter also, and in any event in conflict with the *Ellerine* case. He then returned to the *Ellerine* case, and said that it was binding Court of Appeal authority for the proposition that where a party simply does nothing there is a dispute which the claimant is both entitled and bound to refer to arbitration. Finally he referred to two further considerations which led to the same conclusion namely: (i) the paragraph in *Mustill and Boyd* first quoted above; and (ii) the changes made by the 1996 Act and the DAC report, on which he stated ([1997] 3 All ER 833 at 843, [1997] 1 WLR 1268 at 1278):

j 'The removal of the words which were in s 1(1) of the 1975 Act means that, whereas before the court could give judgment under Ord 14, now it cannot because it must grant a stay. The correct approach is now that suggested by *Mustill and Boyd* and described as the logical approach, namely to leave to the arbitrators that which it was agreed should be referred to them without interference from the courts. That appears to me to be consistent with the underlying philosophy of the 1996 Act. Finally, I turn to the report of the DAC, which I think both sides agree is a relevant aid to construction of the



Act. Paragraph 55 of that report reads: "The Arbitration Act 1975 contained a further ground for refusing a stay, namely where the court was satisfied that 'there was not in fact any dispute between the parties with regard to the matter agreed to be referred'. These words do not appear in the New York Convention and in our view are confusing and unnecessary, for the reasons given in *Hayter v Nelson*." It is not clear (at least to me) what that paragraph means. However, I do not think that it can possibly mean that the Act intended to remove from arbitrators jurisdiction which they were held in *Hayter v Nelson* to have. The removal of the words must have been intended to have some effect because they provided the rationale of the second part of that decision and were the basis upon which the court had jurisdiction under Ord 14. It seems to me that, when the DAC said that the words were unnecessary, it must have meant that there was no need for the court to have jurisdiction since as Saville J said in the third of the three general points referred to above, courts should not be doing what the parties have agreed should be done by the chosen tribunal and, as his first point made clear, arbitrators have ample powers to proceed without delay, as for example by making interim awards.'

#### Analysis and conclusions

I propose to approach the important and difficult issues which arise in two stages, considering first what is the meaning of the word 'dispute' in an arbitration agreement in the light of the authorities and as it stood prior to the enactment of the 1996 Act; and secondly, in the light of the answer to the first question, considering the impact of s 9.

On the first question the sheet anchor of Mr Hamblen's argument is the *Nova (Jersey)* case, which he submitted is binding authority in favour of his interpretation, and consistent with the other Court of Appeal cases, other than the *Ellerine* case, which he submits the *Nova (Jersey)* case overrides.

Mr Waller attacked this standpoint on a number of grounds.

First, he submitted, in line with the view of Clarke J in the present case, that the *Nova (Jersey)* case was obiter, seeing it was unnecessary to the decision which had already been resolved on the first point. I am unable to accept this submission, which seems to me at odds with the very well-established and fundamental principle that if 'more reasons than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi' (see 26 *Halsbury's Laws* (4th edn) para 573 and the cases there cited, including the leading authority of *Jacobs v London CC* [1950] 1 All ER 737, [1950] AC 361).

Secondly, he submitted that it was not part of the ratio of the majority, since although it clearly formed part of the decisions of Lord Wilberforce and Viscount Dilhorne, it should not be treated as part of Lord Fraser's ratio, since Lord Fraser concentrated in the main body of his judgment on the first issue; this seems to me to overlook Lord Fraser's unequivocal expression of entire agreement with Lord Wilberforce's judgment.

Thirdly, he relied on the contrast drawn by Saville J in *Hayter v Nelson* between Lord Wilberforce's interpretation of the word 'dispute' on the one hand, and its meaning in an arbitration clause on the other. This is a question of critical importance, since a thread runs all through Mr Waller's argument that this distinction is fundamental to the proper resolution of the present case.

I am unable to accept the validity of this distinction between the supposedly different meanings of the simple English word 'dispute' seeing that Lord



a Wilberforce addressed it in general terms, with no hint whatsoever of such a very subtle contrast, which forms the only possible basis for side-tracking his decision.

Moreover, and most importantly, this conclusion is in line with the other Court of Appeal authorities cited above other than the *Ellerine* case, and I would direct particular attention to the quotation from Bridge LJ's judgment in the *Ellis Mechanical Services* case, which to my mind was part and parcel of his ratio, and fully in line with the other two judgments in that case.

b I am therefore satisfied that the *Nova (Jersey)* case is binding authority in favour of Mr Hamblen's construction, and that the footnote in *Mustill and Boyd* is correct.

c That leaves the *Ellerine* case as the only discordant voice, and as Saville J himself recognised in *Hayter v Nelson*, on the interpretation I give to the *Nova (Jersey)* case, the *Ellerine* case cannot stand. It is noteworthy that neither the *Nova (Jersey)* case nor any of the preceding Court of Appeal authorities were cited in the *Ellerine* case.

d I now turn to consider *Hayter v Nelson* itself, which Mr Waller portrays as having discerned and expounded judicially for the first time the essential meaning of the word 'dispute' in an arbitration agreement, in contrast to its meaning in the 1975 Act. If I may be permitted a slightly flippant comment in a long judgment, Mr Waller's perception of *Hayter v Nelson* is reminiscent of Alexander Pope's vision of Sir Isaac Newton in his famous epitaph:

'Nature and Nature's laws lay hid in night,  
God said "let Newton be" and all was light.'

e The core of the first passage quoted above is that if Mr Hamblen's construction of 'dispute' is right, then it must follow that a claimant cannot refer an indisputable claim to arbitration, and that an arbitrator purporting to make an award in favour of a claimant advancing such a claim would have no jurisdiction to do so. This is undoubtedly a very powerful argument, and is, as Mr Hamblen f accepted, undoubtedly correct at any rate in theory. However, as the authorities cited above show, and as demonstrated by innumerable cases over the past 70 years, it has never inhibited concurrent arbitration and court proceedings in practice. In other words, the law took a very pragmatic view, whatever the theoretical objections.

g Saville J then proceeded to consider the suggestion that, since arbitrations provide great scope for a defendant to delay paying sums which are indisputably due, the court should endeavour to avoid that consequence by construing these words in arbitration clauses so as to exclude all such cases.

h To that he provided three answers. First, that any assumption that arbitrations were necessarily slow processes could no longer stand, and that, particularly in view of the arbitrator's power to make interim awards, there is no good reason why the arbitration tribunal cannot resolve the dispute without any undue delay. I have no doubt that arbitration procedures have grown increasingly efficient as the years have gone by, but it does not to my mind follow that the Ord 14 procedure has now outlived its usefulness. This was certainly not the view j expressed subsequently by Lord Mustill in the *Channel Tunnel* case [1993] 1 All ER 664, [1993] AC 334, and the keenness on the part of the plaintiffs to pursue their indisputable claims through the courts under Ord 14 speaks for itself. Furthermore the power to grant interim awards is no new phenomenon, having existed since 1934.

Secondly, Saville J laid stress on the importance of the fact that by their arbitration clause the parties have made an agreement that their dispute should

be resolved by a private tribunal. This is manifestly a very important consideration, and was echoed by Lord Mustill in the same passage from his speech in the *Channel Tunnel* case, but that did not prevent him from indorsing the value of the Ord 14 procedure, while saying that it should be limited to cases where the defendant 'is not really raising a dispute at all' (emphasis added to a word which I interpret as equivalent to 'seriously' or 'genuinely').

Saville J's third answer was that the court should not be doing what the parties have agreed should be done by the private tribunal in deciding whether or not the claim is disputable. That is another way of saying that there should not be parallel jurisdictions, which, as I have already noted, has been hitherto regarded as permissible and indeed valuable.

I do not therefore, with all respect, find those three answers entirely convincing.

Later, Saville J developed his theme that the word 'dispute' in the 1975 Act has a different meaning from that word when used in ordinary arbitration clauses. For the reasons I have given, I do not think that is consistent with the *Nova (Jersey)* case; furthermore, and in any event, it would surely be most extraordinary that the legislature in 1924 and 1975, when enacting provisions specifically directed to arbitration agreements, should have attached some special (and as Mr Waller would have it) artificial meaning to the word, different from that used in the agreements themselves which the legislation was regulating.

I now turn to the 1996 Act itself, leaving aside for the moment para 55 of the DAC report.

Mr Hamblen's submission was, first, that the 'matter which under the agreement is to be referred to arbitration' must signify the dispute referred to in the arbitration agreement itself, and that nothing in s 9 undermines the meaning of that word as upheld by the House of Lords in the *Nova (Jersey)* case. Secondly, while recognising the significance of the removal of the 1975 qualification, he submitted that, if Parliament had intended to make such a fundamental change in the law by removing the well established and much hallowed Ord 14 jurisdiction, they would surely have done so much more explicitly, making it clear what was being done.

He recognised that on his construction the arbitrators would have no jurisdiction over indisputable claims in theory, but submitted that this consideration is of no more practical significance than it has been hitherto, for the reasons explained earlier in this judgment.

Mr Waller on the other hand submitted that the removal of those words is critical, and can only have been directed to the abolition of the Ord 14 jurisdiction.

He supported that proposition on a number of individual grounds each of which I propose to consider. (i) *The language*, by reference to the ordinary meaning of the word 'dispute' as reflected in *Hayter v Nelson*. For the reasons I have already given I do not find *Hayter v Nelson*'s analysis on that point convincing, and I consider Mr Hamblen is right in submitting that prima facie the word must be construed in the s 9 context as bearing the meaning authoritatively established in the *Nova (Jersey)* case.

(ii) *The contractual context*, for which purpose he relies on a clause in the charterparty in this particular case, which refers to the charterers being under an obligation to settle the 'undisputed amount' of demurrage within 60 days, which he contrasts with an 'indisputable' amount. I do not find this distinction carries him very far in the solution of the question of principle.

a (iii) *Commercial sense and practicality* In his oral argument Mr Waller placed this at the forefront of his case, submitting that his construction was workable in practice, whereas Mr Hamblen's was unworkable seeing that the plaintiff would have to decide at the outset whether the court or the arbitrators had jurisdiction, thus confronting him with a perilous dilemma, particularly where there is a time bar for arbitration. I fully recognise the force of this point, but for the reasons I  
b have given earlier in this judgment, I consider it to be a theoretical rather than a practical objection, and one which has not caused difficulty throughout the long period when it has been universally accepted that there existed a parallel jurisdiction, which has been regularly invoked.

(iv) *Authority* I have already dealt with the authorities on which Mr Waller relied.

c (v) *Construction of the 1975 Act itself* Mr Waller submitted that a distinction was to be drawn between what he described as the 'precondition' in s 1(1) (viz 'that legal proceedings had been issued in respect of any matter agreed to be referred'); and what he described as the 'exception or proviso', namely the 1975 qualification. Thus, he said, the court would only have come to consider the  
d proviso after it had already decided that the defendant had a prima facie right to a stay; now that the inserted words had been omitted, the right to a stay was absolute.

This was an impressive argument, but in my judgment it founders once it is accepted, as I have held, that in s 1 of the 1975 Act the matter agreed to be referred (ie the dispute) has the same meaning as 'any dispute' in the  
e qualification, from which of course it follows that under the 1975 Act the precondition would not have been satisfied where the claim was indisputable.

(vi) *Policy* Here Mr Waller relied on para 55 of the DAC report and made the following submission, which I quote verbatim from his skeleton argument:

f '(a) By the time the Departmental Advisory Committee ("DAC") were drafting Section 9 of the 1996 Act the source of the court's jurisdiction to grant summary judgment had been identified in *Hayter v Nelson* as the words "there is not in fact any dispute between the parties with regard to the matter agreed to be referred" in section 1(1) of the Arbitration Act 1975 ("the 1975 Act"). The  
g DAC stated in terms that these words were not re-enacted in the 1996 Act for the reasons given in *Hayter v Nelson*. The very case therefore which identified the closing words of section 1(1) of the 1975 Act as the source of the court's jurisdiction was at the forefront of the draftsmen's minds when they enacted Section 9 of the 1996 Act. It is respectfully submitted that the deliberate  
h omission of these words was therefore clearly designed to remove the court's jurisdiction. (b) Moreover, "the reasons given in *Hayter v Nelson*" can only refer to the general observations made by Saville J as to the efficacy of the arbitral process and the importance of holding the parties to their agreement to arbitrate. Again this reference is only consistent with an  
j intention to remove the court's jurisdiction as opposed to that of the arbitrators. It is respectfully submitted that to redefine the meaning of the word "dispute" in the manner suggested by the plaintiffs would be to circumvent the clear intention of Parliament.'

This again was a powerful argument, and one which causes me considerable anxiety, since undoubtedly one seeks an explanation for the omission of the crucial phrase.



Paragraph 55 states that 'these words are ... confusing and unnecessary, for the reasons given in *Hayter v. Nelson*'.

No doubt the word 'confusing' echoed the final paragraph of the second passage quoted above from *Hayter v Nelson*, where Saville J stated that he found the words 'very difficult to understand'; this comment however seems to relate to their formulation rather than their substance.

How then do we interpret the statement that these words are 'unnecessary'? Mr Waller, of course, would construe that as meaning not only that the words themselves are unnecessary, but also that the parallel procedure itself under Ord 14 is unnecessary. This seems to me to put a gloss on the actual, and no doubt carefully considered, phraseology. After anxious consideration, I do not think that para 55 taken as a whole is anything like forthright enough to bear the weight of the radical interpretation Mr Waller seeks to place upon it. In my judgment, if the DAC had intended to carry through such a revolutionary alteration in the law, with such serious consequences on very well established procedures in arbitration cases, they would have spelt it out explicitly, with a full explanation and a detailed justification of the change, so that Parliament was fully apprised of its significance.

This they have not done, and I am therefore not persuaded, despite Mr Waller's exceptionally able arguments, that Parliament, in enacting s 9 without the 1975 qualification, effected (sub silentio) an abolition of the existing Ord 14 practice.

For all these reasons, I would allow this appeal.

**HENRY LJ.** In this appeal shipowners wish to apply under RSC Ord 14 for summary judgment against the charterers in respect of their claim for liquidated damages for demurrage. There was an arbitration agreement between the parties, and the charterers successfully applied to Clarke J ([1997] 3 All ER 833, [1997] 1 WLR 1268) to stay those proceedings, on the basis, in the words of s 9(1) of the Arbitration Act 1996, that they, the charterers, are 'a party to an arbitration agreement' and that these 'legal proceedings are brought in respect of a matter which under the agreement is to be referred to arbitration'.

The 'matter' which under the arbitration agreement is to be referred to arbitration is the shipowner's demurrage claim, as it is (or so the charterers contend) 'a dispute arising from or in connection with the charterparty' (see additional cl 9 of the charterparty).

The charterers having asked for a stay, it is then for the plaintiff shipowners to demonstrate that no such dispute arises in this case. The charterers say that it is clear that there is such a dispute. They were not admitting liability and (as emerged at the hearing before Clarke J) their solicitors had written a letter setting out 'some examples' of the areas in dispute, while making it clear that those areas 'do not constitute a comprehensive list of our client's counterclaims or exceptions/deductions of delay time'. The shipowners calculated that those points only raised a defence to '6.51 of the 33.38 days demurrage', leaving demurrage totalled at \$US416,175 not specifically challenged. Since that hearing, we are told that the charterers have now delivered a 'comprehensive defence' which on their calculation challenges all but approximately \$US180,000 of the demurrage claim, and further denies that that residual sum is due and payable because of various cross claims made in that pleading. But I ignore those factual matters for present purposes. First, the judge did not find it necessary to rule on the strength of the factual material before him. Second, as to the subsequent



a events, no leave has been given to introduce such evidence before us. Accordingly, I proceed on the basis that what we have to consider is whether there is a dispute within the meaning of the arbitration clause when the charterers refuse to admit and refuse to pay the amount claimed.

b If I had to decide this matter untroubled by previous authority construing both the statutory framework governing international arbitrations prior to and since the 1996 Arbitration Act and/or the construction of individual arbitration agreements, I would unhesitatingly conclude that there was a dispute as to the entirety of the sum claimed, and that the proceedings should be stayed and referred to arbitration.

c My reasoning would be that, by their arbitration clause referring all disputes to arbitration, the parties were, without qualification, agreeing on a form of dispute resolution alternative to that provided by the courts. And, as arbitration procedures make their own provision for the possibility of obtaining prompt interim awards for the minimum sum plainly due, I would not be immediately impressed by a submission that I should construe 'dispute' with so artificial a narrowness as to be restricted to such disputes (as to liability or quantum) as are  
d found by the court to merit the grant of leave to defend—after a contested hearing for summary judgment under Ord 14, which often takes hours and sometimes takes days (for an example of that narrow interpretation see *Ellis Mechanical Services Ltd v Wates Construction Ltd* decided in 1976 and reported in [1978] 1 Lloyd's Rep 33). To put it another way, when the parties have chosen  
e arbitration for their dispute resolution, I would not (if unconstrained by statute or authority) interpret their choice as being restricted to referring only those disputes that cannot be resolved by the courts' summary judgment procedures. I would have been persuaded by the reasoning, first, of Clarke J in this case and, second, to be found in *Mustill and Boyd on Commercial Arbitration* (2nd edn, 1989) p 123. Clarke J said ([1997] 3 All ER 833 at 836, [1997] 1 WLR 1268 at 1271):

f 'Mr Waller submits that the purpose of the arbitration clause was to submit to arbitration all disputes arising from or in connection with the charterparty. He submitted that those will include any claim by one party to which the other party refused to admit or does not pay. Thus, for example,  
g the owners might make a claim for freight which the charterers refuse to pay only because they wish to make a cross-claim for damage to cargo but to which they had no defence. The parties contemplated that the arbitrators would have jurisdiction to make an award for freight. The parties cannot (he submits) have intended that the arbitrators would have no jurisdiction to make an award for freight in those circumstances. Indeed arbitrators have  
h been making awards for freight in such circumstances over many years. Unassisted by authority I would accept Mr Waller's submissions. It appears to me that there is indeed here a dispute relating to demurrage, just as there would be a dispute relating to freight in the above example. It seems to me to make no commercial sense to hold that the parties intended that the  
j arbitrators should have jurisdiction over those parts of either party's claim in respect of which the other party has an arguable defence but not otherwise. It makes more sense to hold that the parties intended that the arbitrator should have jurisdiction over all the claims which either party refused to pay. Thus it was contemplated that all such claims should be determined by private arbitration before commercial men and not by the courts. Mr Hamblen recognised that the logic of his argument is that the arbitrators

have no jurisdiction to make an award in respect of an indisputable part of the claim. He also accepts that they have often made such awards in similar circumstances in the past, but he says that the problem does not arise and will not arise in practice because parties do not take the point that the arbitrators have no jurisdiction on the ground that their defence is hopeless. In my judgment, that is or would not be a satisfactory state of affairs. It seems to me to be almost inconceivable that the parties to a contract of this kind intended to confer the kind of limited jurisdiction upon the arbitrators which Mr Hamblen's submissions would involve, if they were right.' a  
b

Next there is the passage from *Mustill and Boyd*. Though I have given the reference to the second edition, forensic archaeologists may be interested to note that the passage to be quoted was in the same form in the first edition (1982), which stated the law as at 1 July 1982. Dealing with non-domestic arbitration agreements, the editors say (p 123): c

'Whatever might be the position as regards a defence which is manifestly put forward in bad faith, there are strong logical arguments for the view that a bona fide if unsubstantial defence ought to be ruled upon by the arbitrator, not the Court. This is so especially where there is a non-domestic arbitration agreement, containing a valid agreement to exclude the power of appeal on questions of law. Here the parties are entitled by contract and statute to insist that their rights are decided by the arbitrator and nobody else. This entitlement plainly extends to cases where the defence is unsound in fact or law. A dispute which, it can be seen in retrospect, the plaintiff was always going to win is none the less a dispute. The practice whereby the Court pre-empts the sole jurisdiction of the arbitrator can therefore be justified only if it is legitimate to treat a dispute arising from a bad defence as ceasing to be a dispute at all when the defence is very bad indeed. The correctness of this approach is not self-evident. Moreover, in all but the simplest of cases the Court will be required not merely to inspect the defence, but to enquire into it; a process which may, in matters of any complexity, take hours or even days. When carrying out the enquiry, the Court acts upon affidavits rather than oral evidence. The defendant might well object that this kind of trial in miniature by the Court is not something for which he bargained, when making an express contract to leave his rights to the sole adjudication of an arbitrator.' d  
e  
f  
g

But whether that course is open to me depends on the statutory framework and the case law arising from it. As the law stood in 1982 and 1989, the editors continued (p 124): 'Whatever the logical merits of this view, the law is quite clearly established to the contrary.' The footnote supporting that proposition for both the first and second editions of the work reads: 'This proposition must now be treated as firmly and finally recognised by *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* ([1977] 2 All ER 463, [1977] 1 WLR 713) and the *Gunnstein* case (*A/S Gunnstein & Co K/S v Jensen, The Alfa Nord* [1977] 2 Lloyd's Rep 434).' The footnote to first edition continued: 'It has, we believe, represented the practice of the court for decades.' h  
j

At that time what I will be referring to as the 1930 amendment had been law for 50 years, and it only ceased to be part of our law with the Arbitration Act 1996. Clarke J found that both that amendment and its excision in the Arbitration Act 1996 radically altered the legal position. I agree. This appeal in my judgment

a turns on the significance of the repeal by the Arbitration Act 1996 of one of the grounds for refusing a stay of legal proceedings where there was an arbitration agreement, namely where the court was satisfied that 'there is not in fact any dispute between the parties with regard to the matter agreed to be referred' (see s 1 of the Arbitration Act 1975).

b This ground for imposing a stay was inserted at the end of s 1 of the Arbitration Clauses (Protocol) Act 1924 (which subsequently became s 1 of the 1975 Act) by s 8 of the Arbitration (Foreign Awards) Act 1930. The ground had not appeared in either of the foundation conventions, the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards, or in the League of Nations Protocol of 24 September 1923. I will refer to that amendment to the Act as the 1930 amendment.

c Hirst LJ has quoted what Saville J told us in *Hayter v Nelson* [1990] 2 Lloyd's Rep 265 as to the genesis of this addition to the convention grounds in the MacKinnon Committee Report on the Law of Arbitration (Cmd 2817), and I do not need to repeat that citation. I understand the report on the working of the Act to complain that the courts were having to accept that there was a dispute on a  
d 'matter' referred to arbitration and so (where the arbitration agreement was not 'null and void, inoperative or incapable of being performed') 'the English court must stay the action', even in cases where there was no 'real dispute'. The complaint therefore was that the definition of 'dispute' used by the English courts had been too wide, and should be restricted to cases where the court is satisfied that there was 'a real dispute to be determined by the arbitration'. The 1930  
e amendment did not attempt to restrict the parties' power to give the widest possible meaning to 'dispute' in their arbitration agreement, but provided that the court shall not stay legal proceedings (however widely 'dispute' has been defined) if satisfied that 'there is not in fact any dispute between the parties'. So after the 1930 amendment, logically it would only come into play when there was  
f a 'dispute' between the parties within the meaning of the arbitration clause, but the plaintiff, seeking to resist the stay, could satisfy the court that there was not in fact any dispute (ie nothing disputable) between the parties. This view is supported by the conclusions of Saville J in *Hayter v Nelson* [1990] 2 Lloyd's Rep 265: (i) in that case there was a dispute between the parties as to the rights and obligations arising out of the agreement containing the arbitration clause (at 267);  
g (ii) in the 1930 amendment requiring the court to refuse a stay where satisfied that 'there is not in fact any dispute between the parties with regard to the matter agreed to be referred', the word 'dispute' had to be given a different (ie more restricted) meaning from the word used in ordinary arbitration clauses: it must be read as meaning 'there is not in fact anything disputable' (at 270).

h Mr Hamblen QC for the shipowners challenged both of those conclusions. His case was that neither the introduction of the MacKinnon-inspired provision changed the law in 1930 nor did the 1996 excision of those words alter things: the words were and always had been superfluous, and what mattered was the meaning of the 'disputes' in context of the arbitration agreement, as the speech  
j of Lord Wilberforce in *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 2 All ER 463, [1977] 1 WLR 713 showed. He contended that the ratio of that decision was that the denial or rejection of an indisputable claim could not create a dispute under the arbitration agreement.

I would be extremely reluctant to hold that neither the 1930 amendment nor its repeal in 1996 affected the law, as it had always been superfluous. First, its genesis contradicts that view. Second, the presumption is that Parliament does



nothing in vain. Third, where Parliament means to clarify without altering the meaning it has intended to give to a provision, a formula such as the introductory words 'for the avoidance of doubt' is used. There is nothing here to indicate that a mere clarification was intended. Fourth, and most significantly, the scheme of the amendment was such that the plaintiff in the action, resisting the stay, would give pride of place to the formulation 'no dispute in fact' as it appeared in the statute and he would be likely to urge a narrow construction of those words on the basis that the mischief the statute aimed at was the alleged opportunity for delay afforded by the arbitration process, and so seek a purposive and restrictive interpretation of what constituted a 'dispute in fact'. Such considerations would be impermissible if the court were construing the bare word 'dispute' in an arbitration agreement in an Act based on an international convention. I am in agreement with Swinton Thomas LJ that there is a real and significant difference between construing the unqualified words 'dispute' in an arbitration agreement, and the qualification imposed by 'in fact no dispute' contained in the 1930 amendment. Clarke J was, in my view, right to describe the fact that the 1930 amendment was not re-enacted in the 1996 Act as being—

'a key difference because it radically alters the position as it was before and, save in very limited circumstances, leaves all disputes within the arbitration clause to be determined by the agreed tribunal.' (See [1997] 2 All ER 833 at 839, [1997] 1 WLR 1268 at 1274.)

And to say:

'The removal of the words must have been intended to have some effect because they provided the rationale of the second part of that decision and were the basis upon which the court had jurisdiction under Ord 14.' (See [1997] 2 All ER 833 at 843, [1997] 1 WLR 1268 at 1279.)

Accordingly, I reject Mr Hamblen's submission that both the 1930 amendment and its repeal counted for nothing. By that amendment Parliament were introducing a significant restriction in the power of the court to grant a stay. I agree with Mr Waller's submission that the 1930 amendment was the source of the court's jurisdiction to grant summary judgment in cases where there was a dispute under the arbitration agreement, but inquiry by the court under the 1930 amendment into whether or not there was anything disputable had shown that there was not. I note Lord Mustill's observation in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 1 All ER 664 at 681, [1993] AC 334 at 356 that such a parallel jurisdiction is 'unique so far as I am aware to the law of England'—might this be because other convention countries have not altered the convention by a like amendment to the convention?

I have given my reasons for stating why I consider the 1930 amendment to have been legally significant. I also consider its repeal to have equal legal significance.

The Arbitration Act 1996 is:

'An Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for connected purposes.'

Part I deals with arbitration pursuant to an arbitration agreement and s 1 provides:



*a* 'General principles.—The provisions of this Part are founded on the following principles, and shall be construed accordingly—(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; (c) in matters governed by this Part, the court should not intervene except as provided by this Part.'

*b* Section 9 deals with the stay of legal proceedings, the relevant parts have already been set out in these judgments. I refer to the first paragraph of this judgment to show how the charterers qualify to apply for a stay of legal proceedings under s 9(1). Once the court is satisfied that they are so qualified, ie *c* that there is such a dispute, then under s 9(4)—

'the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.'

This arbitration agreement is none of those things.

*d* I take s 1 in general and s 1(b) in particular as emphasising the importance of the fact that the parties have chosen an alternative form of dispute resolution, namely arbitration, and should not be limited in that preference unless 'such safeguards are necessary in the public interest'. Though similar provisions were not in force in 1930, had they been in force the 1930 amendment to the Act would have been so justified on those grounds if Parliament regarded the Ord 14 *e* safeguards against a meritless defendant playing for time as being necessary in the public interest. The parallel Ord 14 jurisdiction has, as the judicial comments show, regularly been justified on those grounds up to and including Lord Mustill's comments in the *Channel Tunnel Group* case in 1993. But in that speech Lord Mustill balanced those comments by indorsing—

*f* 'the powerful warnings against encroachment on the parties' agreement to have their commercial differences decided by their chosen tribunals, and on the international policy exemplified in the English legislation that this consent should be honoured by the courts, given by Parker LJ in *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd (in liq)* [1989] 3 All ER 74 at 78, [1990] 1 WLR 153, 158–159 and Saville J in *Hayter v Nelson* [1990] 2 Lloyd's Rep 265.' (See [1993] 1 All ER 664 at 681, [1993] AC 334 at 356.) *g*

When I consider the excision of the 1930 amendment from s 9(4) of the 1996 Act against the background of the general principles set out in s 1 of that Act, and Lord Mustill's powerful indorsement quoted above, I conclude that the intention *h* of the 1996 Act was to exclude the Ord 14 jurisdiction based on an investigation of what was in fact disputable as contained in the 1930 amendment. Equally, I take the excision of the 1930 amendment as showing that Parliament does not consider that the safeguards against arbitral delay that Ord 14 provides are today necessary in the public interest. As Saville J said in *Hayter v Nelson* [1990] 2 Lloyd's *j* Rep 265 at 268:

'... the assumption is made that arbitrations are necessarily slow processes, but whatever the position in the past, I cannot accept that as a general or universal truth today. As Mr. Justice Robert Goff (as he then was) pointed out in *The Kostas Melos* ([1981] 1 Lloyd's Rep 18), arbitrators have ways and means (in particular by making interim awards) of proceeding as quickly as

the Courts—indeed in that particular case quicker than any Court could have acted.’ a

I would not have required the assistance of parliamentary material to have reached that conclusion as to the fundamental importance of the 1930 amendment and its excision in 1996. But we have been shown the report of the Departmental Advisory Committee on Arbitration Law (the DAC) on cl 9 (now s 9) by Saville LJ. Under the heading ‘Clause 9: Stay of Legal Proceedings’ we find: b

‘50. We have proposed a number of changes to the present statutory position (section 4(1) of the 1950 Act and section 1 of the 1975 Act) having in mind Article 8 of the Model law, our treaty obligations and other considerations ... c

54. In this Clause we have made a stay mandatory unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. This is the language of the Model law and of course of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, presently to be found in the Arbitration Act, 1975. d

55. The Arbitration Act, 1975 contained a further ground for refusing a stay, namely where the court was satisfied that “there was not in fact any dispute between the parties with regard to the matter to be referred”. These words do not appear in the New York Convention and in our view are confusing and unnecessary for the reasons given in *Hayter v Nelson* [1990] 2 Lloyd’s Reports 265.’ e

First, I take comfort from the clear statement that the repealed 1930 amendment had contained ‘a further ground for refusing a stay’. That supports the conclusion I have already reached, namely that that ground was additional to the s 9(1) ground for refusing a stay, namely that the legal proceedings have not been brought in respect of ‘a matter which under the agreement is to be referred to arbitration’ (in this case a ‘dispute arising from or in connection with the charterparty’). That sentence is clearly inconsistent with Mr Hamblen’s submission that the s 30 amendment was superfluous. f

Second, like Hirst LJ, I can see that the epithet ‘confusing’ can be justified by Saville J’s finding ([1990] 2 Lloyd’s Rep 265 at 270) that the ‘words inserted into the 1924 Act are, as a matter of pure construction, very difficult to understand’. g

But I confess initially to have found the concept that the 1930 amendment was ‘unnecessary’ to be Delphic in a way befitting only that Oracle. I had been unable to see where in *Hayter v Nelson* Saville J found the 1930 amendment to be unnecessary. Indeed, as is shown by the opening words of the paragraph already relied on, he found (at 270) that their purpose was to introduce the ‘further ground for refusing a stay’, namely to treat— h

‘the word “dispute” in this context as indeed meaning something different from the word used in ordinary arbitration clauses, so that reading the phrase as a whole the words “there is not in fact any dispute” mean “there is not in fact anything disputable”.’ j

Those words were necessary to achieve that purpose.

But ultimately I am persuaded by the meaning Clarke J attached to ‘unnecessary’:

a 'It seems to me that when the DAC said that the words were unnecessary, it must have meant there was no need for the court to have jurisdiction since, as Saville J said in the third of the three general points referred to above, courts should not be doing what the parties have agreed should be done by the chosen tribunal and, as his first point made clear, arbitrators have ample powers to proceed without delay, as for example by making interim awards.'

b (See [1997] 3 All ER 833 at 843, [1997] 1 WLR 1268 at 1279.)

But even if Clarke J were wrong in that, it would still not in my judgment, for the reasons given above, support Mr Hamblen's contention that both the 1930 amendment and its excision in 1996 were because it was 'superfluous'.

c With the excision of the 1930 amendment went the authority of the cases that had founded themselves on it. The most important of these is, of course, *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 2 All ER 463, [1977] 1 WLR 713. The following passage makes it perfectly clear that their Lordships were founding their decision on the 1930 amendment:

d 'It remains however open to the appellants to show, the onus being on them, that "there is not in fact any dispute between the parties with regard to the matter agreed to be referred". If they succeed in this, the stay will be refused.' (See [1977] 2 All ER 463 at 467, [1977] 1 WLR 713 at 718.)

In *Hayter v Nelson* [1990] 2 Lloyd's Rep 265 at 271 Saville J having pointed to those words said:

e 'The reasoning of the House of Lords was in the context of considering the appellants' second argument, that there was not in fact any dispute, within the meaning of s. 1 of the 1975 Act—see, for example, the speech of Lord Wilberforce ([1977] 2 All ER 463 at 466, [1977] 1 WLR 713 at 718). Thus although the speeches themselves do not seek to distinguish between the meaning of the word "dispute" in that Act, and its meaning in what in the light of the first holding was a necessarily hypothetical (but unformulated) arbitration clause, I read them as referring to the former rather than the latter.'

f

g Thus the speeches are based on the meaning of the word 'dispute' in the 1930 amendment rather than the meaning of that word in the arbitration clause.

h Similar considerations apply to the decision in *Ellis Mechanical Services Ltd v Wates Construction Ltd* [1978] 1 Lloyd's Rep 33. That case dealt with judgment under Ord 14 for what was 'indisputably due' as Saville J ([1990] 2 Lloyd's Rep 265 at 268) said after his famous example of the argument over who won the University Boat Race:

'Because one man can be said to be indisputably right and the other indisputably wrong does not, in my view, entail that there was therefore never any dispute between them.'

j And the purpose of the 1930 amendment was the source of the restricted meaning of 'dispute': 'There is not in fact anything disputable'. Therefore, in the *Ellis* case, the court was in fact considering the words of the 1930 amendment. This can be further demonstrated by the consideration of that authority by the court in *Associated Bulk Carriers Ltd v Koch Shipping Inc, The Fuohsan Maru* [1978] 2 All ER 254, which makes it clear that the conclusion that the sum found to be 'indisputably due' had been arrived at by the Ord 14 decision of the court as being



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a sum as to which 'there is not in fact any dispute'. So that case is comparable with the *Nova* case in that the court there too reached its result by construction of the 1930 amendment.

b  
What the words 'there is not in fact any dispute' meant in the 1930 amendment is now history, and no longer a relevant question to be asked. In my judgment Clarke J was right to follow the line of authority from *Tradax Internacional SA v Cerrahogullari TAS*, *The M Eregli* [1981] 3 All ER 344 to *Ellerine Bros (Pty) Ltd v Klinger* [1982] 2 All ER 737, [1982] 1 WLR 1375, which focused on the meaning of dispute in the arbitration agreement. As he said in the report of this case at first instance ([1997] 3 All ER 833 at 841–842, [1997] 1 WLR 1268 at 1277):

c  
d  
e  
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'In the *Ellerine* case the Court of Appeal was also considering a question of construction of an arbitration agreement, in which it was agreed that all disputes or differences whatsoever should be referred to arbitration. The plaintiffs claimed an account. The defendants had simply done nothing. The Court of Appeal expressly followed the decision in *The M Eregli* and held that silence did not mean consent and that, as Kerr J said, until the defendant admits that a sum is due and payable there is a dispute within the meaning of the arbitration clause. Even in such a case I can see an argument for saying that a claimant would be entitled to an award if the respondent then refused to pay. But, however that may be, the *Ellerine* case is authority for the proposition that where a party simply does nothing there is a dispute which the claimant is both entitled and bound to refer to arbitration. It follows that there is binding Court of Appeal authority in favour of the defendants' case on construction of the clause. It is true that the *Nova (Jersey) Knit* case was not directly referred to the Court of Appeal in that case, but it is expressly referred to by Kerr J in *The M Eregli* so that it cannot possibly be held that it was overlooked or that the *Ellerine* case was decided per incuriam. Both Kerr J and Saville J regarded the second point in the *Nova (Jersey) Knit* case as depending upon the meaning of the final words of s 1(1) of the 1975 Act and not upon the true construction of the contract. It may well be that the Court of Appeal did the same. In these circumstances, the correct approach for a judge of first instance is to follow the reasoning of the Court of Appeal, so far as construction of the contract is concerned.'

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I agree with that, and that decision is equally binding on this court. It follows that in my judgment Clarke J was right, and I would dismiss this appeal. By one of those quirks of the forensic process, Clarke J's judgment was not analysed in any depth at the hearing of this appeal. In studying it for the purpose of this judgment, I have come increasingly to admire it and to welcome its assistance in understanding a legal point deceptively simply to state, but one which I have found elusive.

j  
**SWINTON THOMAS LJ.** In answering the question whether there is a relevant dispute to be referred to arbitration together with the grant of a stay of the legal proceedings which have been commenced, on the facts of this case, it is helpful to refer very briefly to the history of the relationship between arbitration proceedings and court proceedings in English law.

Section 1(1) of the Arbitration Clauses (Protocol) Act 1924 provided:

'Notwithstanding anything in the Arbitration Act, 1889, if any party to a submission made in pursuance of an agreement to which the said protocol



a applies, or any person claiming through or under him, commences any legal  
proceedings in any court against any other party to the submission, or any  
person claiming through or under him, in respect of any matter agreed to be  
referred, any party to such legal proceedings may at any time after  
appearance, and before delivering any pleadings or taking other steps in the  
proceedings, apply to that court to stay the proceedings, and that court or a  
b judge thereof, unless satisfied that the agreement or arbitration has become  
inoperative or cannot proceed, shall make an order staying the proceedings.'

The MacKinnon Committee *Report on the Law of Arbitration* (Cmd 2817) (1927)  
para 43 reads:

c 'Our attention has been called to a point that arises under the Arbitration  
Clauses (Protocol) Act, 1924. Section 1 of that Act in relation to a submission  
to which the protocol applies deprives the English Court of any discretion as  
regards granting a stay of an action. It is said that cases have already not  
infrequently arisen, where (e.g.) a writ has been issued claiming the price of  
goods sold and delivered. The defendant has applied to stay the action on  
d the ground that the contract of sale contains an arbitration clause, but  
without being able, or condescending, to indicate any reason why he should  
not pay for the goods, or the existence of any dispute to be decided by  
arbitration. It seems absurd that in such a case the English Court must stay  
the action, and we suggest that the Act might at any rate provide that the  
e Court shall stay the action if satisfied that there is a real dispute to be  
determined by arbitration.'

The report uses the words 'a real dispute'.

Section 1(1) of the Arbitration Clauses (Protocol) Act 1924 was then amended  
by s 8 of the Arbitration (Foreign Awards) Act 1930 to incorporate the words  
f 'there is not in fact any dispute between the parties with regard to the matter  
agreed to be referred'. Those words were carried through into the 1950 Act and  
the 1975 Act and are central to the issue that arises in this case.

Section 1(1) of the Arbitration Act 1975 provides:

g '*Staying court proceedings where party proves arbitration agreement.*—(1) If any  
party to an arbitration agreement to which this section applies, or any person  
claiming through or under him, commences any legal proceedings in any  
court against any other party to the agreement, or any person claiming  
through or under him, in respect of any matter agreed to be referred, any  
party to the proceedings may at any time after appearance, and before  
h delivering any pleadings or taking any other steps in the proceedings, apply  
to the court to stay the proceedings; and the court, unless satisfied that the  
arbitration agreement is null and void, inoperative or incapable of being  
performed or that there is not in fact any dispute between the parties with  
regard to the matter agreed to be referred, shall make an order staying the  
j proceedings.'

Clause 9 of the charterparty in the present case is in common form:

'General Average and Arbitration to be London, English Law to apply. For  
Arbitration the following clause to apply: Any dispute arising from or in  
connection with this Charter Party shall be referred to Arbitration in  
London. The Owners and Charterers shall each appoint an Arbitrator

experienced in the shipping business. English law governs this Charter Party and all aspects of the Arbitration.'

The plaintiffs issued a writ claiming demurrage. The defendants sought an order staying the action under s 9 of the Arbitration Act 1996, to which I will refer later. The plaintiffs' case was that the defendants had no arguable defence to the claim. The defendant had failed to pay the amount of the demurrage claimed and claimed that demurrage. The defendants have refused to pay and do not admit that they are liable. Accordingly the issue arose as to whether there was 'a dispute between the parties', entitling the defendants to a stay under s 9.

The words used in cl 9 of the charterparty in relation to a referral to arbitration were 'any dispute'. The words in s 1(1) of the 1975 Act are 'there is not in fact any dispute between the parties'. To the layman it might appear that there is little if any difference between those words. However the legislature saw fit to draft s 1 using the phrase 'in fact no dispute'. The legislature did not use the words 'there is no dispute' and consequently a meaning must be given to those words and the courts have done so, although there is no general agreement as to what they mean. The distinction between the two phrases 'any dispute' and 'not in fact any dispute' is of central importance in understanding what underlies the cases that preceded the 1996 Act. To a large extent as a matter of policy to ensure that English law provided a speedy remedy by way of RSC Ord 14 proceedings for claimants who made out a plain case for recovery, and to prevent debtors who had no defence to the claim using arbitration as a delaying tactic, the words 'in fact no dispute' as opposed to 'no dispute' have from time to time been interpreted by the courts as meaning 'no genuine dispute', 'no real dispute', 'a case to which there is no defence' 'there is no arguable defence', and later a case to which there is no answer as a matter of law or as a matter of fact, that is to say that the sum claimed 'is indisputably due'. The approach of the courts has on occasions been similar to that adopted by them in Ord 14 proceedings in cases where there is no arbitration clause. Lord Mustill said in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 1 All ER 664 at 680, [1993] AC 334 at 334 at 356:

'In recent times, this exception to the mandatory stay has been regarded as the opposite side of the coin to the jurisdiction of the court under Ord 14 to give summary judgment in favour of the plaintiff where the defendant has no arguable defence.'

We were told in the course of this case that parties are much more ready to seek and arbitrators more ready to grant interim awards than they were in the past with the result, so it is said, that any policy considerations no longer exist or, if they do, they are much less pressing than they were in the past.

The question that arises on this appeal is as to whether, in a case such as the present, there can be said to be a dispute between the parties when the alleged debtor has refused to pay the amount claimed and denied that there is any sum due and owing without condescending to detail by way of defence.

The case for the appellants, put very shortly, is that before there can be a dispute capable of being referred to the arbitrator there must be an arguable case for disputing the claim, and if the defence put forward is unsustainable then there is no dispute or put another way, no 'real' or 'genuine' dispute. It is said that the plaintiffs' claim is indisputable. It is of importance, to my mind, that the clause in the agreement makes no reference to a real or genuine dispute, or any reference

a to whether or not the claim is indisputable, but refers only to 'any dispute'. The respondents submit that if the defendants to a claim refuse to pay then there is in any ordinary language a dispute and that word includes any claim which is not admitted. They stress, rightly in my view, that the parties themselves have agreed that matters in issue between should be referred to arbitration as opposed to being adjudicated upon by the courts. Further they rely on the provisions of s 9 of the Arbitration Act 1996.

b The words 'dispute' and, 'in fact any dispute' have been considered by the courts in a number of cases.

In *Ellerine Bros (Pty) Ltd v Klinger* [1982] 2 All ER 737, [1982] 1 WLR 1375 the relevant clause in the contract was in these terms:

c 'All disputes or differences whatsoever which shall at any time hereafter arise between the parties hereto or any of them ... shall be referred to a single Arbitrator ...'

In dealing with the facts of the case Templeman LJ said ([1982] 2 All ER 737 at 739, [1982] 1 WLR 1375 at 1378–1379):

d 'So far as the evidence goes, all was silent for nearly a year and then the plaintiffs woke up and they wrote to the defendant on 4 September 1980 saying: "We have not received any statement of accounts or payments in respect of 'Gold'. Could we have a report from you please." The silence continued and they wrote a reminder on 11 December 1980. There was then an oral request by one of the representatives of the plaintiffs who happened to see the defendant. Another reminder was sent on 8 January 1981 drawing attention to the clause of the agreement which cast on him the duties of keeping accounts and making reports and asking for an urgent reply. The plaintiffs received back on 19 January 1981 a perfectly polite but useless letter from the defendant's secretary saying that unfortunately the defendant was in the United States and would not be returning to London until the end of the month and that the plaintiffs might rest assured that their letters would be brought to his attention as soon as possible. Nothing of course happened. A reminder was sent on 11 February 1981 and a further apology was received from the secretary on 2 March 1981. Finally, the plaintiffs lost patience and 24 March 1981 they wrote to the defendant's solicitors giving an ultimatum saying: "... unless we receive a full and proper account together with payment of all sums due, within the course of the next seven days, proceedings will be instituted without further notice or delay." The reply to that, of course, was that the defendant's solicitors would take instructions. On 3 April the plaintiffs issued a writ, served by post on 7 April. That writ, after reciting the agreement, alleged that the defendant had duly distributed and exploited the film, though the plaintiffs could not give particulars until after discovery.'

j Subsequently, the defendant took out a summons asking for the proceedings be stayed pending arbitration. The judge stayed the proceedings and the plaintiffs appealed.

Templeman LJ said ([1982] 2 All ER 737 at 741, [1982] 1 WLR 1375 at 1380–1381):

'Section 1(1) of the 1975 Act only applies, as indeed it expressly says it only applies, if an action is brought claiming in respect of any matter agreed to be



referred to arbitration. What is said is that all the plaintiffs were doing was seeking an order to which they were entitled under the terms of the agreement (they were entitled to an account, there can be no dispute about that) and therefore the writ which they issued did not constitute legal proceedings "in respect of any matter agreed to be referred" at the date when the writ was issued and the last phrase of the subsection, which enables the court to continue the action if "there is not in fact any dispute between the parties with regard to the matter agreed to be referred", does not avail the defendant, because it must again be supported by "a matter agreed to be referred" and which was the proper subject of arbitration at the date of the writ. If a dispute arose between the date of the writ and the date of the hearing by the court, nevertheless there was no relevant dispute, because the relevant time is the date when the writ was issued. That submission, by the light of nature and without reference to authority, would produce an awkward result. It would mean that if, in the present case, for example, there was no dispute and all the plaintiffs were asking for was for the defendant to do what he is admittedly bound to do, namely to furnish an account, then, notwithstanding that there were hidden behind the application for an account all kinds of embryonic questions which were bound to arise and which were the proper subject of arbitration, the arbitration clause would fail to have effect and the court would be entitled to continue to hear the action, notwithstanding that the real grievances between the parties fell fairly and squarely within the mischief of the arbitration clause. This would put a premium on plaintiffs issuing proceedings without waiting to hear from the defendant or without drawing reference to matters which were almost bound to be in dispute. Again by the light of nature, it seems to me that s 1(1) is not limited either in content or in subject matter; that if letters are written by the plaintiff making some request or some demand and the defendant does not reply, then there is a dispute. It is not necessary, for a dispute to arise, that the defendant should write back and say, "I don't agree." If, on analysis, what the plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the arbitration agreement, then the applicant is entitled to insist on arbitration instead of litigation.'

That statement by Templeman LJ, with whom Fox LJ agreed, could not be clearer and amply covers the facts of the present case. It is on all fours with the present case and is binding upon us.

Templeman LJ then cited with approval a decision of Kerr J (as he then was) in *Tradax Internacional SA v Cerrahogullari TAS, The M Eregli* [1981] 3 All ER 344, to which I will refer later.

Mr Hamblen QC submits that the decision in the *Ellerine* case was reached per incuriam because the court did not consider *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 2 All ER 463, [1977] 1 WLR 713. In my view that submission is unsustainable. The *Nova (Jersey)* case was considered at length by Kerr J in *The M Eregli* and in the light of the quotations from *The M Eregli* in the *Ellerine* case it is inconceivable that the *Nova (Jersey)* case was overlooked by Templeman and Fox LJ in the *Ellerine* case. The answer to the submission is that, rightly in my view, the court considered the *Nova (Jersey)* case to be irrelevant to the issue that they were deciding.



a In the *Nova (Jersey)* case, by virtue of a partnership agreement made in 1970 and an assignment made in 1973, an English company and a German company became partners; the former was to supply the latter with certain machinery to be used in Germany in partnership operations. It was agreed that all disputes arising out of the partnership relationship should be decided by an arbitration tribunal in Germany provided for in a separate agreement. In 1972 the English company sold the machinery to the German company receiving in return 24 bills of exchange payable on different dates between March 1973 and December 1975. After six of them had been honoured, the German company refused further payments alleging that bills had been obtained by fraud. The partnership and the German company commenced arbitration proceedings in Germany. In 1974 the English company commenced an action in England claiming payment of the bills. The German company having applied to have this action stayed, Bristow J refused a stay. The Court of Appeal reversed his decision.

d Allowing the appeal, the House of Lords held that the arbitration agreement did not extend to the claims on the bills of exchange. It is of fundamental importance that the claims in that case were on bills of exchange. It was also held that there was no dispute between the parties in regard to the matter agreed to be referred within s 1(1) of the Arbitration Act 1975.

Lord Wilberforce said ([1977] 2 All ER 463 at 468–469, [1977] 1 WLR 713 at 720):

e ‘In my opinion the conclusion must be reached that the arbitration clause, even on the assumptions I have stated above, does not extend to cover the appellants’ claims on the bills. This is sufficient to enable the appellants to succeed. I shall deal however with the second point. I take it to be clear law that unliquidated cross-claims cannot be relied on by way of extinguishing set-off against a claim on a bill of exchange ... The amount claimed here in respect of the machines is certainly neither ascertained nor liquidated, and the claim in respect of mismanagement is one for a wholly unrelated tort, so that there would seem to be no basis for denying the appellants’ claim that, as regards the bills, there is no dispute.’

g Although it is true that Lord Wilberforce in that passage, as Mr Hamblen naturally stressed, used the words ‘no dispute’ he was considering those words as he himself said at the outset of his speech in the context of s 1 of the 1975 Act, that is to say that there was in fact no dispute, and he found in that case that there was in fact no dispute in relation to the bills of exchange. That that is the correct interpretation of the speech of Lord Wilberforce was the very clear view of Kerr J in *The M Eregli* [1981] 3 All ER 344 at 349, when he said:

h ‘Next, in *Nova (Jersey)* ... the House of Lords, in effect, reached the same conclusion in relation to an arbitration clause which was subject to s 1 of the Arbitration Act 1975 by holding as part of the ratio that in relation to certain unpaid bills of exchange there was “not in fact any dispute between the parties with regard to the matter agreed to be referred”, and that the arbitration clause had no application to claims under the bills.’

Lord Wilberforce had said ([1977] 2 All ER 463 at 467, [1977] 1 WLR 713 at 718):

‘There is no doubt that the relevant arbitration agreement is not a domestic arbitration agreement so that, prima facie, s 1(1) applies and a stay is mandatory. It remains however open to the appellants to show, the onus

being on them, that “there is not in fact any dispute between the parties with regard to the matter agreed to be referred”. If they succeed in this, the stay will be refused. Either way, no discretion enters in the matter and the, unknown, merits of the respondents or demerits of the appellants are irrelevant.’ a

*Ellis Mechanical Services Ltd v Wates Construction Ltd* [1978] 1 Lloyd’s Rep 33 concerned an arbitration clause in a building contract. Lord Denning MR said (at 35): b

‘There is a point on the contract which I might mention upon this. There is a general arbitration clause. Any dispute or difference arising on the matter is to go to arbitration. It seems to me that if a case comes before the Court in which, although a sum is not exactly quantified and although it is not admitted, nevertheless the Court is able, on an application of this kind, to give summary judgment for such sum as appears to be indisputably due, and to refer the balance to arbitration. The defendants cannot insist on the whole going to arbitration by simply saying that there is a difference or a dispute about it. If the Court sees that there is a sum which is indisputably due, then the Court can give judgment for that sum and let the rest go to arbitration, as indeed the Master did here.’ c  
d

Bridge LJ said (at 37):

‘To my mind the test to be applied in such a case is perfectly clear. The question to be asked is: is it established beyond reasonable doubt by the evidence before the Court that at least £x is presently due from the defendant to the plaintiff? If it is, the judgment should be given for the plaintiff for that sum, whatever x may be, and in a case where, as here, there is an arbitration clause, the remainder in dispute should go to arbitration. The reason why arbitration should not be extended to cover the area of the £x is indeed because there is no issue, or difference, referable to arbitration in respect of that amount.’ e  
f

Although the case was not decided on that point it related to a domestic arbitration in which the court has a discretion whether or not to stay the proceedings under s 4 of the 1950 Act. The court found that the sum claimed was ‘indisputably due’ and did not consider the distinction between the words ‘dispute’, and ‘in fact any dispute’. g

That issue was specifically addressed by Saville J in *Hayter v Nelson* [1990] 2 Lloyd’s Rep 265 at 267–268:

‘In some cases the suggestion seems to be made that if it can be shown that a claim under a contract is indisputable, i.e. a claim that simply cannot be resisted on either the facts or the law, then there is no dispute or difference within the meaning of the arbitration clause in that contract.’ h

He went on to consider the *Ellis Mechanical Services* case and the *Ellerine* case and said (at 268): j

‘In my judgment in this context neither the word “disputes” nor the word “differences” is confined to cases where it cannot then and there be determined whether one party or the other is in the right. Two men have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or

a Cambridge. The fact that it can be easily and immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that that dispute did not in fact exist. Because one man can be said to be indisputably right and the other indisputably wrong does not, in my view, entail that there was therefore any dispute between them. In my view this ordinary meaning of the word “disputes” or the word “differences”  
b should be given to those words in arbitration clauses. It is sometimes suggested that since arbitrations provide great scope for a defendant to delay paying sums which are indisputably due, the Court should endeavour to avoid the consequence by construing these words in arbitration clauses so as to exclude all such cases, but to my mind there are at least three answers to such suggestions.’

c Saville J then went on to point out that in the present day arbitrations are not necessarily slow processes, that the parties have agreed to arbitrate, and that if the courts decide whether or not the claim is disputable they are doing precisely what the parties have agreed should be done by arbitration. He went on to point out  
d that a submission that a claim was indisputable involved reading the words ‘there is not in fact any dispute between the parties’ as meaning that there is not in fact any defence to the claim which are not the words used in the arbitration clause.

Mr Waller submitted that if Mr Hamblen’s argument as to the meaning of a dispute is correct then an arbitrator would have no jurisdiction to make an award, either interim or final, in respect of which a defendant had no arguable defence.  
e For example, an arbitrator would have no jurisdiction to make an award in respect of a claim for freight. Furthermore, as an additional absurdity, if an entire claim was submitted to arbitration, the arbitrator would have no power to make an award on those parts of the claim in respect of which there was no arguable defence or no real or genuine dispute, but to make an award in respect of which there was a genuine dispute but in respect of which the defendant’s argument  
f failed. This argument seems to me to be compelling, and Mr Hamblen had no real answer to it save to say that it would be unlikely to arise in practice. I have serious doubts about that proposition when applied to a defendant who is anxious to delay payment for as long as possible.

This point was dealt with by Kerr J in *The M Eregli* [1981] 3 All ER 344 at 350,  
g where he said:

‘The fallacy in the plaintiffs’ argument can be seen at once if one considers what would have been the position if the plaintiffs had in fact purported to appoint Mr Barclay as their arbitrator within the time limit of nine months. They could clearly have done so, and indeed any commercial lawyer or  
h businessman would say that this is what they should have done under the clause to enforce their claim. Arbitrators are appointed every day by claimants who believe, rightly or wrongly, that their claim is indisputable. However, on the plaintiffs’ own argument, Mr Barclay would have had no jurisdiction, since there was then, as they now say, no “dispute” to which the arbitration clause could have applied. In my view this argument is obviously  
j unsustainable.’

The judgment of Kerr J in *The M Eregli* was approved by Phillips J in *First Steamship Co Ltd v CTS Commodity Transport Shipping Schiffahrtsgesellschaft mbH, The Ever Splendor* [1988] 1 Lloyd’s Rep 245 at 290, by Colman J in *Acada Chemicals Ltd v Empresa Nacional Pesquera SA* [1994] 1 Lloyd’s Rep 428 and by Clarke J in



*Hume v AA Mutual International Insurance Co Ltd* [1996] LRLR 19 and in the present case. a

In *Hayter v Nelson* [1990] 2 Lloyd's Rep 265 at 268 Saville J said, in relation to this point:

'The proposition must be that if a claim is indisputable then it cannot form the subject of a "dispute" or "difference" within the meaning of an arbitration clause. If this is so, then it must follow that a claimant cannot refer an indisputable claim to arbitration under such a clause; and that an arbitrator purporting to make an award in favour of a claimant advancing an indisputable claim would have no jurisdiction to do so. It must further follow that a claim to which there is an indisputably good defence cannot be validly referred to arbitration since, on the same reasoning, there would again be no issue or difference referable to arbitration. To my mind such propositions have only to be stated to be rejected—as indeed they were rejected by Mr. Justice Kerr (as he then was) in *The M. Eregli* ([1981] 2 Lloyd's Rep 169) in terms approved by Lords Justices Templeman and Fox in *Ellerine v. Klinger*.'

In my view, following those cases, Mr Waller's submission is correct, and in the words of Templeman LJ in *Ellerine v Klinger* there is a dispute once money is claimed unless and until the defendants admit that the sum is due and payable. The cases relied on by Mr Hamblen to the opposite effect resulted from the particular interpretation that the courts have placed on the words in s 1 of the 1975 Act and its predecessors to which I have referred. In my judgment if a party has refused to pay a sum which is claimed or has denied that it is owing then in the ordinary use of the English language there is a dispute between the parties. d

I turn, then, to s 9 of the Arbitration Act 1996, which provides: e

'*Stay of legal proceedings.*—(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter. f

(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures. g

(3) An application may be made by a person before taking the appropriate procedural steps (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim. h

(4) On application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed ...'

The important distinction between s 9 of the 1996 Act and s 1(1) of the 1975 Act is the omission of the words 'that there is not in fact any dispute between the parties with regard to the matter agreed to be referred'. Accordingly the court no longer has to consider whether there is *in fact* any dispute between the parties but only where there is a dispute with the arbitration clause of the agreement, and the cases which turn on that distinction are now irrelevant. Mr Hamblen submits that this amendment to the law of arbitration has made no difference in substance j



a but is merely a simplification of the law and the court still has to resolve, when asked to do so, an issue as to whether, under the arbitration clause in the contract, there is a dispute between the parties. He submits that this issue must be resolved in accordance with the authorities prior to 1996, in particular the *Nova (Jersey)* case.

b Mr Waller submits that s 9 of the 1996 Act was enacted to make it plain in the light of the pre-existing cases that, save as otherwise provided in the section itself, a party is entitled to a stay of the proceedings unless the court concludes that the action is not brought in respect of the matter which, under the agreement, is referred to arbitration or under sub-s (4). Accordingly, the problem which arose in this case and in other cases in resolving the distinction between 'a dispute' in the arbitration clause of the contract, and 'in fact a dispute between the parties' c in s 1 of the 1975 Act has been resolved, and the court must grant a stay in any case in which the sum claimed is not admitted. Mr Hamblen submits that if that was the intention of Parliament one would have expected it to have been spelt out clearly and explicitly.

d The Departmental Advisory Committee on Arbitration Law in their report on the Arbitration Bill reported in February 1996, in relation to cl 9 (as it then was) (para 55):

e "The Arbitration Act, 1975, contained a further ground for refusing a stay, namely, where the court was satisfied that "there was not in fact any dispute between the parties with regard to the matter agreed to be referred." These words do not appear in the New York Convention and in our view are confusing and unnecessary for the reasons given in *Hayter v Nelson* [1990] 2 Lloyd's Rep 265.'

In his judgment in this case, Clarke J said ([1997] 3 All ER 833 at 843, [1977] 1 WLR 1268 at 1278): 'It is not clear (at least to me) what that paragraph means.'

f I understand, of course, why the judge said what he did. However, one cannot overlook the fact that the chairman of the DAC was Saville LJ (as he had by then become) who decided *Hayter v Nelson*. It is absolutely clear to my mind that para 55 of the report was a shorthand cross-reference to the judgment in *Hayter v Nelson* and the clearest possible indication that the intent was to incorporate the ratio decidendi of that case into s 9. In my view, the alteration to the words of s 1 g of the 1975 Act to those contained in s 9 of the 1996 Act can only make sense if construed in that way, and I would so construe them. Accordingly, I would uphold Mr Waller's submission in relation to s 9.

For those reasons, I would dismiss this appeal.

h *Appeal dismissed. Leave to appeal to the House of Lords granted.*

Dilys Tausz Barrister.

## Neal v Bingle

COURT OF APPEAL, CIVIL DIVISION

BELDAM, SIMON BROWN AND WALLER LJJ

24 JUNE, 22 JULY 1997

*Damages – Personal injury – Loss of benefits – Unemployed plaintiff in receipt of social security benefits sustaining personal injuries in road accident – Plaintiff bringing action against defendant, claiming damages for loss of benefits – Whether plaintiff entitled to recover damages for loss of pre-accident benefits – Social Security Administration Act 1992, s 81(5).*

In January 1989 the plaintiff, who was in receipt of income support and other social security benefits following an accident in 1986, was injured in a road accident and issued proceedings against the defendant for damages for personal injury. Following the accident the plaintiff received benefit payments amounting to £30,210.27 in respect of which a certificate of total benefit had been issued by the Compensation Recovery Unit of the Department of Social Security and which, pursuant to the Social Security Administration Act 1992, formed the basis of the deduction from the amount of any compensation payment made by the defendant to the plaintiff and was required to be paid by the defendant to the Secretary of State. In order to prevent his claim being extinguished, the plaintiff contended that he was entitled to claim that he had lost the social security benefits which had been receiving before the accident which were not deductible from any compensation. The judge awarded the plaintiff general damages in the sum of £4,000 and £450 medical expenses, but held that s 81(5)<sup>a</sup> of the 1992 Act, which provided that 'in the assessment of damages in respect of an accident, injury or disease the amount of any relevant benefits paid or likely to be paid shall be disregarded', prevented the plaintiff from recovering as pecuniary loss the amount of the benefits he was receiving before the accident, since the court was required to disregard such benefits altogether and the addition of them to the damages was as much precluded as the deduction of them. The plaintiff appealed.

**Held** – On its true construction, s 81(5) of the 1992 Act did not prevent the court from considering recovery of a sum as special damages based on the benefit which, but for the accident, a plaintiff would have continued to receive; the fact that a plaintiff continued to receive an equivalent sum in benefit to the sums which he was receiving before the accident was no bar to such a recovery, since the benefit he was receiving before the accident was due to his pre-existing disability or unemployment. Moreover, there was no general principle against a plaintiff claiming for loss of the benefits which, but for the accident, he would have received during the period of his disability following the accident. Such recovery would not result in the compensator having to pay twice over, since the amount of the benefits awarded to the plaintiff would be satisfied by payment of the equivalent amount determined in accordance with the certificate of deduction under s 82(2)<sup>b</sup> of the Act and the plaintiff would then receive any

a Section 81(5) is set out at p 63 f, post

b Section 82(2) is set out at p 63 a, post

a compensation awarded by way of general damages undepleted by the payment of an equivalent sum to the Secretary of State. It followed, in the instant case, that the judge ought to have awarded the plaintiff a sum equivalent to the benefits which he would have received but for the accident. The appeal would accordingly be allowed (see p 64 *h j*, p 65 *g h*, p 66 *j* and p 67 *b c*, post).

b *Liffen v Watson* [1940] 2 All ER 213 and *Dennis v London Passenger Transport Board* [1948] 1 All ER 779 considered.

### Notes

For pecuniary loss through personal injuries and deduction for benefits received or receivable, see 12 *Halsbury's Laws* (4th edn) paras 1151, 1152.

c For the Social Security Administration Act 1992, s 81, see 40 *Halsbury's Statutes* (4th edn) (1997 reissue) 624.

### Cases referred to in judgments

*Hassall v Secretary of State for Social Security, Pether v Secretary of State for Social Security* [1995] 3 All ER 909, [1995] 1 WLR 812, CA.

d *Liffen v Watson* [1940] 2 All ER 213, [1940] 1 KB 556, CA.

*Dennis v London Passenger Transport Board* [1948] 1 All ER 779.

*Mitchell v Dept of the Environment for Northern Ireland* (23 May 1995, unreported), NI HC.

### Cases also cited or referred to in skeleton arguments

e *Berriello v Felixstowe Dock and Rly Co* [1989] 1 WLR 695, CA.

*Hussain v New Taplow Paper Mills Ltd* [1988] 1 All ER 541, [1988] AC 514, HL.

*IRC v Hambrook* [1956] 3 All ER 338, [1956] 2 QB 641, CA.

### Appeal

f By notice dated 23 May 1996 the plaintiff, John Albert Neal, appealed from the decision of Judge Hague QC sitting in the Slough County Court on 8 May 1996 awarding him damages in the sum of £4,450 in respect of his claim against the defendant, Gregory Charles Bingle, for personal injuries sustained in a road accident. The facts are set out in judgment of Beldam LJ.

g *Roger Smith* (instructed by *Kleinman Klarfeld*, Stanmore) for the plaintiff.  
*David Tucker* (instructed by *Greenwoods*) for the defendant.

*Cur adv vult*

h 22 July 1997. The following judgments were delivered.

j **BELDAM LJ.** The appellant, Mr John Albert Neal, now 60 years of age, appeals from the decision of Judge Hague QC sitting in the Slough County Court on 8 May 1996 awarding him £4,450 damages for personal injuries he suffered in a road accident on 14 January 1989. The defendant had admitted liability to compensate the plaintiff but contested the nature and extent of the injuries which the plaintiff claimed he had suffered and the period of disability attributable to them. In summary, the plaintiff who was 52 at the time, claimed that he had suffered injury to his neck and lower back which had rendered him unfit for work from the date of the accident until trial.

The defendant's case was that the plaintiff had not worked for a considerable period prior to the accident and it was unlikely that he would have done so had

the accident not occurred. Because of pre-accident disability he was incapable of work. In so far as the court might find on the evidence that the plaintiff was not capable of work, it was due to pre-existing orthopaedic problems with his lower back and not due to the accident. Further, if as he contended he was capable of light work, he had chosen not to obtain such work. a

The judge found that, although the plaintiff suffered a whiplash injury to the neck as a result of the accident, the disability in his lumbar spine pre-dated the accident and was due to a previous accident when he fell from a ladder in 1986. b

From about 1980 the plaintiff had worked as a self-employed builder and decorator doing some small building work but, after completing a profitable contract in South Africa in 1985, he returned to the United Kingdom and in May 1986 fell off a ladder while working on his own house. Since that time he had not done any work at all. Thus, at the time of the road traffic accident he was in receipt of income support and other social security benefits. c

After the accident on 14 January 1989 the plaintiff was taken to Edgware General Hospital and detained for two nights for observation, returning as an out-patient two weeks later. It was agreed at the trial that he suffered a minor head injury and was knocked out for about a minute and that he had suffered the whiplash injuries to his cervical spine in the accident. However, the judge found that those injuries had settled down over time and by the date of the hearing the plaintiff had recovered from them. The parties agreed that the appropriate award for general damages for the whiplash injury and minor concussion should be £4,000. The plaintiff had spent approximately £450 in fees for treatment from an osteopathic doctor which he was also entitled to recover. The plaintiff had claimed that all his disabilities were due to injuries sustained in the road accident, but the judge found that his lumbar spine had not been injured and that the only injury for which he was entitled to compensation was the whiplash injury. d e

Having made these findings, the judge turned to the question of special damages. He rejected the plaintiff's claim for loss of earnings and loss of the opportunity to take light, sedentary employment. Thus the judge found that the plaintiff had suffered no loss of earnings as a result of the accident. f

At the date of the accident the plaintiff was in receipt of social security benefit. The plaintiff had received social security benefit payments from the date of the accident to 14 January 1994, the relevant period for the purposes of the Social Security Administration Act 1992, amounting to £30,201.27. The Compensation Recovery Unit of the Department of Social Security (the CRU) had issued a certificate of total benefit (the CRU certificate) in this sum on 19 May 1995. The CRU stated that the certificate showed the amounts of benefit paid to the plaintiff because of his injury in the road accident on 14 January 1989. Under the relevant provisions relating to the recovery from damages of sums equivalent to benefit contained in the Social Security Act 1989 and re-enacted in the consolidating Social Security Administration Act 1992, this sum formed the basis of the deduction from the amount of any compensation payment made by the defendant to the plaintiff, and required to be paid by the defendant to the Secretary of State. As the stated sum greatly exceeded the damages awarded, and was payable out of any payment 'falling to be made ... to ... the victim in consequence of the injury', the whole of the general damages would be extinguished and the plaintiff would receive nothing. To preclude this possibility the plaintiff adopted the solution suggested by Henry LJ in his judgment in *Hassall v Secretary of State for Social Security*, *Pether v Secretary of State for Social* g h i j



a Security [1995] 3 All ER 909, [1995] 1 WLR 812. He indorsed the suggestion of Mr  
Burrell QC, put forward in an article in Issue 2/94 of *Kemp and Kemp The*  
b *Quantum of Damages*, that in such circumstances the plaintiff could claim as special  
damage the loss of 'unrecoupable' benefits he was receiving before the accident  
(see [1995] 3 All ER 909 at 915, [1995] 1 WLR 812 at 819. Prior to the accident the  
plaintiff had been receiving income support on the basis of his availability for  
c work which was not deductible from any sum received as damages. Because he  
was injured in the accident and was no longer available for work, the benefits he  
received became deductible from any compensation he might recover.  
Depending on the findings of the judge at trial, he could suffer a loss of general  
damages because of his disability. Accordingly, he was entitled to claim that he  
had lost the social security benefits he was receiving before the accident which  
were not deductible from any compensation.

In the present case the judge held that such a claim was not sustainable.  
Consequently the effect of his judgment was that the plaintiff received no general  
damages at all. The plaintiff appeals, contending that the judge wrongly rejected  
his claim to be entitled to the loss of the benefits he had been receiving before the  
d accident. In the course of argument before the judge, counsel realised that the  
medical evidence required the judge to decide the length of the plaintiff's  
disability due to the injuries sustained in his accident, so they asked the judge to  
make a finding when, if he had not had his pre-accident condition, the plaintiff  
would have been able to sign on as able to accept work if it was offered to him.  
As the Social Security Administration Act 1992 contains provisions for review of  
e and appeal from the matters set out in the CRU certificate, such a finding was  
perceived by counsel to be potentially important to both parties. However, the  
judge declined to make any such finding. For the purposes of the appeal, the  
matter having been raised by the court in the course of argument, the parties  
agreed that the plaintiff would have recovered from the effects of the accident by  
f 14 January 1991. Thus the period of disability as a result of the injuries  
attributable to the accident was, on the facts found by the judge, two years. If the  
CRU certificate was amended to accord with the judge's finding, the amount paid  
to the victim in respect of the accident would be £10,869.45.

### *The background*

g Section 2 of the Law Reform (Personal Injuries) Act 1948 provided:

'(1) In an action for damages for personal injuries ... there shall in  
assessing those damages be taken into account, against any loss of earnings  
... which has accrued or probably will accrue to the injured person from the  
h injuries, one half of the value of any rights which have accrued or probably  
will accrue to him therefrom in respect of industrial injury benefit, industrial  
disablement benefit or sickness benefit for the five years beginning with the  
time when the cause of action accrued. This subsection shall not be taken as  
requiring both the gross amount of the damages before taking into account  
the said rights and the net amount after taking them into account to be found  
j separately ...'

Provision was made in sub-s (3) in assessing the damages to ignore any finding  
of contributory negligence so that the deduction of one half of the benefits was  
made from the total damages for loss of earnings. It is unnecessary to consider  
the historical reasons for these provisions. They gave rise to no difficulties in

practice but, as the cost of maintaining and caring for injured plaintiffs increased, it came to be perceived that social security funds were bearing the brunt of expenses which should be borne by the insurance companies who almost always indemnified the tortfeasor against a liability for which he was responsible. In 1978 the *Royal Commission on Civil Liability and Compensation for Personal Injury* (Cmnd 7054-I, chairman Lord Pearson) recommended that the full value of social security benefits paid to an injured person as a result of an injury should be deducted in assessing damages. However, it proved difficult to obtain a consensus as to how these recommendations should be implemented. Eventually the Social Security Act 1989 gave effect to the proposals but they have given rise to considerable difficulty and unfairness which have, in part at least, been redressed by the provisions of the Social Security (Recovery of Benefits) Act 1997.

### *The recoupment provisions*

Recoupment was originally provided for in the Social Security Act 1989 and by the Social Security (Recoupment) Regulations 1990, SI 1990/322. The stated purpose of the provisions was to ensure that the State should not subsidise tortfeasors and that accident victims should not get a windfall from double payments, once in compensation and once in benefit. Thus the new provisions required full deduction to be made of all prescribed benefits. The deduction was to be made from the entire payment of damages, including general damages for pain and suffering and loss of amenity, and not just set against the special damages for loss of earnings. The machinery used was to require the person making the compensation payment (the compensator) to refrain from making any payment of damages until the Secretary of State had furnished a certificate of total benefit. The compensator was then required to deduct from any payment of damages an amount equal to the gross amount of the relevant benefits paid or likely to be paid to or for the victim during the period of five years following the accident. Special provision was made where the compensator was a foreign national, for small payments of damages and other similar circumstances. As the payments were required to be made on the basis of a certificate provided by the Secretary of State, the Act allowed for review of the certificate and appeals against the amount both by the compensator and by the victim.

In the consolidating legislation, the Social Security Administration Act 1992, the recoupment provisions were contained in Pt IV under the rubric 'Recovery from compensation payments'. Section 81 contained relevant interpretations for that part of the Act. By s 82 it was provided:

'(1) A person ("the compensator") making a compensation payment, whether on behalf of himself or another, in consequence of an accident, injury or disease suffered by any other person ("the victim") shall not do so until the Secretary of State has furnished him with a certificate of total benefit and shall then—(a) deduct from the payment an amount, determined in accordance with the certificate of total benefit, equal to the gross amount of any relevant benefits paid or likely to be paid to or for the victim during the relevant period in respect of that accident, injury or disease; (b) pay to the Secretary of State an amount equal to that which is required to be so deducted; and (c) furnish the person to whom the compensation payment is or, apart from this section, would have been made ("the intended recipient") with a certificate of deduction.

a (2) Any right of the intended recipient to receive the compensation payment in question shall be regarded as satisfied to the extent of the amount certified in the certificate of deduction.'

Section 83 provided:

b 'The compensator's liability to make the relevant payment arises immediately before the making of the compensation payment, and he shall make the relevant payment before the end of the period of 14 days following the day on which the liability arises.'

Section 84 provided:

c '*The certificate of total benefit.*—(1) It shall be for the compensator to apply to the Secretary of State for the certificate of total benefit ...

(2) The certificate of total benefit shall specify—(a) the amount which has been, or is likely to be, paid on or before a specified date by way of any relevant benefit which is capable of forming part of the total benefit ...'

d Section 91 made provision for overpaid benefits, s 97 for a review of certificates of total benefit and s 98 for appeals 'against any certificate of total benefit at the instance of the compensator, the victim or the intended recipient'.

e As has been pointed out, the deduction of an amount equal to the gross amount of relevant benefits paid or likely to be paid to the victim during the relevant period is to be made from a compensation payment which includes any payment falling to be made in consequence of the accident by or on behalf of a person who is 'liable to any extent in respect of that accident'. Thus the payment of the equivalent sum comes out of the award for which the compensator is *liable*, including general damages and special damages such as loss of earnings and other pecuniary loss.

f Section 81 further provided:

'... (5) Except as provided by any other enactment, in the assessment of damages in respect of an accident, injury or disease the amount of any relevant benefits paid or likely to be paid shall be disregarded.

g (6) If, after making the relevant deduction from the compensation payment, there would be no balance remaining for payment to the intended recipient, any reference in this Part to the making of the compensation payment shall be construed in accordance with regulations.'

The regulations referred to were Pt IV of the 1990 regulations, reg 14 of which provided:

h 'Where, after making the relevant deduction from the compensation payment, there is no balance remaining for payment to the intended recipient, any reference in Schedule 4 [to the Social Security Act 1989—now Pt IV of the Social Security Administration Act 1992] to the making of the compensation payment shall be construed as a reference to the acceptance by the intended recipient of an offer in respect of his claim against the compensator.'

j This provision appears to have been inserted so that the compensator and the intended recipient could not argue that if after taking account of the deductions no damages were payable, the recoupment provisions did not apply because the compensator was making no compensation payment.



Thus it seems that Parliament contemplated that, but for this provision, the Secretary of State might be unable to recoup any of the benefit payments made during the relevant period. a

In rejecting the plaintiff's claim to recover as pecuniary loss the amount of the benefits he was receiving before the accident, the judge regarded the provisions of s 81(5) as preventing any such recovery. He said:

'I can see no answer to the argument of Mr Holdsworth [counsel for the defendant] that such an addition cannot be made by reason of s 81(5) ... Mr Reade sought to say that the dicta related to the fact and quality of the benefits paid: that may be, but in my judgment it is no answer to the point. I consider that it is plain that the subsection requires the court to disregard the benefits *altogether*, and the addition of them (or any part of them) to the damages is as much precluded by the subsection as the deduction of them. Neither Henry LJ in his dicta nor Mr Burrell in his article refer to s 81(5), except obliquely, and neither explains why the subsection does not apply.' (Judge Hague's emphasis.) b

The judge then referred to the judgment of Pringle J in the High Court of Northern Ireland in *Mitchell v Dept of the Environment for Northern Ireland* (23 May 1995, unreported), who also relied on the equivalent provision to s 81(5) in the Northern Ireland legislation. c

In my view this subsection does not provide the conclusive answer to the plaintiff's claims the judge suggested. It was, I think, included to make it clear that benefits which prior to the arrangements for recoupment had been deducted from loss of earnings should no longer be regarded as deductible to avoid them being deducted twice. Prior to the passing of the Act benefits such as family credit, attendance allowance, statutory sick pay and unemployment benefit had been held by the court to be deductible from loss of earnings as sums which the victim would not have received but for the accident. They were taken into account in full in the assessment of damages. It is noticeable that s 81(5) refers to the assessment of damages and not to the assessment of the compensation payment. Moreover, it is quite clear that it is 'in assessing damages in respect of an accident' that the relevant benefits 'paid or likely to be paid' are to be disregarded. So the provisions could not refer to benefits paid before the accident. It is also clear that the phrase 'any relevant benefits paid or likely to be paid' where they appear in s 82(1)(a) refer to payments made after the accident and during the relevant period. d

I can thus find no support for the judge's interpretation that the provisions of s 81(5) prevent the court from considering recovery of a sum as special damages based upon the benefit which, but for the accident, the plaintiff would have continued to receive. e

The mere fact that the plaintiff continued to receive an equivalent sum in benefit to the sums which he was receiving before the accident is no bar to such a recovery. The reality is that the benefit he was receiving before the accident was due to his pre-existing disability or unemployment. After the accident he received the same sum but repayable by the recoupment provisions from any compensation recovered. Suppose the case that the plaintiff, rendered unconscious by the accident and unable to look after himself, had been looked after by a benevolent relative unaware that the plaintiff could claim benefits as a result of the accident. The plaintiff's existing benefits would be stopped because f



- a he did not sign on and until he made a new claim for benefits resulting from the injuries sustained in the accident he would be in receipt of no benefits. I can see no reason in general principle why the plaintiff could not claim the benefits lost. Moreover, there are many instances in which a plaintiff receives an equivalent sum to earnings or other benefits of which he was in receipt before the accident on condition that he was morally or legally obliged to repay the sums received as compensation. So, for example, in *Liffen v Watson* [1940] 2 All ER 213, [1940] 1 KB 556 the plaintiff, a domestic servant, before the accident had received from her employer £1 per week wages and board and lodging. After the accident she went to live with her father who provided board and lodging for her. The trial judge refused to award as damages the value of her board and lodging because her father had without cost to her provided board and lodging of equivalent value.
- c This court held that the trial judge was wrong. Slessor LJ said ([1940] 1 KB 556 at 557, cf [1940] 2 All ER 213 at 219):

- d 'If, since the plaintiff's discharge from hospital, her father has provided her with board and lodging in his home, that is no reason why she should not be heard to say that her loss of the board and lodging previously provided by her employer was as much a loss to her as if she had lost the actual sum in money.'

Goddard LJ said (([1940] 1 KB 556 at 558, cf [1940] 2 All ER 213 at 219):

- e 'The plaintiff lost her right to the board and lodging provided by her employer because she was rendered by the accident unfit to work. It does not matter whether after the accident she was taken in by her father or by a friend to whom she might say: "I cannot make a contract with you, but I will pay you something if I recover damages." The only consideration is what the plaintiff lost. She lost the value of the board and lodging just as she lost her wages and she is entitled to be compensated for that loss.'
- f

Similarly in *Dennis v London Passenger Transport Board* [1948] 1 All ER 779, the plaintiff was held entitled to recover wages paid to him by his employer on condition that, if he recovered them, he would repay the employer.

- g There is therefore no general principle against a plaintiff claiming for loss of the benefits which, but for the accident, he would have received during the period of his disability following the accident.

- h If the plaintiff obtains judgment for those benefits, it would not result, as was suggested, in the compensator having to pay twice over. In the ordinary case the amount of the benefits awarded to the plaintiff by the judgment will be satisfied by payment of the equivalent amount determined in accordance with the certificate of deduction (see s 82(2)). The plaintiff will then receive any compensation awarded by way of general damages undepleted by the payment of the equivalent sum to the Secretary of State.

- i In giving further reasons for his decision, Judge Hague emphasised that recoupment was intended to be from all the damages, both general and special, and should not be 'at the expense of the compensator'. The repayment provisions on a successful appeal against a CRU certificate are only explicable on that basis.

In the ensuing paragraph he suggested that Henry LJ had concentrated entirely on unfairness to the victim and ignored unfairness to the compensator, but it would seem from his remarks that the judge was under the impression that the

recoupment provisions required the compensator to pay the full amount stated in the certificate of total benefit even though it exceeded the full amount of any compensation payment or award of damages. However, I do not think that the recoupment provisions do so provide. Section 82 does not require payment of the sums specified in the certificate of total benefit. It requires the compensator to deduct from the compensation payment an amount 'determined in accordance with the certificate of total benefit' and equal to the gross amount of the relevant benefit and to pay to the Secretary of State an amount equal to that which is required to be so deducted. Since the compensator cannot 'deduct' from the compensation payment more than the amount of the compensation payment, he is not required to pay to the Secretary of State more than the compensation payment; any balance over and above the amount of the compensation payment cannot in my view be said to be 'deducted from it'. This seems to me to be further supported by the arrangements for recovery of any amount of the relevant payment made which exceeds the amount that ought to have been paid. For by s 99(1) the Secretary of State is required to repay an amount equal to that excess to the intended recipient. Thus although s 98 affords the compensator the right of appeal against a certificate of total benefit on the ground for example: '(b) that benefit paid or payable otherwise than in consequence of the accident, injury or disease in question has been brought into account', there is no provision for repayment of any sum to the compensator.

This omission seems to have led the judge to express the view that if the plaintiff were to appeal successfully against the certificate and to achieve a repayment as 'on [his] findings in the previous judgment he might well be able to do' a repayment to him could result in substantial overcompensation at the expense of the defendant. For reasons already given I cannot agree with this suggestion.

Section 98 gives a right of appeal against the certificate of total benefit on the grounds set out in sub-s (1)(a) or (b) and whilst it is true that no appeal can be brought until the claim giving rise to the compensation payment has been finally disposed of and the relevant payment has been made, the provisions of s 99 for recovery in consequence of an appeal only apply when the amount of the relevant payment actually made exceeds the amount that ought to have been paid. The relevant payment is the payment to the Secretary of State by the compensator which as previously explained will not exceed the total amount of the damages awarded or agreed. There would thus be no question of any repayment being due to the compensator and if, as appears to have been the case, Parliament intended that the recoupment should be made from the compensation payment as a whole, there could be no question of the intended recipient receiving more whether by damages or repayment than the total amount of the damages. But equally if an excessive amount has been deducted from the compensation payment and the plaintiff successfully appeals under s 98, I can see no reason why he should not be paid the excess.

For these reasons I consider that the judge ought to have awarded the plaintiff a sum equivalent to the benefits which he would have received but for the accident. As he held that the plaintiff's disability due to the accident lasted only until 14 January 1991, the amount was £10,869.45 which with his medical expenses and general damages amounted to £15,319.45. This sum represents the limit the defendant as compensator is required to pay to the Secretary of State. It will then be for the plaintiff to appeal against the amount stated in the CRU

*a* certificate. If the Secretary of State does not accept that benefits paid otherwise than in consequence of the accident have been brought into account, he would no doubt refer the question to a medical tribunal who must take into account the court's decision 'relating to the issue' (see s 98(6)).

*b* Thus the dispute, if there is one, would not concern the compensator who has already discharged in full his liability to the intended recipient and the Secretary of State.

I would thus allow the appeal and enter judgment for the plaintiff for £15,319.45.

**SIMON BROWN LJ.** I agree.

*c* **WALLER LJ.** I also agree.

*Appeal allowed.*

Kate O'Hanlon Barrister.

# Gilham v Browning and another

COURT OF APPEAL, CIVIL DIVISION

LORD WOOLF MR, POTTER AND MAY LJJ

3, 11 FEBRUARY 1998

*County court – Practice – Discontinuance of action – Discontinuance of counterclaim by defendants – Whether court having jurisdiction to strike out notice of discontinuance for abuse of process – Whether notice of discontinuance should be struck out – CCR Ord 18.*

*County court – Practice – Nonsuit – Whether party having unfettered right to be nonsuited – CCR Ord 21, r 2.*

In September 1991 G issued proceedings against the defendants in relation to the sale of some goats, claiming the balance of the purchase price. The defendants contended that no further payment was due and counterclaimed £120,000 without giving details. The judge gave the defendants conditional leave to defend on payment into court of £5,000 and thereafter orders for directions were made. There then followed a period of inactivity, during which time G died. The defendants subsequently served a substantial expert's report particularising their loss. However, the judge, having directed that G's wife, as his executrix, be substituted as plaintiff, refused leave to adduce the evidence on the ground that there was no proper explanation for the late service of the evidence and that it could result in considerable prejudice to the plaintiff because G was not available to deal with it. The defendants did not seek to appeal that order, but served a notice of discontinuance under CCR Ord 18, rr 1<sup>a</sup> and 3. On the plaintiff's application, the judge set aside the notice of discontinuance on the ground that it was an abuse of process because the defendants were trying to escape from the effect of the order disallowing their evidence by abandoning their counterclaim, so that they might bring new proceedings in which the disallowed evidence could be called. The defendants then chose to be nonsuited on their counterclaim, but the judge refused to permit them to do so. The defendants appealed against the judge's orders, contending (i) that there was no power in the county court to strike out a notice of discontinuance for abuse, and (ii) that in the county court a party had an unfettered right to choose to be nonsuited at least until the court began to give its judgment.

**Held** – The appeal would be dismissed for the following reasons—

(1) The county court had jurisdiction to strike out a notice of discontinuance if it was an abuse of process, notwithstanding that there was no express discretion to do so in Ord 18. Whether in a particular case there was an abuse would be a question of fact and degree. In the instant case, by issuing the notice of discontinuance, the defendants had sought to escape by the side door from the first action where their counterclaim was evidentially hopeless in order to start a new action where the evidential problems would not arise, in circumstances where a long overdue date for trial of the first action was fixed and imminent. The judge had therefore correctly concluded that the notice of discontinuance



a was an abuse of process and he had correctly exercised his discretion to strike it out (see p 76 c d j to p 77 a and p 81 h j, post); *Castanho v Brown & Root (UK) Ltd* [1981] 1 All ER 143 applied.

(2) The introduction into the County Court Rules of provisions for discontinuance, which covered the circumstances where previously parties might have chosen to be nonsuited, had made the preservation of a general common law right to be nonsuited unnecessary. There was discontinuance under Ord 18 up to judgment and a discretionary power in the court under Ord 21, r 2<sup>b</sup> to nonsuit when the evidence had been heard if the plaintiff failed to prove his claim. Since that covered the entire ground, there was no room for a general right to be nonsuited (see p 80 c g h and p 81 c d h j, post); *Fox v Star Newspaper Co Ltd* [1900] AC 19 applied; *Clack v Arthurs Engineering Ltd* [1959] 2 All ER 503 considered.

### Notes

For discontinuance and nonsuit, see 10 *Halsbury's Laws* (4th edn) paras 331–332, 416–418.

### d Cases referred to in judgments

*Ashmore v British Coal Corp* [1990] 2 All ER 981, [1990] 2 QB 338, [1990] 2 WLR 1437, CA.

*Beachley Property Ltd v Edgar* (1996) *Times*, 18 July.

e *Busfield, Re, Whaley v Busfield* (1886) 32 Ch D 123, CA.

*Castanho v Brown & Root (UK) Ltd* [1981] 1 All ER 143, [1981] AC 557, [1980] 3 WLR 991, HL; *varying* [1980] 3 All ER 72, [1980] 1 WLR 833, CA.

*Clack v Arthurs Engineering Ltd* [1959] 2 All ER 503, [1959] 2 QB 211, [1959] 2 WLR 916, CA.

*Fakih Bros v A P Moller (Copenhagen) Ltd* [1994] 1 Lloyd's Rep 103.

f *Fox v Star Newspaper Co Ltd* [1900] AC 19, HL; *affg* [1898] 1 QB 636, CA.

*Goldsmith v Sperrings Ltd* [1977] 2 All ER 566, [1977] 1 WLR 478, CA.

*Hunter v Chief Constable of West Midlands* [1981] 3 All ER 727, [1982] AC 529, [1981] 3 WLR 906, HL.

*Magnus v National Bank of Scotland Ltd* (1888) 58 LT 617.

g *Outhwaite v Hudson* (1852) 7 Exch 380, 155 ER 955.

*Robinson v Lawrence* (1851) 7 Exch 123, 155 ER 883.

*Rolph v Zolan* [1993] 4 All ER 202, [1993] 1 WLR 1305, CA.

### Cases also cited or referred to in skeleton arguments

h *Bailey v Bailey* [1983] 3 All ER 495, [1983] 1 WLR 1129, CA.

*Costellow v Somerset CC* [1993] 1 All ER 952, [1993] 1 WLR 256, CA.

*Gardner v Southwark London BC* [1996] TLR 17, CA.

*Home Entertainments Corp v Patel* [1997] CA Transcript 728.

*Letpak Ltd v Harris* (1996) *Times*, 6 December, CA.

j *Moore (David) Builders Ltd v Preddy* [1995] CA Transcript 1862.

*Mortgage Corp, The v Sandoes* (1996) *Times*, 27 December.

*Renge v Collins* (1966) 110 SJ 724, CA.

*Robinson v Lawrence* (1851) 7 Exch 1239, 155 ER 883.

*Willis v Royal Doulton (UK) Ltd* [1996] CA Transcript 1383.

b Rule 2 is set out at p 77 c d, post

## Appeal

By notice dated 20 December 1996 the defendants, William Browning and Mrs Maureen Browning, appealed from the decision of Judge Bishop on 9 December 1996 in the Kingston upon Thames County Court whereby he struck out the defendants' notice of discontinuance of their counterclaim in respect of an action brought by the plaintiff, Mrs Sheila Gilham (widow and executrix of the estate of Kenneth Gilham, deceased), for moneys payable under a contract made between Mr Gilham and the defendants. The facts are set out in the judgment of May LJ.

*Andrew Goodman* (instructed by *Reid Minty*) for Mr and Mrs Browning.  
*Philip Kolvin* (instructed by *Barlows*, Chertsey) for Mrs Gilham.

*Cur adv vult*

11 February 1998. The following judgments were delivered.

**MAY LJ** (giving the first judgment at the invitation of Lord Woolf MR). This is an appeal by leave from the judgment and order of Judge Bishop on 9 December 1996 in the Kingston upon Thames County Court. The questions which the appeal raises are firstly whether a county court has power to refuse to permit a party to serve an effective notice of discontinuance under CCR Ord 18 if to do so is an abuse, and secondly whether a general common law right to choose to be nonsuited survives in the county court and, if it does, whether the court has jurisdiction to refuse to permit this to be done, if to do so is an abuse.

The proceedings concerned the sale of some goats. Kenneth Gilham was, with his wife, a partner in Bowers Court Farm. By an agreement made in March or April 1991 he sold the goodwill and assets of the farm, including the goats, to Mr and Mrs Browning. In September 1991, Mr Gilham issued proceedings against the Brownings in the Kingston upon Thames County Court claiming £8,778.80, the balance of the purchase price. By a reamended defence and counterclaim they said that no further payment was due and counterclaimed for non-delivery of some of the things included in the sale and for damages for misrepresentation or breach of contract. They counterclaimed £120,000 without giving details. They said that the goats had a virulent disorder known as Johne's disease, which had infected their own goats. They said that Mr Gilham or his farm manageress knew this. They say that Johne's disease has a long incubation period so that the full effect took some years to emerge, but that eventually their own goats were seriously affected.

On 21 August 1992 Judge Hull QC gave the Brownings conditional leave to defend upon payment into court of £5,000. Orders for directions were made on 12 October 1993 including provision that affidavits used on the application for summary judgment might stand as signed witness statements. There was then what on the face of it was an excessive period of inactivity. There was at best desultory interlocutory progress between October 1993 and April 1996, when the court set the action down for trial and fixed a trial date of 13 December 1996. It looks as if there had been unacceptable delay.

On 2 August 1996 Mr Gilham died. On 25 September 1996 the Brownings' solicitors served a substantial expert's report which for the first time particularised their loss which they then said amounted to £1.5m. On 18 October 1996 the solicitors served four witness statements and on 21 October 1996 they indicated that they wanted to serve supplemental statements from the Brownings

a in addition to the affidavits which had been used earlier. All this evidence was served well beyond the time envisaged by the October 1993 order for directions.

b On 25 October 1996 Judge Bishop directed that Mrs Gilham should be substituted as plaintiff as her husband's executrix. He also refused the Brownings leave to adduce the experts' report, the four witness statements and the two further supplemental statements. This decision was based on the then recently decided case in this court of *Beachley Property Ltd v Edgar* (1996) Times, 18 July. The judge held that there was no proper explanation for the late service of the evidence and significantly that there was very considerable prejudice to the plaintiff because Mr Gilham had now died and was therefore not available to deal with the further evidence. The Brownings did not seek to appeal this order and have not done so in the intervening 15 months despite further cases in the Court of Appeal following on from and developing *Beachley Property Ltd v Edgar*. The Brownings are not therefore, and were not on 9 December 1996, in a position to contend that this decision was wrong. An appeal from that order is not before us, although Mr Goodman has submissions about abuse which tend to question the correctness of the order. It is sufficient for present purposes to say that, although d in the light of developments in the *Beachley Property Ltd v Edgar* approach the period of six weeks or more between the date of the application and the date for trial might upon reconsideration have been seen as sufficient for the plaintiff to deal with the new evidence with the help of directions from the court, the defendants were never going to get over any prejudice arising from Mr Gilham's death.

e On 12 November 1996 new solicitors came on the record for the Brownings. On 2 December 1996 the Brownings served a notice of discontinuance of the counterclaim under CCR Ord 18, rr 1 and 3. On the same day, the plaintiff issued an application for an order setting aside the notice of discontinuance which the plaintiff says was an abuse. On 9 December 1996 Judge Bishop agreed to the parties' application to deem the occasion to be the start of the trial. He set aside f the notice of discontinuance of the counterclaim. The Brownings then tried to choose to be nonsuited on their counterclaim. The judge refused to permit them to do so. The Brownings then offered no evidence on their counterclaim which was dismissed. The plaintiff's claim was then compromised.

g On 6 February 1997 the Brownings started new proceedings in the High Court against Mrs Gilham both as executrix of her husband and in her capacity as partner of Bowers Court Farm. The substance of their claim, which was not statute-barred when it was started, is the same as that in the counterclaim in the first proceedings. It may be a matter for consideration on another occasion whether, if Mrs Gilham were to be sued as partner, this should have been in the h original county court proceedings.

i The Brownings appeal against the judge's orders setting aside the notice of discontinuance and refusing to allow them to choose to be nonsuited. The basis of the judge's decision was that what the Brownings were trying to do was an abuse because they were trying to get round the effect of his order of 25 October 1996 disallowing their evidence by abandoning their counterclaim before it had been adjudicated upon so that they might start the new proceedings in which the disallowed evidence could be called. The Brownings accept that this was their purpose. But they contend that there is no power in the county court to strike out a notice of discontinuance for abuse and they further contend that in the county court a party has an unfettered right to chose to be nonsuited at any rate until the court begins to give its judgment. They say further that what they wanted to do was not an abuse.



*Discontinuance*

Discontinuing a claim or being nonsuited may not by itself prevent the bringing of fresh proceedings on the same facts. The relevant rules and procedure are materially different in the High Court and in the county court. In the High Court, the ability of a party to choose to be nonsuited ceased in 1883—see *Fox v Star Newspaper Co Ltd* [1900] AC 19. In *Fox's* case in the Court of Appeal, Chitty LJ ([1898] 1 QB 636 at 639) said of the then High Court rule providing for discontinuance:

‘The principle of the rule is plain. It is that after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is no longer dominus litis, and it is for the judge to say whether the action shall be discontinued and upon what terms.’

The decision was upheld in the House of Lords. It may be seen in the modern context as an early example of the court managing litigation.

The present High Court rules enable a party to discontinue without leave up to a time 14 days after the service of a defence or the service of the defendant's affidavit where the proceedings are begun by originating summons, but thereafter only where all parties consent in writing. Otherwise leave to discontinue is required—see RSC Ord 21, rr 2 and 3. If an application for leave is made under Ord 21, r 3,

‘... the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.’

In other words, the court can impose conditions, one of which may be to limit or forbid the possibility of resurrecting the discontinued claim in new proceedings. Thus the Brownings could not without leave have done what they say they were entitled to do here if the proceedings had been in the High Court. Their only course would have been to apply for leave to discontinue and there seems little doubt that leave would only have been granted on terms that they were forbidden from starting all over again.

In the county court, the rules are different. CCR Ord 18, r 1 provides:

‘The plaintiff in an action or matter may, at any time before judgment or final order, discontinue the proceedings wholly or in part against all or any of the defendants thereto by giving notice to the proper officer and to every defendant against whom he desires to discontinue ...’

Order 18, r 2(1) provides that a defendant served with a notice of discontinuance may have his costs taxed and that if costs allowed on taxation are not paid within 14 days he may enter judgment for the taxed costs and the costs of entering judgment. Order 18, r 2(3) provides:

‘Discontinuance of any action or matter or a particular claim therein under rule 1 shall not be a defence to subsequent proceedings for the same or substantially the same cause of action; but if any such proceedings are subsequently brought before payment of any costs taxed under paragraph (1), the court may order them to be stayed until those costs have been paid.’



a Order 18, r 3 provides that rr 1 and 2 apply with appropriate modifications to counterclaims.

b In *Castanho v Brown & Root (UK) Ltd* [1980] 3 All ER 72, [1980] 1 WLR 833, in a High Court action a plaintiff claimed damages for personal injuries and interim payments were made to the plaintiff. It was later realised that a better result might be obtained if proceedings were brought in Texas and proceedings were started in the Texas State Court. The plaintiff's English solicitors then served a notice of discontinuance under RSC Ord 21, r 2(1), a defence recently having been served which admitted liability. Further proceedings were started in the United States Federal Court in Texas and the proceedings in the State Court were ended by filing a nonsuit. Parker J struck out the notice of discontinuance in the English proceedings as an abuse and granted an injunction restraining c proceedings in the United States. He held that it was an abuse of process to use the machinery of discontinuance without leave to improve the plaintiff's position in the American proceedings and because the plaintiff had received interim payments which he could not repay. He exercised what he held to be an inherent jurisdiction of the court to prevent abuse. The Court of Appeal by a majority d reversed Parker J's order. Lord Denning MR in a dissenting judgment observed that the rules concerning discontinuance did not deal with the then recently introduced provisions for interim payments. Lord Denning MR said ([1980] 3 All ER 72 at 80, [1980] 1 WLR 833 at 855):

e 'I summarised the cases on "abuse of process" in *Goldsmith v Sperrings Ltd* [1977] 2 All ER 566 at 574–575, [1977] 1 WLR 478 at 489–490. I said: "On the face of it, in any particular case, the legal process may appear to be entirely proper and correct. [So here the notice of discontinuance, on the face of it, is in time and correctly done without leave.] What may make it wrongful is the purpose for which it is used." If it is used for the purpose of the party obtaining some collateral advantage for himself, and not for the purpose for f which such proceedings are properly designed and exist, he will be held guilty of abuse of process of the court.'

The House of Lords held that the notice of discontinuance was an abuse of the process of the court and had rightly been set aside by Parker J because the court would not have allowed the plaintiff, who had secured interim payments and an admission of liability by suing in England, to discontinue his action in order to obtain advantages by suing in a foreign court without being put on terms. Lord Scarman, with whose opinion the other Law Lords agreed, said ([1981] 1 All ER 143 at 148, [1981] AC 557 at 571):

h 'Unless, therefore, it is possible to treat a notice of discontinuance without leave which complies with the Rules of the Supreme Court as an abuse of process (which is what Parker J did), the notice cannot be struck out. In the Court of Appeal, Lord Denning MR was prepared so to hold (see [1980] 3 All ER 72 at 80, [1980] 1 WLR 833 at 855). Brandon LJ expressed no opinion. Shaw LJ, however, held that it was not possible. It seemed to him "an inversion of logic to speak of an act which purports to terminate a process as being an abuse of that process" (see [1980] 3 All ER 72 at 88, [1980] 1 WLR 833 at 864). I am not sensitive to the logical difficulty. Even if it be illogical (and I do not think it is) to treat the termination of legal process as an act which can be an abuse of that process, principle requires that the illogicality be overridden, if justice requires. The court has inherent power to prevent a party from obtaining by the use of its process a collateral advantage which j

it would be unjust for him to retain; and termination of process can, like any other step in the process, be so used. I agree, therefore, with Parker J and Lord Denning MR that service of a notice of discontinuance without leave, though it complies with the rules, can be an abuse of the process of the court.

Lord Scarman then held that it was an abuse in that case, asking whether, if leave had been required, unconditional leave would have been granted. He held that it would not and that Parker J was right to strike out the notice of discontinuance. For reasons which are not material to the appeal now before us, Lord Scarman then held that the Court of Appeal were right to discharge the injunction and that, the notice of discontinuance having been struck out, leave to discontinue should be given on terms.

Thus in the High Court a notice of discontinuance duly served without leave may be struck out if its purpose is an abuse. *Fakih Bros v A P Moller (Copenhagen) Ltd* [1994] 1 Lloyd's Rep 103 is an example of the exercise by Hobhouse J of this jurisdiction where he held that, had the plaintiffs had to apply for leave to discontinue, they would undoubtedly have been put on terms; and that by giving notice of discontinuance without leave they were attempting to avoid the imposition of those conditions and this they should not be allowed to do. The notice of discontinuance was accordingly struck out. I see no good reason why the same should not apply in the county court to a notice of discontinuance served under CCR Ord 18.

In the present case, Judge Bishop held that what the Brownings wanted to do was an abuse. He held, applying *Castanho v Brown & Root*, that he had jurisdiction to strike out the notice of discontinuance and he did so. He also held that he had a similar jurisdiction in relation to the Brownings' wish to be nonsuited. He held that the entitlement to be nonsuited as of right referred to in *Clack v Arthurs Engineering Ltd* [1959] 2 All ER 503, [1959] 2 QB 211 had to be modified in the light of *Castanho v Brown & Root (UK) Ltd*. Mr Goodman submits that both these decisions were wrong.

Mr Goodman submits that the only express provision enabling the county court to deal with abuse of process is CCR Ord 13, r 5, which relates to pleadings; but a notice of discontinuance is not a pleading. He submits that the scheme of Ord 18 permits a party to disengage and start again. There is no judicial discretion and no requirement of leave. The county court power in CCR Ord 37 enabling the court to set aside applies to orders, judgments or originating process, warrants or summonses. There is no express power to set aside a notice of discontinuance. He submits that s 76 of the County Courts Act 1984, which provides that in 'any case not expressly provided for by or in pursuance of this Act, the general principles of practice in the High Court may be adopted and applied to proceedings in a county court', is directed to extending the powers of the county court where the County Court Rules make no provision, not to curtailing express provisions of those rules which cover the situation. Mr Goodman refers to *Rolph v Zolan* [1993] 4 All ER 202 at 209, [1993] 1 WLR 1305 at 1313 in the judgment of Dillon LJ and to *Clack v Arthurs Engineering Ltd* [1959] 2 All ER 503 at 507, [1959] 2 QB 211 at 218, where there is reference to the predecessor of s 76 of the 1984 Act. Mr Goodman submits that the High Court practice is not applicable where CCR Ord 18 provides what he refers to as a complete code without any element of judicial discretion and where in the county court there is, he submits, an unfettered right to elect to be nonsuited under Ord 21, r 2. In the county court, but not in the High Court, a party may

a still 'escape by the side door and avoid a contest', even in the last years of the  
twentieth century. Mr Goodman accepts in general that the county court may  
have elements of inherent jurisdiction but submits that there is no room for one  
here. He submits that *Castanho v Brown & Root (UK) Ltd* may be distinguished in  
b that the mechanism of the CCR Ord 18 is precisely to enable a party to disengage  
and start a new action. There will always be a reason to trigger the  
discontinuance. The whole reason for the county court rule is to provide a  
collateral advantage. He submits that the court in *Castanho v Brown & Root (UK)*  
*Ltd* was driven to use abuse of process as a device to overcome the problem raised  
by interim payments.

c It is of course important to recognise on the one hand that the court uses a  
jurisdiction to strike out for abuse sparingly and in plain cases where there has  
been misuse of the court's process, and on the other that the court is not  
constrained by fixed categories of circumstances in which the court has this  
power.

Mr Kolvin refers to what Lord Diplock said in *Hunter v Chief Constable of West*  
*Midlands* [1981] 3 All ER 727 at 729, [1982] AC 529 at 536:

d 'My Lords, this is a case about abuse of the process of the High Court. It  
concerns the inherent power which any court of justice must possess to  
prevent misuse of its procedure in a way which, although not inconsistent  
with the literal application of its procedural rules, would nevertheless be  
manifestly unfair to a party to litigation before it, or would otherwise bring  
e the administration of justice into disrepute among right-thinking people.  
The circumstances in which abuse of process can arise are very varied; those  
which give rise to the instant appeal must surely be unique. It would, in my  
view, be most unwise if this House were to use this occasion to say anything  
that might be taken as limiting to fixed categories the kinds of circumstances  
f in which the court has a duty (I disavow the word discretion) to exercise this  
salutary power.'

Mr Kolvin also refers to *Ashmore v British Coal Corp* [1990] 2 All ER 981 at 984,  
[1990] 2 QB 338 at 348, where Stuart-Smith LJ said:

g 'Counsel for the appellant submits that the tribunal did err in law. He  
submits that unless she is estopped by res judicata, issue estoppel or  
agreement to be bound by the findings in the *Thomas* case, and it is common  
ground that she is not, the appellant has an absolute right to have her claim  
litigated. He argues that, because the appellant is not estopped for any of  
those reasons, her claim cannot be frivolous, vexatious or an abuse of  
h process. I do not agree. A litigant has a right to have his claim litigated,  
provided it is not frivolous, vexatious or an abuse of the process. What may  
constitute such conduct must depend on all the circumstances of the case;  
the categories are not closed and considerations of public policy and the  
interests of justice may be very material.'

j Mr Goodman submits that *Hunter's* case and *Ashmore's* case were both extreme  
cases decided on public policy grounds not available in the case before us. He  
submits that it is a more important public policy that there should be certainty  
and that the relevant County Court Rules should not be rendered uncertain by  
the possibility of the exercise of judicial discretion. But Mr Kolvin might also  
have referred to recent decisions of the Court of Appeal to the effect that actions  
may be struck out for want of prosecution where there is abuse not amounting



to contumelious conduct and where the opposing party has suffered no prejudice but where the litigant has seriously abused the court's process. There is a clear public interest, in addition to the interests of individual litigants, that litigation should be justly, speedily and economically conducted and to conduct litigation in a way which is contrary to that interest is in my judgment capable of being an abuse. The court's jurisdiction and duty to manage and control cases in the interests of speed and economy is a developing one. The court's jurisdiction to control abuse is also developing, but it has the blessing of the House of Lords in *Hunter's case* and in *Castanho v Brown & Root (UK) Ltd*.

In my judgment, taking account of Mr Goodman's submissions, there is nevertheless no good reason for not applying the *Castanho* decision to notices of discontinuance in the county court. There is no express power in the High Court Rules to strike out a notice of discontinuance yet the jurisdiction exists. The fact that there is no express discretion in county court Ord 18 does not help Mr Goodman, since *Castanho v Brown & Root (UK) Ltd* applied to a non-discretionary part of the High Court Rules. I consider that the judge was correct to hold that he had jurisdiction to strike the notice out if it were an abuse. Whether in a particular case there is abuse will be a question of fact and degree. It is a jurisdiction to be used with circumspection no doubt, but it is a jurisdiction which is available in the county court as in the High Court.

Mr Goodman submits that seeking to discontinue in this case was not an abuse. He submits alternatively that the judge wrongly exercised his discretion. He submits that there should have been some evidence. But it was common ground and unconcealed that the Brownings' purpose was to avoid the consequences of the unappealed order of 25 October 1996 and the judge was entitled to proceed on that basis. Mr Goodman submits that seeking to terminate the county court counterclaim could not be an abuse. If there is an abuse it is in starting fresh proceedings in the High Court and it is in that case that the question of abuse should arise. I do not agree. No doubt the question could and may arise whether the High Court proceedings are an abuse, but that does not prevent the question also arising upon the notice of discontinuance in the county court proceedings when the purpose of the discontinuance is clear. It is in my judgment right that it should then arise for two reasons. Firstly, the county court judge was better placed to judge whether terminating the first proceedings was an abuse. Secondly, the question of abuse in the High Court proceedings would be materially affected by the question whether the counterclaim had been discontinued in the county court, since CCR Ord 18, r 2(3) provides that discontinuance shall not be a defence to subsequent proceedings except that those proceedings may be stayed if the costs of the first proceedings have not been paid. Mr Goodman indeed submits that subsequent proceedings after discontinuance could not be an abuse by virtue of the terms of Ord 18, r 2(3).

In my judgment therefore there is jurisdiction in the county court to strike out a notice of discontinuance if it is an abuse, and I further consider that the county court judge in this case was plainly correct to conclude that the notice of discontinuance of the counterclaim in this case was an abuse and that he correctly exercised his discretion to strike the notice out. It was, I think, seeking to use the court process to obtain a collateral advantage which it would be unjust for the Brownings to obtain, ie to escape by the side door from the first action where their counterclaim was evidentially hopeless in order to start a new action where the evidential problems would not arise, and this in circumstances where a long



a overdue date for trial of the first action was fixed and imminent. If it were necessary to characterise the abuse adjectivally, I should say that it was plain.

### Nonsuit

b Nonsuiting is, as Mr Goodman accepted, an anachronism. Before the judge, submissions proceeded on the agreed basis that in the county court, though not in the High Court, there is a preserved common law right to choose to be nonsuited up to the time when the judge gives judgment or at least until the close of the evidence. Indeed in his skeleton submission in this court Mr Kolvin for the plaintiff accepted this. In the course of oral submission however the court questioned whether this is so.

c CCR Ord 21, r 2 provides:

‘(1) If the plaintiff appears at the hearing of an action or matter but fails to prove his claim to the satisfaction of the court, it may, without prejudice to any other power, either nonsuit him or give judgment for the defendant.

d (2) Where, after a plaintiff has been nonsuited, or proceedings have been struck out, and costs have been awarded to the defendant, a subsequent action or matter for the same or substantially the same cause of action is brought before payment of those costs, the court may stay the subsequent action or matter until they have been paid.’

e Thus Ord 21, r 2(1) gives the court power to nonsuit a party instead of giving judgment against him. This may be useful, for instance, where an unskilled litigant in person fails to prove a case but might in justice be permitted to try again. It does not depend on the choice or indeed the consent of the litigant.

f In *Clack v Arthurs Engineering Ltd* [1959] 2 All ER 503, [1959] 2 QB 211 the plaintiff employee, whose employment was terminated, claimed the balance of a month’s salary instead of notice. The county court judge, having heard evidence on both sides, found that the plaintiff had not proved his case, but invited him to amend his particulars of claim. His counsel elected not to do this and the judge then nonsuited the plaintiff under Ord 23, r 3 of the County Court Rules 1936, which was in substantially the same terms as the present Ord 21, r 2. The defendants appealed. It was held (1) that once the evidence had been completed and the judge had found the facts, he had an unfettered discretion to enter a nonsuit regardless of the absence of consent of the plaintiff; (2) that Ord 23, r 3 applied, not only when the evidence fell short of proving the pleaded case, but also where the plaintiff’s evidence, but for the fact that it was disbelieved, would have substantiated his claim; but (3) that the judge had failed to exercise his discretion judicially in that (a) he arrived at his decision to nonsuit the plaintiff without hearing counsel on either side, and (b) the plaintiff had elected not to accept the invitation to amend his particulars of claim and should not be granted the concession of a nonsuit when he had already had his chance to frame his case in an alternative way, for the overriding consideration was that, in the public interest, there should be an end of litigation.

j The county court judge had found that, although that plaintiff’s case could not succeed, he was not altogether satisfied that proper justice would have been done if judgment were given for the defendants. It seemed to him to be one of the rare cases in which the plaintiff should be nonsuited. In the Court of Appeal, there were three submissions as appears from the reserved judgment of the court given by Willmer LJ, where he said ([1959] 2 All ER 503 at 506, [1959] 2 QB 211 at 216–217):

‘Three submissions have been advanced on behalf of the defendants in support of the appeal. First, it has been contended that the power to non-suit a plaintiff cannot be exercised without the consent of the plaintiff. Here the plaintiff never consented to be non-suited, and was never invited to consent. Secondly, it has been urged that the rule has no application to a case such as the present, where the plaintiff’s evidence, if it had been accepted, would have fully proved his case. This is not a case, it is pointed out, in which the plaintiff’s evidence fell short of proving his pleaded case; on the contrary, the evidence would have proved the claim but for the fact that it was disbelieved. The defendants’ third submission is that, assuming the rule to be applicable to the circumstances of this case, the learned judge failed to exercise his discretion judicially, in that he chose to non-suit the plaintiff, without being invited to do so, after the plaintiff by his counsel had specifically declined an invitation to amend the particulars of claim.’ a  
b  
c

Willmer LJ reviewed the history of the retention in the county court of the power of nonsuit saying that the court entertained no doubt that the powers of the county court in relation to nonsuit must be related to the practice of the old courts of common law as it existed before 1873 (see [1959] 2 All ER 503 at 507, [1959] 2 QB 211 at 218). He concluded: d

‘From an examination of all these cases it seems possible to draw the following conclusions: (1) At any time up to verdict, if the plaintiff elected to be non-suited he was entitled to it as of right, and the court had no discretion to refuse—see *Robinson v. Lawrence* ((1852) 7 Exch 123, 155 ER 883); *Outhwaite v. Hudson* ((1852) 7 Exch 380, 155 ER 995). (2) If before verdict the plaintiff refused to be non-suited, the position is not so clear ... (3) Once the evidence had been completed and the verdict of the jury taken—or, where there was no jury, once the judge had found the facts—it seems clear that the court had an unfettered discretion, if the verdict was against the plaintiff, either to enter a nonsuit or to give judgment for the defendant.’ (See [1959] 2 All ER 503 at 509, [1959] 2 QB 211 at 221.) e  
f

It is evident that the first of these conclusions was not strictly necessary to the court’s decision, although it was the conclusion of the court after detailed consideration of authority. It was based on two pre-Judicature Act decisions both of Parke B in 1851 and 1852. In *Robinson v Lawrence* (1851) 7 Exch 123 at 125, 155 ER 883 at 883–884 Parke B said: g

‘At common law, whenever the plaintiff ought to appear in Court, he was at liberty to withdraw: Co. Litt. 138. b., 139. a. In the present case when the judge was about to deliver his opinion, and indeed by the permission of the judge, the plaintiff withdrew. We have looked through the County Court Acts, but do not find any clause contained in them that prohibits the plaintiff from exercising this common law right.’ h

The reference to the County Court Acts was to s 79 of the County Court Act 1846, which for present purposes contained provisions substantially the same as those in the present County Court Rules Ord 21, r 2(1). j

The judgment in *Clack*’s case concludes with an observation that consideration might be given to abolishing the power of nonsuit in the county court. Mr Goodman points out that this has not yet been done. In the light of what Willmer LJ said and the unqualified note in *The County Court Practice* 1997 based on it, Mr Goodman can scarcely be criticised for supposing that a general common law

a right to choose to be nonsuited did indeed survive in the county court. It is, however, important to appreciate that, if it does survive, it is not to be found in CCR Ord 21, r 2. This gives the court a limited discretion to order a nonsuit: it does not give a party any right, let alone an untrammelled right, to choose to be nonsuited. What is contended for is the survival of a common law anachronism.

b It is necessary to consider the process by which nonsuiting disappeared from the High Court. In *Fox v Star Newspaper Co Ltd* it was held that the right to elect to nonsuit did not survive the 1883 High Court Rules. In the Court of Appeal, A L Smith LJ said ([1898] 1 QB 636 at 637–638):

c ‘Before the Judicature Act a plaintiff, after he had brought the defendant into court, if he found the case going against him, or that he had not the requisite materials to support his claim, could elect to be nonsuited, with the result that he could bring a fresh action. It was intended, I think, by those who framed the Rules of 1875, that the power of a plaintiff thus to harass the defendant with further litigation on the same subject-matter after he had been nonsuited at a trial should be restricted. Accordingly it was provided by Order XLI., r. 6, of the Rules of 1875, that “any judgment of nonsuit, unless the Court or a judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant; but in any case of mistake, surprise, or accident any judgment of nonsuit may be set aside on such terms as to payment of costs and otherwise as to the Court or a judge shall seem just.” That rule put a fetter upon the power of a plaintiff to demand as of right to be nonsuited in a common law action. It was argued that that rule still remains in force. I am clearly of opinion that it does not, because it was repealed by the existing rules, and Order LXXII., r. 2, cannot have the effect of keeping it alive. I agree with what was said on this subject by Kay J. in *Magnus v. National Bank of Scotland* ((1888) 58 LT 617) and by Cotton L.J. in *In re Busfield* ((1886) 32 Ch D 123 at 131). I think that Order XLI., r. 6, of 1875 has been advisedly omitted from the Rules of 1883, because there is really no such thing now as a judgment of nonsuit, and it was found that the matter with which the rule dealt is provided for by the rule as to discontinuance, namely, Order XXVI., r. 1, which provides that, after a certain stage, the plaintiff cannot without the leave of the Court discontinue the action.’

g Chitty LJ said (at 638, 639):

h ‘I am of the same opinion. The provisions of Order XXVI. of the present rules appear to me to cover the case of what was formerly termed a nonsuit ... The term “discontinuance” may have had at one time a more limited meaning than it has in Order XXVI., r. 1, but it is obvious on the face of that rule that the term is there used in a broad sense, and is intended to cover the case of what in a common law action was termed a nonsuit as well as the power which a plaintiff in Chancery formerly had of dismissing his own bill.’

j In the House of Lords in *Fox v Star Newspaper Co Ltd* [1900] AC 19 at 20 the Earl of Halsbury LC said:

‘Our whole system has been changed, and I think the reason why the word “nonsuit” itself is not now to be found in the rules is that it was determined that the power of a plaintiff at the common law to claim a nonsuit, or the plaintiff in equity to dismiss his bill at his own option, should no longer be permitted, and it is probable that the word “discontinuance” was supposed to apply to both forms of procedure both at common law and in equity.



Accordingly by Order XXVI., r. 1, the only mode by which a plaintiff can submit to defeat is under that Order, unless he allows the proceedings to go on until the verdict is recorded against him. The word "discontinuance" no doubt had, under a former system, the more limited application, and the old system of nonsuit is manifestly no longer capable of being reconciled with the new procedure either in form or substance. The substance is that when it once comes into court, and when the plaintiff offers no support to his action, there must be a verdict for the defendant.'

Thus nonsuiting disappeared from the High Court because discontinuance had been introduced by the rules and discontinuance covered the circumstances where previously parties might have chosen to be nonsuited. Mr Goodman accepted that discontinuance under the present CCR Ord 18 is in substance identical with the right to choose to be nonsuited for which he contended.

Mr Goodman at the court's request kindly and speedily researched the origin of the rules about discontinuance in the county court. I, for my part, am most grateful for his efforts. Section 79 of the County Court Act 1846 refers to nonsuiting in terms substantially the same as the present Ord 21, r 2. This was the provision referred to by Parke B in *Robinson v Lawrence*. The County Court Act 1846 had no provision for discontinuance. Order 64 of the County Court Rules 1856 provides for 'withdrawal by the plaintiff' without specifically dealing with the institution of subsequent proceedings on the same facts. It is significant that this first appearance of a species of discontinuance in the rules occurred after the two decisions of Parke B to which Willmer LJ referred in *Clack's* case. Order XII, r 1 of the County Court Rules 1875 used the term 'discontinuance' for the first time in the county court. The substance of the rule was the same as Ord 64 of the 1856 Rules. Section 88 of the County Court Act 1888 re-enacted s 79 of the 1846 Act with minor changes. Order IX of the County Court Rules 1889 provided for the plaintiff serving a notice of discontinuance and for the defendant obtaining an order for costs. Order IX, r 1 of the 1903 Rules amended the 1889 version to enable the defendant to tax his costs without order of the court. In 1914, the rule was again amended to provided that discontinuance should not be a defence to a subsequent action so that in substance the rule by then had achieved its modern form. There were further amendments in 1936, when the provisions became Ord 18, and in 1981.

In summary therefore, the county court provision giving the judge a discretionary power to nonsuit a party after hearing the evidence instead of entering judgment for the other party has existed in substantially the same form since 1846: discontinuance was introduced in substance in 1856, was first called 'discontinuance' in 1875 and reached substantially its modern form in 1914. By 1914 at the latest, but probably by 1856 or 1875, the County Court Rules, in providing for discontinuance, made the preservation of a general common law right to be nonsuited unnecessary.

In saying in *Clack's* case that 'at any time up to verdict, if the plaintiff elected to be nonsuited he was entitled to it as of right, and the court had no discretion to refuse', Willmer LJ referred to two cases which antedated the introduction into the County Court Rules of provisions for discontinuance. Willmer LJ also said ([1959] 2 All ER 503 at 505, [1959] 2 QB 211 at 216):

'Since the introduction of the 1883 Rules of the Supreme Court, the High Court retains no power to enter a non-suit (see *Fox v. Star Newspaper Co.*



a ([1900] AC 19)). In the county court the power survives, and is specifically preserved by Ord. 23, r. 3, of the County Court Rules ...'

In so far as this passage is relied on in support of the submission that a general common law power survives in the county court because of what is now Ord 21, r 2, I would respectfully disagree. In my view a discretionary power given to the court at the end of the evidence is at best neutral about whether a general common law right survives. I should incline to think that the inference was otherwise. In my judgment however, upon consideration it is clear that the reasoning in *Fox v Star Newspaper Co Ltd* must also apply to the County Court Rules. In the High Court, discontinuance, fairly recently introduced when *Fox v Star Newspaper Co Ltd* was decided, had taken the place of nonsuit which had ceased to be available. In the county court, there is discontinuance under Ord 18 up to judgment and a discretionary power in the court to nonsuit when the evidence has been heard if the plaintiff fails to prove his claim. That covers the entire ground and there is no room for a general right to be nonsuited, which in my judgment upon the authority of *Fox v Star Newspaper Co Ltd* did not survive the introduction of rules for discontinuance. Discontinuance was not addressed in *Clack's* case and the critical statement about nonsuiting was obiter.

I sympathise with Mr Goodman on this subject, since he came to court expecting to submit that abuse of process did not apply to an unfettered common law right to choose to be nonsuited. He was in the end constrained, I think, to see the force of the court's suggestion that the common law right had not survived at all to be the subject of such a jurisdiction. It will be little comfort to him to know that I should, if it had been necessary, have had no hesitation in holding that the judge would have been right to hold that he had jurisdiction to refuse to allow the Brownings to choose to be nonsuited. It would have been nonsensical if the county court had jurisdiction to strike out a notice of discontinuance as an abuse, as in my view upon House of Lords authority in *Castanho v Brown & Root (UK) Ltd* [1981] 1 All ER 143, [1981] AC 557 it does, but had no jurisdiction to refuse to permit a party to be nonsuited when each course was in substance doing the same thing. The decision in *Clack's* case was that the court has a discretionary power to nonsuit once the evidence had been completed even though the party did not ask for it. That decision is not in question. The court did not consider questions of abuse of process. Doing so in the modern context, I would have had no doubt that the county court judge did have jurisdiction to refuse to permit a party to be nonsuited. However, in the light of my view about the survival of the common law right to be nonsuited, the question does not arise.

h For these reasons, I would hold that the judge reached the correct conclusions and dismiss the appeal.

POTTER LJ. I agree.

j LORD WOOLF MR. I also agree.

*Appeal dismissed. Leave to appeal to the House of Lords refused.*

## Alan Wibberley Building Ltd v Insley

COURT OF APPEAL, CIVIL DIVISION

SIMON BROWN, WARD AND JUDGE LJJ

21 OCTOBER, 12 NOVEMBER 1997

*Boundary – Hedge – Evidence of boundary between adjoining properties – Presumption – Whether hedge and ditch presumption prevailing over deed of conveyance delineating boundary by reference to Ordnance Survey map.*

In 1920 B bought a farm and its surrounding land 'containing by admeasurement forty seven acres or thereabouts'. The farm was sold in 1975 by a differently drafted conveyance which delineated the land by reference to the Ordnance Survey map and included field number 6751. In 1985 the defendant bought part of field 6751 which adjoined a field owned by the plaintiff. The plaintiff had acquired that field in 1984 by a conveyance which delineated the land for the purpose of identification only. The fields had been separated by a hedge and a ditch which was on the plaintiff's side of the hedge, but the defendant scrubbed out the hedge and erected a wood post and wire fence along the old line of the far lip of the ditch. The plaintiff alleged trespass and issued proceedings against the defendant seeking relief. The defendant contended that the boundary was fixed by the application of the presumption that the person who dug the ditch dug it at the extremity of his land and threw the soil onto his own land to make the bank on which the hedge was planted. The recorder held that the presumption did not arise, since the land had been conveyed by reference to the Ordnance Survey map which delineated the boundary as the centre line of the hedge between the fields. The recorder ordered the plaintiff to erect a fence along that line, restrained both parties from entering the other's land and awarded the plaintiff damages. The defendant appealed, contending that since there had never been common ownership in relation to the plaintiff's title and the defendant's title, that prior to 1975 neither title had been conveyed by reference to Ordnance Survey maps and that the plaintiff's title had never been conveyed by reference to such maps, the recorder had erred in not applying the hedge and ditch presumption.

**Held** – (Judge LJ dissenting.) Where two adjoining fields were separated by a hedge and a ditch, the presumption of fact that both the hedge and the ditch belonged to whoever owned the land on the hedge-side of the ditch only came into operation in cases where the boundary was not delimited in the parcels to the conveyance. Accordingly, where a conveyance defined the parcels by direct reference to an Ordnance Survey map which established the boundary, there was no room for the operation of the presumption and the fact that the parcels were not conveyed from a common owner did not render inoperable that rule. In the instant case, the plaintiff's 1984 conveyance was insufficient to identify the parcels precisely, since the plan was for identification. However, the defendant's conveyance defined the parcels by reference to the Ordnance Survey map which established beyond possibility of question that the boundary was the middle of the hedge, notwithstanding that defendant's predecessor in title might have presumed that his land included the ditch. Moreover, that conveyance clarified where the boundary line was and did not therefore operate to convey the ditch to the plaintiff's predecessor. Since there was no room for the presumption to

a apply because the evidence had clearly displaced the inference and rebutted the fact it was seeking to establish, it followed that the recorder had correctly applied the law to the facts he found and that he came to the correct conclusion. The appeal would accordingly be dismissed (see p 89 a to f, p 90 d e j, p 91 b, p 94 h j, p 95 c d h j and p 96 b to d f to j, post).

*Fisher v Winch* [1939] 2 All ER 144 applied.

## b Notes

For the delimitation of boundaries by reference to Ordnance Survey maps, see 4(1) *Halsbury's Laws* (4th edn reissue) para 905.

For the hedge and ditch presumption, see *ibid* para 917, and for cases on the subject, see 7(1) *Digest* (2nd reissue) 477–478, 3922–3929.

## c

### Cases referred to in judgments

*Collis v Amphlett* [1918] 1 Ch 232.

*Craven (Earl) v Pridmore* (1902) 18 TLR 282, CA.

*Davey v Harrow Corp* [1957] 2 All ER 305, [1958] 1 QB 60, [1957] 2 WLR 941, CA.

*Fisher v Winch* [1939] 2 All ER 144, [1939] 1 KB 666, CA.

## d

*Hall v Dorling* (1996) 74 P & CR 400, CA.

*Neilson v Poole* (1969) 20 P & CR 909.

*Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381, HL.

*Taylor v Needham* (1810) 2 Taunt 278, 127 ER 1084.

*Vowles v Miller* (1810) 3 Taunt 137, 128 ER 54.

## e

### Cases also cited or referred to in skeleton arguments

*Falkingham v Farley* [1991] TLR 128, CA.

*Flower v Hartopp* (1843) 6 Beav 476, 49 ER 910.

*Rouse v Gravelworks Ltd* [1940] 1 All ER 26, [1940] 1 KB 489, CA.

## f

### Appeal

By notice dated 18 June 1996 the defendant, John Graham Insley, appealed with leave of the Court of Appeal (Hobhouse and Millett LJ) granted on 14 June 1996 from the decision of Mr Recorder Pardoe QC sitting in the Stoke on Trent County Court on 30 November 1995, whereby, in a boundary dispute, he inter alia awarded to the plaintiff, Alan Wibberley Building Ltd, damages of £900 and declared what the boundary was between the plaintiff's land and the defendant's land. The facts are set out in the judgment of Ward LJ.

## g

*Ian Foster* (instructed by *Grindeys*, Stoke on Trent) for the defendant.

*Charles Machin* (instructed by *Challinors & Dickson*, Hanley) for the plaintiff.

## h

*Cur adv vult*

12 November 1997. The following judgments were delivered.

## j

**WARD LJ** (giving the first judgment at the invitation of Simon Brown LJ). This is a boundary dispute. To hear those words, 'a boundary dispute', is to fill a judge even of the most stalwart and amiable disposition with deep foreboding since disputes between neighbours tend always to compel, as this one did, some unreasonable and extravagant display of unneighbourly behaviour which profits no one but the lawyers. Fortunately this appeal is different. Ably argued as it has been by both counsel, it crisply raises a point of law of some importance, especially in rural England and Wales. That question, for the moment quite



broadly stated, is this: where adjoining fields are separated by a hedge and a ditch, who owns the ditch? The interest in the case springs from the possibility that there are not just two contenders, namely one or other of the owners of the contiguous fields, but a predecessor in title to one of them. To sharpen the focus of the issue before us, I must set the scene.

The scene is the village of Saverley Green somewhere in the depths of the Staffordshire countryside. For over 150 years of the history revealed to us, the Home Farm and the Saverley Green Farm were in separate ownership. The defendant now owns part of the original Home Farm; the plaintiff part of the original Saverley Green Farm. It was not in dispute that until removal of part of it by the defendant some time in or after 1987 there had been a hedge between those two farms. The judge found on the balance of probabilities that a ditch, as originally dug, ran the full length of that hedge and continued to exist until recently. The ditch and the hedge were likely to have been contemporaneously dug and planted. The ditch was on the Saverley Green side of the hedge.

The parties' title to their properties must be examined. By deed made in 1920, Home Farm was conveyed to a Mr Beard under this description of the parcels of land:

'ALL THAT farmhouse buildings and land situated and known as Home Farm Saverley Green in the County of Stafford containing by admeasurement forty seven acres or thereabouts ...'

In 1975 Mr Beard sold to Mrs Burton. That conveyance was differently drafted and the difference is important. By that deed the vendor as beneficial owner conveyed unto the purchaser:

'ALL THAT the property more particularly described in the Schedule hereto ...

THE SCHEDULE before referred to:

ALL THAT messuage or farmhouse and outbuildings situated and known as Home Farm ... TOGETHER WITH the land forming the site thereof and used and occupied therewith which said property comprises in the whole ten decimal point three nine acres or thereabouts and is more particularly delineated for the purposes of identification only on the plan annexed hereto and thereon edged blue and is more particularly described as follows:

<u>O.S. No:</u>	<u>Description</u>	<u>Acreage</u>
5455	House and Buildings	0.82
6246	Pasture	3.38
6751	Ditto	3.08
7336	Ditto	<u>3.11</u>
		<u>10.39'</u>

As would be expected and as was common ground the plans are an exact copy of the Ordnance Survey map showing the fields as numbered. Field 6751 adjoins field 7751, which is part of the Saverley Green Farm. This is the boundary with which we are concerned.

The defendant owns Saverley Cottage, which he acquired in 1978. It lies across the top of part of both fields with the disputed boundary between the fields forming the stem of the T. In 1985 he bought a tiny corner of the Home Farm field 6751 from Mrs Beard and for a length of 87 feet this addition to his garden adjoins the plaintiff's field 7751. The terms of that conveyance are rightly agreed to be immaterial for present purposes.



a As for the Saverley Green Farm, the plaintiff's predecessor in title took a conveyance in 1921 of:

b 'ALL that messuage farmhouse or teniment [sic] with the barns stables outbuildings and hereditaments thereto belonging called the Saverley Green Farm ... formerly in the occupation of ... Richard Harvey AND ALSO ALL those several closes pieces or parcels of land ... commonly known by the names and containing by admeasurement the several quantities hereinafter mentioned that is to say [there follow the names of a number of fields with their acreage].'

By a conveyance made in 1984 the plaintiff acquired:

c 'ALL THOSE plots pieces or parcels of land situate at Saverley Green in the County of Stafford and which are for the purpose of identification only delineated on the plan annexed hereto and thereon edged blue which said land was (with other property) conveyed ... by a Conveyance dated ... One thousand nine hundred and twenty one ...'

d The plan appears to have been drawn to correspond to—but not to be an exact copy of—the Ordnance plan and it shows field 7751 forming the eastern boundary with Home Farm of the land thus conveyed.

e The dispute arose because sometime in about 1987 the defendant scrubbed out the hedge dividing the two fields with which we are concerned and erected a wood post and wire fence along the old line of the far lip of the ditch and perhaps was beyond that line. The plaintiff alleged trespass and sought relief accordingly.

f Mr Recorder Pardoe QC found for the plaintiff and on 30 November 1995 declared the true line of the boundary between these properties, ordered the plaintiff to erect a fence along that line, restrained both parties from entering the other's land and awarded the plaintiff damages of £900. The defendant appeals against that order.

g The issue joined before the recorder was whether or not, as the defendant contended, the boundary was fixed by application of the presumption that the person who dug the ditch dug it at the extremity of his land and threw the soil onto his own land to make the bank on which the hedge was planted, or whether, as the plaintiff contended, that presumption did not arise where the land had been conveyed by reference to the Ordnance Survey map which delineated the boundary. The recorder applied *Fisher v Winch* [1939] 2 All ER 144, [1939] 1 KB 666 and *Davey v Harrow Corp* [1957] 2 All ER 305, [1958] 1 QB 60 and held that—

h 'the boundary of the land conveyed to Mrs Burton by the 1975 conveyance was the centre line of the hedge between fields 6751 and 7751. It follows that the boundary towards field 7751 of the part of field 6751 conveyed to the defendant by Mrs Burton in 1985 was similarly the centre line of the then existing hedge. The conveyancing of [Saverley Green Farm] which was also by reference to OS field numbers and acreages leads to a conclusion  
j correlative to one I have just come to. I conclude that the plaintiff's title extended similarly to the centre line of the hedge between fields 6751 and 7751.'

The appeal was launched on the basis that the recorder erred in not applying the hedge and ditch presumption, contending in the notice of appeal that *Fisher v Winch* did not apply as:

'(i) in this case there had never been common ownership in relation to the Plaintiff's title and the Defendant's title; (ii) prior to 5th February 1975 neither title had been conveyed by reference to Ordnance Survey maps or plans; and (iii) The Plaintiff's title has never been conveyed by reference to Ordnance Survey maps or plans.'

When granting leave to appeal on 14 June 1996 Millett LJ said:

'It seems to me that it is arguable that what follows is this: first, prior to 1975 the mutual boundary was on the plaintiff's side of the ditch, the hedge and ditch belonging to the defendant's predecessor in title, since there was then nothing to exclude the presumption. Secondly, the hedge and ditch have never been conveyed to the plaintiff who has no paper title to them. Thirdly, they were, no doubt inadvertently, excluded from the conveyance to the defendant's vendor. If that is right, then the paper title is still vested in the vendor of the 1975 conveyance to the defendant's vendor. One or other of the parties may have established title by adverse possession, but no issue as to this was before the learned recorder. He was concerned solely with the paper title. Whether it is really worth pursuing the dispute before this court in order to establish a new starting position under which neither party has a paper title to hedge and ditch is a matter for the parties.'

The case has been presented to us on the basis that the ditch did remain vested in Mr Beard; and by deed dated 9 August 1996 made between the executors of Mr Beard of one part, Mrs Burton of the second part and the defendant of the third part, title to the ditch has now passed to the defendant. The principal submission is that the plaintiff never owned the ditch, and so could not complain of trespass upon it.

Central to the appellant's submission is the proposition that prior to the 1975 conveyance the boundary between the two farms had been fixed by operation of the hedge and ditch presumption and that, having once been fixed, it could not and did not change.

The origin of the presumption can be traced back to observations of Lawrence J in the course of argument in *Vowles v Miller* (1810) 3 Taunt 137 at 138, 128 ER 54 at 55, when he said:

'The rule about ditching is this. No man, making a ditch, can cut into his neighbour's soil, but usually he cuts it to the very extremity of his own land: he is of course bound to throw the soil which he digs out, upon his own land; and often, if he likes it, he plants a hedge on the top of it ...'

By 1902 this presumption was, per Collins MR, 'well-established': see *Earl of Craven v Pridmore* (1902) 18 TLR 282 at 283. As that case made plain the presumption is a rebuttable one, the question there being, 'how far the presumption had been displaced by evidence of acts of ownership on the part of the defendants.'

Not to treat this presumption as rebuttable was the error identified in *Fisher v Winch*. Since this case so shaped the recorder's decision, I must analyse it in some detail. The facts were that the land of both parties had been in common ownership. The first part of the estate to be conveyed was the land sold to the defendant. The terms of that conveyance were to all intents and purposes identical to the 1975 conveyance to Mrs Brewer and thence to the defendant in

a this case, that is to say it was a conveyance of land described in a schedule which, Greene MR said—

b 'sets out by reference to the numbers on the ordnance map the different parcels, with their description and acreage, which were comprised in the conveyance. That conveyance had a plan delineated upon it, and in that plan the ordnance survey numbers, with the acreage which corresponds with the ordnance survey acreage, are shown. It is quite clear from a comparison of that plan with the language of the schedule that the plan is copied from the ordnance survey ...' (See [1939] 2 All ER 144 at 146, [1939] 1 KB 666 at 670–671.)

c The conveyance of the remainder of the estate to the plaintiff was of 'land ... containing ... 3.261 acres ... numbered 214 on the ordnance survey map ... which ... by way of identification only is delineated on the plan drawn hereon ...' That conveyance is, therefore, even more closely linked to the Ordnance Survey than the 1984 conveyance of part of Saverley Green Farm to the plaintiff. The following observations of Greene MR are therefore as applicable to the case before us as they were to the matter before him. He said ([1939] 2 All ER 144 at 146, [1939] 1 KB 666 at 671):

e 'It is to be noticed, in comparing these two conveyances, that there is a difference in wording, because the conveyance under which the defendant claims uses the plan and the schedule as descriptive, and not merely for identification, whereas in the later conveyance the measurement is given and the number is given, but the plan is only "for greater clearness and by way of identification only." However, once the question as to what the defendant's predecessor in title got under his conveyance is decided, no difficulty arises as to what the plaintiff's predecessor in title got under his conveyance, and the real question is what the defendant got.'

f It was necessary in that case to led expert evidence—

g 'as to the universal practice in making up the ordnance survey maps. The effect of that evidence is that, where there is a hedge or a fence running along a parcel, that is the boundary which is taken by the ordnance survey for the purpose of delimiting the parcels which are shown on the maps ... where the party's title is derived from a document which refers to the ordnance map, it is necessary to look at the ordnance map and ascertain where the boundary shown on that map is truly positioned ... the boundary referred to on the ordnance survey map is the centre line of the hedge and the fence. That being so, when the conveyance is looked at, the boundaries on which are traced by reference to the ordnance survey and the acreage of which is fixed by reference to the ordnance survey, it is established beyond possibility of question what the boundary is.' (See [1939] 2 All ER 144 at 147, [1939] 1 KB 666 at 672.)

j The conclusion of Greene MR was:

'That is really an end of the case. The appeal has been necessary because, as I have said, the judge, thinking that the governing matter was the presumption, and not observing that the presumption *comes into operation only in cases where the boundary is not delimited in the parcels to the conveyance*, decided the other way ...' (See [1939] 2 All ER 144 at 147–148, [1939] 1 KB 666 at 673; my emphasis.)



Greene MR's earlier remarks are important in dealing with Mr Foster's submissions on the appellant's behalf. At the beginning of his judgment, he said ([1939] 2 All ER 144 at 145, [1939] 1 KB 666 at 669–670): a

'The dispute between the parties is as to the precise boundary between their respective properties. The judge decided this case in favour of the defendant *upon one point alone*. He proceeded upon the footing that a well-known presumption was to prevail—namely, that *where there is nothing else to identify the boundary*, and there is a ditch and a bank, the presumption is that the person who dug the ditch dug it at the extremity of his land and threw the soil on his own land to make the bank. That, of course, is a *very convenient rule of common sense*, which applies in proper cases in regard to agricultural land, *where there is no boundary otherwise ascertainable* ... The judge, thinking that the case was governed *entirely* by that presumption, decided in favour of the defendant, but he did not direct his mind to what in this case is the *initial question*—namely, *what, on the true construction of the conveyances to the parties, the boundary of their respective land is*. If an examination of those conveyances, coupled with any evidence that is admissible for the purpose of construing them, shows what the boundary is, there is *no room at all for operation of that presumption*. The judge did not direct his mind to that question, but, in my opinion, the present controversy is solved without difficulty when that question is considered.' (My emphasis.) b  
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In agreeing, MacKinnon LJ drew attention to a passage in the judgment of Scrutton LJ in *Collis v Amphlett* [1918] 1 Ch 232 at 259: e

'There is undoubtedly a popular belief in some parts of the country which has found its way into books that the owner of a hedge is also the owner of a space outside it; sometimes said to be four feet from the base of the bank on which the hedge stands. I am not aware of any legal authority for this broad proposition.' f

Goddard LJ added ([1939] 2 All ER 144 at 148, [1939] 1 KB 666 at 673–674):

'This matter of the respective position of the fence and the ditch as affording evidence of the boundary was referred to both in the defence and throughout the trial—which I think possibly explains some of the confusion that arose—as a custom. It is not a custom at all, when rightly understood. It is a *mere presumption*. It is a very different thing from a custom. This is a presumption which is in use, and it is very often *decisive where there is no evidence at all* as to what the boundaries are, but, like any other presumption, it is *rebuttable*, and very often it can easily be rebutted by the production of title deeds. In this case, when the title deeds are examined, there is *no room for the operation of the presumption at all*.' (My emphasis.) g  
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In *Davey v Harrow Corp* [1957] 2 All ER 305 at 307, [1958] 1 QB 60 at 69 Lord Goddard CJ said:

'... after that case [*Fisher v Winch*] and this, courts in future can take notice of this practice of the Ordnance Survey [that the boundary line on the map indicated the centre of the existing hedge] as at least *prima facie* evidence of what a line on the map indicates.' i

These decisions seem to me to compel this approach to this appeal. (1) 'The initial question' is 'what on the true construction of the (two) conveyances to the



a parties (the one to the plaintiff, the other to the defendant) is the boundary of their respective land’.

(2) The plaintiff’s 1984 conveyance in the wide language used is insufficient to identify the parcels precisely. The plan is for identification only, the effect of which, Megarry J said in *Neilson v Poole* (1969) 20 P & CR 909 at 916, ‘seems ... to confine the use of the plan to ascertaining where the land is situated, and to prevent the plan from controlling the parcels in the body of the conveyance ...’  
b All this conveyance tells one is that the land was part of Saverley Green Farm as it was conveyed in 1921. The precise line of the boundary cannot be identified from the conveyance but upon its proper interpretation, it cannot be doubted that the land being conveyed, extended up to its boundary with Home Farm, wherever that boundary was.

c (3) Since ‘the presumption only comes into operation in cases where the boundary is not delimited in the parcels to the conveyance’ then, in the absence of any other evidence, it can be *presumed* that the boundary is the Saverley Green edge of the ditch and accordingly that the Saverley Green Farm does not include the ditch itself. This presumption is, however, rebuttable.

d (4) Turning to the defendant’s conveyance (which it is agreed for all practical purposes means the 1975 conveyance), this defines the parcels by reference to the Ordnance Survey map and so ‘it is established beyond possibility of question what the boundary is’ viz, the middle of the hedge. There is, therefore, ‘no room at all for the operation of the presumption’. Consequently, as the defendant now accepts, the ditch was not conveyed to him.

e (5) If the two parcels were in common ownership, then ‘once the question is decided as to what (the first purchaser) got under his conveyance, no difficulty arises as to what the (purchaser of what can therefore only sensibly be understood to be the remainder of the estate) got under his conveyance’.

f (6) The fact that the parcels were not conveyed from a common owner does not render inoperable the rules either that the first task is to construe the respective conveyances or that the presumption has its proper place when ‘there is no boundary otherwise ascertainable’.

g I apprehend there would not be much quarrel with those conclusions, and so I turn to the defendant’s amended case which I understand to be this. By virtue of proposition 2 and 3 above, the plaintiff’s land extends only to the edge of the ditch.

By virtue of proposition 4 above, the defendant was conveyed land only to the middle of the hedge.

h The ditch, which by operation of the presumption was part of the old Home Farm before 1975 but which was not included in the land conveyed in 1975, must, therefore, still be a part of Home Farm and must still be owned by the original vendor, Mr Beard.

i I cannot accept that reasoning, which in my judgment betrays these errors. (1) There is no law that the owner of the hedge owns the land beyond it—see Scrutton LJ cited above. There is no custom to that effect—see Goddard LJ above. It is only a presumption.

(2) By misunderstanding the operation of the presumption the defendant has elevated a presumed fact into an established fact. The presumption is not a presumption of law, but a presumption of fact. It entitles the fact-finding tribunal to infer from basic facts (a ditch dug when land was not in common ownership) a presumed fact (the boundary is on the far side of the ditch from the hedge.) That presumed fact is not an established fact because it is capable of being rebutted.

(3) Evidence capable of displacing the presumption is such of the material evidence which is before the fact-finding tribunal. The fact-finding tribunal was the recorder, not a hypothetical observer judging matters as they stood in 1920 or 1921 or indeed at any time before the 1975 conveyance. a

(4) The terms and surrounding circumstances of the 1975 conveyance constitute evidence capable of displacing the presumption.

(5) The conveyance, like the contract which preceded it, must be objectively construed. Consideration of its 'genesis' and of 'the "aim" of the transaction', to borrow from *Prenn v Simmonds* [1971] 3 All ER 237 at 241, [1971] 1 WLR 1381 at 1385, leads inexorably to the conclusion that Mr Beard intended to sell and Mrs Burton intended to buy the whole of the Home Farm land up to the boundary with Saverley Green Farm, wherever that boundary was. It may well be that, being well versed in the rural lore that the ditch belongs to hedge, they might have had a common intention to include the ditch and that it was (per Millett LJ) 'no doubt inadvertently, excluded'. There might well have been a case for rectification. But the deed has not been rectified. The parties to the deed are therefore stuck with the objective meaning of the words of the conveyance which must now be taken to have given effect to their intention to convey the whole estate. Imputed to Mr Beard is, therefore, an assertion that the boundary between his farm and his neighbour's farm was the middle of the hedge. What had only been a presumption that his land included the ditch has been displaced by his tacit admission that his land did not include it. If his land ended in the middle of the hedge, his neighbour's land began there as well. The 1975 conveyance does not operate to 'convey' the ditch to the plaintiff's predecessor: what it did was clarify where the defendant's predecessor regarded a hitherto uncertain boundary line to lie. b  
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(6) Any other conclusion would produce the absurdity that there was a strip of land the width of the ditch running down the field. It would be landlocked because no rights of way are reserved. Such an omission is a further pointer to the true construction of the deed excluding ownership of the ditch to which, on this hypothesis, the vendor could have no access. Mr Foster valiantly counters this absurdity with what he says is an absurdity inherent in Mr Machin's submissions for the plaintiff, namely that if the vendor had sold the top half of the field and conveyed it by deed describing the land by reference to the Ordnance Survey map, but sold the bottom half without such reference, then what everyone would once have thought to have been a straight line would now be a zigzag. That is as may be. But the answer to it is that such an oddity would have been created entirely by sloppy conveyancing where the conveyancers have failed to have regard to the effect of *Fisher v Winch* [1939] 2 All ER 144, [1939] 1 KB 666 on the presumption. That, I suspect, is the true source of the difficulty posed by this appeal. f  
g  
h

If the proper construction of the 1975 conveyance is that Mr Beard conveyed the whole of his land up to its boundary with the adjoining farm, then 'there is no room at all for the operation of the presumption.' It may be another way of saying the same thing, but it seems to me that there is no room for the presumption to apply because the evidence has clearly displaced the inference and rebutted the fact it was seeking to establish. j

I am therefore satisfied that the recorder correctly applied the law to the facts he found and that he came to the correct conclusion. The result does not diminish the usefulness of the presumption and what may be a widely held common perception of its operation in rural communities. I am, however,

- a relieved that the conclusion will have the beneficial result that maps of rural  
England and Wales will not have to be redrawn to show mile upon mile of  
ditches owned by some long forgotten vendor whose solicitors chose to convey  
the land he was selling by reference to the Ordnance Survey map. I am relieved  
that boundary disputes will not as a result have the added complication of tracing  
these long lost owners and squabbling about title having been acquired by  
b adverse possession. As I indicated at the beginning of this judgment, boundary  
disputes are horrid enough as they are.  
I would therefore dismiss this appeal.

- JUDGE LJ.** The action by the plaintiff was formulated in trespass. The claim to  
c possession of the disputed land was based not on general evidence of physical  
control of the land or adverse possession as against the defendant but on proof of  
ownership or title to it. For this purpose it was not enough for the plaintiff to  
demonstrate that contrary to his own assertions the defendant also lacked or was  
unable to prove title to the same disputed piece of land.

- d There was no evidence before the recorder that the disputed land had been in  
common ownership. He decided that the boundary between the two estates had  
been marked by a hedge and ditch which were likely to have originated  
contemporaneously. The ditch was on the plaintiff's side of the hedge.  
Nevertheless he concluded that the plaintiff's title included not only the ditch but  
ran up to the centre of the hedge itself.

- e The difficulty with this conclusion is that there is nothing in any of the deeds  
relating to the plaintiff's land prior to the May 1984 conveyance which begins to  
hint at it. The title of the plaintiff depended on the terms of the May 1984  
conveyance from C J and H B Bedson, the executors of Joseph Bedson deceased,  
who acquired the land by indenture dated 11 April 1921, by verbal description.  
f No reference to ordnance survey maps or plans was made in any relevant deed  
relating to this land prior to 14 May 1984, when the conveyance referred to them  
'for identification purposes only', and went on to state expressly that the land that  
passed to the plaintiff was the land included in the April 1921 indenture.  
Although the 1984 conveyance referred to the ordnance survey, of itself the  
ordnance survey does not fix private boundaries. Therefore although the parties  
g to a conveyance may choose deliberately to adopt the ordnance survey to identify  
the land which is the subject of the conveyance, that in my judgment does not  
enable a party without title to a given parcel of land to convey it to a purchaser  
merely by including within the conveyance a reference to the ordnance survey  
(or any other feature). In summary, and for present purposes ignoring the  
h provisions of the Land Registration Act 1925, he cannot by mere assertion in the  
conveyance, however phrased, pass a title to land over which he himself has  
none, a fortiori where the relevant conveyance, as here, merely refers to the  
ordnance survey for the purposes of identification.

- i Although not cited in argument I find the corollary of the principle I am  
endeavouring to express encapsulated in the observations of Mansfield CJ in  
*Taylor v Needham* (1810) 2 Taunt 278 at 282–283, 127 ER 1084 at 1086:

'... it would be a very odd thing in the law of any country, if A. could take,  
by any form of conveyance, a greater or better right than he had who  
conveys it to him; it would be contrary to all principle. But it does not rest  
merely on the general principle; for if you look into all the books upon  
estoppel, you find it laid down, that parties and privies are not estopped, and



he who takes an estate under a deed, is privy in estate, and therefore never can be in a better situation than he from whom he takes it.'

In reality the conclusion that the defendant nevertheless trespassed on the plaintiff's land was based on evidence about his own lack of title and argument about the applicability or otherwise of the hedge and ditch presumption in the context of the conveyance to the plaintiff as well as to him.

The defendant's title was acquired by conveyance dated 23 July 1985 from Patricia Burton whose title derived from the conveyance to her from Wilfred Beard dated 5 February 1975. The schedule of the 1975 conveyance described the parcels of land by reference to Ordnance Survey field numbers and acreages shown on the plan, which was itself a copy of the relevant part of the Ordnance Survey. She purported to convey the same land to the defendant as Mr Beard had conveyed to her, and for this purpose adopted the same document. The reference to the Ordnance Survey meant that the boundary of the land conveyed by the respective vendors was based on the centre of the hedge line, and did not expressly include the ditch and half the hedge on the plaintiff's side.

Wilfred Beard had acquired his land from Joseph Beard by conveyance dated 25 September 1956 and he in his turn had acquired the land by conveyance dated 13 January 1920. Each of these conveyances depended on verbal description and neither referred to any plan nor the Ordnance Survey.

From this brief summary it is clear that until 5 February 1975 all the deeds in respect of both parcels of land were silent about the true line of the boundary between them. As the recorder found, the relevant parcels of land, including the disputed land, were not for any relevant purposes in common ownership. Next, for the reasons given when analysing the plaintiff's title, the defendant could not purchase land from Mrs Burton which she herself was not entitled to sell. Finally, in my judgment the application of the hedge and ditch presumption until 4 February 1975 would, in the absence of any other relevant evidence (and there was none) have led to the conclusion that the land owned by Wilfred Beard or his predecessors in title included the area of land now in dispute.

Although a significant part of the argument depended on analysis of the hedge and ditch principles, in my judgment they are uncontroversial, and adequately summarised for present purposes in *Emmet on Title* (18th edn, 1983) vol 1, para 17.023:

'When two estates are separated by a hedge and a single ditch, the presumption is, in default of evidence, that both ditch and hedge belong to the owner of the land on which the hedge is planted ... The presumption does not arise if the position of the boundary can be ascertained from the title deeds.'

I can see no basis for trivialising this principle. In large areas of the countryside it is well understood and has indeed ensured that those with a boundary formed by a hedge and ditch know exactly where they stand without recourse to legal advice or litigation. In *Fisher v Winch* [1939] 2 All ER 144 at 145, [1939] 1 KB 666 at 669 Greene MR observed 'it is a very convenient rule of common sense, which applies in proper cases in regard to agricultural land, where there is no boundary otherwise ascertainable'. Goddard LJ, while rejecting the argument that the hedge and ditch method of ascertaining a boundary amounted to a 'custom' and underlining that it was merely a presumption, added that it was 'very often decisive where there is no evidence at all as to what the boundaries are' (see [1939] 2 All ER 144 at 148, [1939] 1 KB 666 at 674).



a In *Davey v Harrow Corp* [1957] 2 All ER 305 at 307, [1958] 1 QB 60 at 69 Lord Goddard CJ returned to the same point acknowledging that 'the learned judge was justified, in the absence of the further evidence which was given before us, in applying the presumption that the bank and fence were the property of the landowner on whose side of the fence the ditch was not'.

b In *Davey's* case the conveyances which formed the plaintiff's title were always described by reference to the Ordnance Survey, and the case involved the rather odd situation that the defendant, having pleaded that the trees with the encroaching roots were on their property, asserted after all, that the land on which the trees grew belonged to the plaintiff or his predecessors in title. In the present case neither title was identified by reference to Ordnance Survey plans until relatively recently, and certainly not before February 1975. In *Fisher v Winch* c the boundary under consideration had been created out of two separate disposals of parcels of land on successive days by the common owner. Although the conveyances were differently worded, examination of the title deeds to both parcels of land demonstrated the line of the boundary. As Beldam LJ commented in *Hall v Dorling* (1996) 74 P & CR 400 at 404, 'if the trustees had specifically d conveyed land delineated on a plan to the defendant they could not subsequently in law transfer it to the plaintiff'. Therefore the decision in *Fisher v Winch* was hardly surprising. By contrast, in the present case, the deeds did not stem from common ownership of land nor did the conveyances immediately follow one another. Rather two separate titles without an identifiable common source of origin were under consideration.

e If when considering the plaintiff's claim the court were limited to consideration of the words of the separate conveyances from which each party received its title, or in other words, in the present case without reference to title (or lack of it) before 14 May 1984 in relation to the parcel of land belonging to the plaintiff, and in the defendant's case, without reference to title before 23 July f 1985, or indeed 5 February 1975, then the decision in *Fisher v Winch* would lead to the conclusion that the line of the boundary was the middle of the hedge and that the plaintiff were entitled to the disputed land. One simply looks at the two plans and by reference to the Ordnance Survey the relevant boundary lines shown in each coincide.

g In my judgment the approach to the problem adopted in *Fisher v Winch* is not justified when the dispute does not arise out of the creation of two parcels of land out of one. In the present case there has in law been no link between the titles to the separate parcels of land owned by the plaintiff and the defendant. Therefore the two unconnected titles must be analysed. The history cannot be ignored, h particularly where as here, the conveyance on which the plaintiff's title depends expressly refers to the 1921 conveyance. Despite the reference to the Ordnance Survey for identification purposes this reference emerged from nowhere without any evidence to suggest that the vendor was entitled to sell the disputed land. Indeed he only purported to sell the land which had been acquired by Joseph Bedson under the April 1921 conveyance. Therefore without repeating the j reasons given earlier in this judgment the plaintiff's conveyance did not vest ownership in him. Equally, the defendant's claim to the disputed land depended on the hedge and ditch presumption of law but was contradicted by the conveyance to him. Whatever the position may have been in February 1975, the conveyance to the defendant did not grant him title to the disputed land. However in my judgment the deficiencies in his title do not result in the acquisition of the land by the plaintiff.

This conclusion leaves a strip of apparently valueless land between the two properties which belong to neither the plaintiff nor the defendant. This is unlikely to have been the intention of the parties who owned the disputed land, Mrs Burton, or more particularly Mr Beard. Treating them for present purposes only as one, so as to avoid unnecessary repetition, as they did not deliberately reserve this small piece of land, for example, to allow for subsequent building development on it, it presumably all came about by oversight or accident. That would not justify the court interfering with rights to land which were not disposed of expressly, or in effect decide that they forfeited their title to land to someone to whom they had not sold it. Neither Mr Beard nor Mrs Burton intended that the hedge and ditch which belonged to them should become the property of the plaintiff. Their deeds did not say so. They should not be deemed to have surrendered the disputed land to the plaintiff or any successors in title.

The solution reached in this case is that there has been a deed of confirmation purporting to put right the accidental omission from the 1975 and 1985 conveyances to the defendant. It has no bearing on the outcome of this case because it was not at any stage before the recorder, nor indeed before this court. I have therefore wholly ignored it in reaching my conclusion, but pause to observe, first, that it if had been before the recorder it might have assisted in the resolution of the problems, but this being a boundary dispute, it is impossible to conclude that it would have brought this expensive litigation to an end, and second, that where similar problems arise, it would be sensible for the predecessors in title to be contacted at a very early stage in the proceedings and an appropriate deed or declaration obtained from them. It is unlikely that the owner of a valueless piece of land, which he thought he had disposed of, for which he believed he had ceased to have any responsibility, would become unreasonably demanding. Finally, in view of the conclusion reached by Ward and Simon Brown LJ, whose judgments I have read in draft, both vendors and purchasers of land should be alerted to the problems of using the Ordnance Survey for the purpose of identifying the land which they respectively wish to sell and buy. The Ordnance Survey highlights the hedge and ignores the ditch. The inconvenience of buying and thereafter maintaining (whether by laying, or otherwise) half the width of a hedge, without any entitlement to use the adjacent ditch, as well as the scope for dispute with the owner of the other half of the hedge, require that the most careful consideration should be applied to the problem of using the Ordnance Survey as providing the boundary between the two parcels of land.

For the reasons given earlier in this judgment I would allow this appeal.

**SIMON BROWN LJ.** Where two estates are separated by a hedge and a ditch, both are presumed to belong to whoever owns the land on the hedge-side of the ditch. This is known as the hedge and ditch presumption. But it is only a presumption and it is rebuttable whenever other evidence points to a different boundary.

The novel question raised by this appeal is whether the presumption is rebutted merely by a conveyance of the hedge-side land which, by direct reference to an Ordnance Survey (OS) map, conveys only the land up to the centre point of the hedge.

Mr Foster, on behalf of the appellant (the hedge-side owner) submits not. He acknowledges that as a result of the two successive conveyances of the hedge-side land, respectively in 1975 from Wilfred Beard to Patricia Burton and in 1985 from

a Patricia Burton to the appellant, both Mrs Burton and in turn the appellant himself acquired land only to the centre of the hedge. He relies, however, on the judge's finding of fact that prior to 1975 the hedge and ditch presumption would have arisen in Wilfred Beard's favour to argue that the subsequent conveyances of the hedge-side land, whilst admittedly failing to convey the further half of the hedge and the ditch to the appellant, can on no view have operated to transfer  
b this strip of land to the ditch-side owner, the respondent. Rather, he submits, ownership of this strip remains in Wilfred Beard's estate. As for the 1984 conveyance of the ditch-side land to the respondent, that, Mr Foster submits, was of entirely neutral effect. It purported to convey only the land which the vendor's predecessor in title had himself acquired under the 1921 conveyance and its reference to the OS map was for identification purposes only.

c For my part, I accept that the 1984 conveyance of the respondent's land was of neutral effect. It was consistent equally with the disputed strip being included in or excluded from the land being transferred. Even, indeed, had the 1984 conveyance purported to convey this strip by defining the land (as the 1975 and 1985 conveyances did) directly by reference to the OS plan, that too, I am  
d prepared to accept, would not have been sufficient to displace the presumption: the appellant as hedge-side owner could still have contended that the respondent's predecessors in title had purported to convey to him more than they owned and that the boundary remained where the presumption placed it.

Therefore, as I repeat, the case turns on the effect of the 1975 and 1985 conveyances. Do these operate to rebut the presumption?

e Ward LJ has already considered the main authorities and in particular has set out the relevant parts of the judgments of the Court of Appeal in *Fisher v Winch* [1939] 2 All ER 144, [1939] 1 KB 666. I acknowledge, of course, that in that case the earliest conveyances before the court, the conveyances which had transferred the respective estates out of common ownership, had conveyed the properties by  
f reference to OS plans, and that in the case of the defendant hedge-side owner that had been, as here, by direct reference to the plan. Necessarily, therefore, the court was bound to conclude that the plan and not the presumption was decisive of the position of the boundary: if the ditch had been dug before the conveyances (ie whilst the estates were still in common ownership), then by definition it could have raised no presumption at all; if, however, it were dug after the conveyances,  
g it could not enlarge the hedge-side owner's estate which was already by then established by the terms of the conveyance itself.

The present case, I accept, is by no means as simple as that. But to my mind the plain fact that the 1975 conveyance (and in turn the 1985 conveyance) transferred land only to the centre of the hedge (a fact which Mr Foster now  
h acknowledges although apparently it was contested below, certainly on the pleadings) should be regarded, in the absence of any evidence to the contrary, as decisive of the true boundary of the estate which Mr Beard owned and was presumably intent on conveying. Given, indeed, the presumption as to the true boundary arising from the OS plan and, as I see it, the natural presumption, in the  
i absence of any evidence to the contrary, that Mr Beard was intent on conveying his whole estate—rather than on leaving in limbo down the years a strip of land in the middle of nowhere whose ownership it might become ever more difficult to establish—I see no room for the operation of the hedge and ditch presumption at all. Indeed I go further. I question whether in a case like the present it was appropriate to investigate whether, prior to 1975, the facts would have been such as to found a claim based on the presumption. Here, it will be noted, there was a factual dispute below as to whether there ever had been a ditch running



alongside the hedge at the relevant part of the boundary. True, that dispute was resolved in the defendant's favour. But why, I ask rhetorically, did the judge ever need to address it? He will have decided this factual issue on the balance of probabilities, perhaps by the narrowest margin. Yet the likelihood that Mr Beard thought that his boundary ended at the hedge by reference to which he conveyed his estate seems to me altogether clearer.

I conclude that once, as here, the hedge-side owner's land appears to be defined by an OS related conveyance to end at the line of a hedge, that (provided only that the conveyance of the adjacent estate is consistent) is that, and it becomes unnecessary to explore whether or not, at some earlier date, the facts might have supported a claim to additional land based on the hedge and ditch presumption. It is only when a boundary dispute crystallises that one needs to consider the position. If, as here, the hedge-side owner's land has by then been defined by a conveyance, that is decisive. Only if the conveyance leaves his boundary unclear does it become necessary to research, perhaps into the distant past, to see whether the dispute can instead be resolved by that touchstone of last resort, the hedge and ditch presumption.

The short answer to the appellant's question: how could the 1985 conveyance transfer to the respondent more land than, given the hedge and ditch presumption, was his vendor's to sell, is that it did not: the question wrongly predicates that the presumption had operated to define the boundary before the 1975 conveyance. It had not. There had not by then been any boundary dispute and thus no occasion to decide one way or the other whether the presumption arose. By the time the dispute arose, the boundary was well able to be determined in the manner I have indicated, ie by the conveyances, in particular the 1975 and 1985 conveyances of the appellant's land. There was accordingly no good reason to assume that the respondent's land prior to 1975 extended only to his edge of the ditch and to my mind the judge's needless findings of fact on the point are no sufficient basis for according the presumption a role in resolving this dispute that it should never have had.

If it be suggested that the approach I advocate depreciates the value of the hedge and ditch presumption, a presumption widely recognised and relied upon up and down the country, I reply not so. The presumption remains as valuable as ever it was. Those whom it favours, however, must recognise that it will be lost by conveyances of their land which clearly appear to deny its effect. If, as vendors, they wish to transfer the ditch and not just half the hedge, their conveyance should not define the land, as here, by direct reference to an OS plan which puts the boundary along the hedge. If, for whatever unlikely reason, they wish to retain the ditch, their conveyance should make this plain. If, as purchasers, they are intent upon acquiring the ditch, they should ensure that the conveyance to them is apt for the purpose. If in all this they fail, the presumption will not thereafter avail them.

I too would dismiss this appeal.

*Appeal dismissed.*



## Hunter v British Coal Corp and another

COURT OF APPEAL, CIVIL DIVISION

HOBHOUSE, BROOKE LJ AND SIR JOHN VINELOTT

20 JANUARY, 11 FEBRUARY 1998

*Damages – Personal injury – Nervous shock – Defendants’ breach of duty causing plaintiff to be involved in events leading to accident – Plaintiff not personally or directly involved at time of accident – Plaintiff suffering shock and depression when subsequently learning of colleague’s death believing that he was in part responsible for accident – Whether plaintiff direct or primary victim and entitled to damages for nervous shock caused by defendants’ breach of duty of care.*

The plaintiff was employed by the second defendant as a driver of a diesel-powered vehicle at the first defendant’s coal mine. Whilst moving four junction legs on his vehicle he became aware of a hydrant protruding down into the roadway on his right from a water range. He tried to manoeuvre the vehicle around the hydrant, but as he did so the front edge of the load struck the hydrant causing water to flow. Concerned that the vehicle would get stuck in the mud, the plaintiff attempted, with help from a fellow employee, C, to close up the hydrant valve, but was unable to do so, and he went off in search of a hose-pipe to channel the escaping water onto the conveyor. When he was 30 metres away from the scene, the hydrant burst and he rushed to find a stop valve to shut the water off, which he managed to do after about ten minutes. Whilst doing so, he heard a message over the tannoy that a man had been injured and, on his way back to the scene of the accident, he met a workmate who told him that it looked like C was dead. The plaintiff immediately thought that he was responsible and suffered nervous shock and depression as a consequence. Thereafter, he brought proceedings against the defendants for damages for psychiatric injury. The judge found that the defendants were negligent in failing to maintain the prescribed minimum vehicle clearances at the accident site and in breach of s 83<sup>a</sup> of the Mines and Quarries Act 1954, but dismissed the plaintiff’s action on the ground, inter alia, that he did not qualify as a primary victim because he was not a participant in the accident as his participation had ceased when he turned off the water. The plaintiff appealed.

**Held** – (Hobhouse LJ dissenting) A plaintiff who believed that he had been the involuntary cause of another’s death or injury in an accident caused by the defendant’s negligence could recover damages as a primary victim for psychiatric injury suffered as a result if he had been directly involved as an actor in the incident. However, a plaintiff who was not present at the scene of an accident could not recover damages as a primary victim for such injury because he felt responsible for the accident when the news of it was broken to him later. In the instant case, the plaintiff was not involved as an actor in the incident in which C died, since he was 30 metres away when the hydrant burst, and he only suffered his psychiatric injury on being told of C’s death 15 minutes later and because he felt responsible for it. It followed that there was not a sufficient

<sup>a</sup> Section 83, so far as material, provides: ‘No internal combustion engine, steam boiler or locomotive shall be used below ground in a mine otherwise than in accordance with the provisions of regulations in that behalf or with the consent of ... an inspector.’

degree of physical and temporal proximity present for the plaintiff to be treated as a primary victim. Moreover, the illness which he suffered was an abnormal reaction to the news of C's death triggered off by an irrational feeling of responsibility and not a foreseeable consequence of the defendants' breach of duty of care. Accordingly, the appeal would be dismissed (see p 104 j to p 105 c, p 106 j to p 107 a, p 108 h to p 109 d, p 110 j to p 111 c j to p 112 g and p 114 c to e, post).

*Alcock v Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907 and *Frost v Chief Constable of the South Yorkshire Police*, *Duncan v British Coal Corp* [1997] 1 All ER 540 considered.

*Young v Charles Church (Southern) Ltd* (1997) Times, 1 May distinguished.

## Notes

For liability for nervous shock, see 33 *Halsbury's Laws* (4th edn reissue) para 612, and for cases on the subject, see 17 *Digest* (Reissue) 145–148, 378–393.

For the Mines and Quarries Act 1954, s 83, see 29 *Halsbury's Statutes* (4th edn) (1995 reissue) 210.

## Cases referred to in judgments

*Alcock v Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907, [1992] 1 AC 310, [1991] 3 WLR 1057, HL.

*Andrews v Williams* [1976] VR 831, Vic SC.

*Bell v Great Northern Rly Co of Ireland* (1890) 26 LR Ir 428, Ex D.

*Chadwick v British Transport Commission* [1967] 2 All ER 945, sub nom *Chadwick v British Railways Board* [1967] 1 WLR 912.

*Dooley v Cammell Laird & Co Ltd* [1951] 1 Lloyd's Rep 271, Assizes.

*Dulieu v White & Sons* [1901] 2 KB 669, [1900–3] All ER Rep 353, DC.

*Frost v Chief Constable of the South Yorkshire Police*, *Duncan v British Coal Corp* [1997] 1 All ER 540, [1997] 3 WLR 1194, CA.

*Galt v British Railways Board* (1983) 133 NLJ 870.

*Hay (or Bourhill) v Young* [1942] 2 All ER 396, [1943] AC 92, 1942 SC (HL) 78, HL.

*Hughes v Lord Advocate* [1963] 1 All ER 705, [1963] AC 837, [1963] 2 WLR 779, HL.

*McAlister (or Donoghue) v Stevenson* [1932] AC 562, [1932] All ER Rep 1, HL.

*McFarlane v E E Caledonia Ltd* [1994] 2 All ER 1, CA.

*McLoughlin v O'Brian* [1982] 2 All ER 298, [1983] 1 AC 410, [1982] 2 WLR 982, HL.

*Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, Aust HC.

*Page v Smith* [1995] 2 All ER 736, [1996] AC 155, [1995] 2 WLR 644, HL.

*Ravenscroft v Rederiaktiebolaget Transatlantic* (1992) Times, 6 April, CA.

*Robertson v Forth Road Bridge Joint Board*, *Rough v Forth Road Bridge Joint Board* 1996 SLT 263, Ct of Sess.

*Rowe v McCartney* [1976] 2 NSWLR 72, NSW CA.

*Schneider v Eisovitch* [1960] 1 All ER 169, [1960] 2 QB 430, [1960] 2 WLR 169.

*Wigg v British Railways Board* (1986) 136 NLJ 446.

*Young v Charles Church (Southern) Ltd* (1997) Times, 1 May, CA.

## Cases also cited or referred to in skeleton arguments

*Bryant v London Fire and Civil Defence Authority* (1994) 2 BMLR 124, CA.

*Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605, HL.

*McFarlane v Wilkinson*, *Hegarty v E E Caledonia Ltd* (1997) Times, 13 February, CA.

*Sutherland Shire Council v Heyman* (1985) 157 CLR 424, Aust HC.

**Appeal**

- a The plaintiff, John Hunter, appealed from the decision of Judge Bentley QC sitting at the Sheffield County Court given on 24 April 1997, whereby he dismissed his action in negligence for damages for psychiatric injury suffered in connection with a fatal accident on 1 October 1990 at a coal mine at North Selby, North Yorkshire, owned by the first defendant, British Coal Corp. Mr Hunter was employed by the second defendant, Cementation Mining Co (Cementation). The facts are set out in the judgment of Brooke LJ.

Anthony Berrisford (instructed by Raleys, Barnsley) for Mr Hunter.

Margaret Bickford-Smith (instructed by Nabarro Nathanson, Sheffield) for British Coal and Cementation.

*Cur adv vult*

11 February 1998. The following judgments were delivered.

- d **BROOKE LJ** (giving the first judgment at the invitation of Hobhouse LJ). This appeal raises a quite new point. Under what circumstances does the law provide compensation for survivor's guilt? Should a workman who was not present at the scene of a fatal accident to a work colleague for which he believed himself to be responsible be compensated for the reactive depression he suffered as a consequence? The judge dismissed the plaintiff's action on conventional lines, holding that he was not a participant and did not qualify to be regarded as a secondary victim of the accident. It has been argued in this court that the law has now moved on, and that the effect of one obiter dictum in the House of Lords in *Alcock v Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907, [1992] 1 AC 310 and of the decision of this court in *Frost v Chief Constable of the South Yorkshire Police*; *Duncan v British Coal Corp* [1997] 1 All ER 540, [1997] 3 WLR 1194, now under appeal to the House of Lords, is to widen the scope of recovery to an extent not previously recognised by English law. If this is indeed the law, it will have incalculable consequences.

- g This is not a conventional case of post-traumatic stress disorder (for which see ch 3 of Law Commission Consultation Paper No 137 *Liability for Psychiatric Illness*). It is not a case in which the plaintiff was himself at risk of physical injury when the accident occurred (*Page v Smith* [1995] 2 All ER 736, [1996] AC 155). It is not a case in which the plaintiff was involved as a rescuer (*Frost's case*). Nor did he ever see the deceased's dead body or the scene of the accident until after it was cleared up. There was nothing particularly out of the ordinary about the shock to his nervous system which he suffered when he was told, 15 minutes later, that his workmate had died. Part of the cause of his anxiety reaction was his feeling that he had triggered off the chain of events which led to his colleague's death: the other part was derived from what he heard about the severity of the injuries he had suffered. It was common ground at the trial that he had suffered a mild to moderate depressive illness for two years following the accident, and the judge accepted the evidence of a psychiatrist who described Mr Hunter's continuing guilt feelings as pathological in origin.

Before discussing the applicable law, I will set out the facts. This is an appeal by the plaintiff, John Hunter, from a judgment of Judge Bentley QC in the Sheffield County Court on 24 April 1997 when he ordered that judgment be entered for the defendants, British Coal Corp and Cementation Mining Co



(Cementation), on the trial of the plaintiff's claim that he was entitled to damages for psychiatric injury suffered in connection with a fatal accident on 1 October 1990 at British Coal's coal mine at North Selby, in North Yorkshire. a

At the time of the accident Mr Hunter was 33 years old. He was employed by Cementation as the driver of a diesel-powered Free Steered Vehicle (FSV) and was working at North Selby pursuant to contractual arrangements made between the two defendants. The judge accepted Mr Hunter's evidence at the trial without any reservation and said he was an obviously truthful witness. His account of the matter, which the judge accepted, was on the following lines. b

He had started work at 6 am that day. During the afternoon he was instructed to take four junction legs from J18 to the North Return. He loaded them onto his FSV and secured them in place, using two load binders and pack wood. He then set off inbye, with nobody with him to act as a look-out or guard. He went through the air doors on J12, round a bend and then right into the North transport road. c

Floor conditions were now very bad. Floor blow had led to the floor being rutted and uneven, and the travelling space available to him was reduced by a conveyor running along the left hand side and by a pipe range to the right. The only light came from his cap lamp and the vehicle's headlights. The driver's seat in his FSV was at right-angles to the direction of travel, and there were blind spots to both front and rear. d

There came a stage when he became aware of a hydrant protruding down into the roadway on his right from the water range. He took steps to lower the plate or bed of his vehicle, in order to reduce the height of his load, in an effort to enable the loaded vehicle to clear the hydrant, but as he was lowering the plate and travelling forwards, the front edge of the load struck the hydrant. He immediately reversed back and then stopped his vehicle and got out. e

He could see water coming out of the hydrant's mouth, as if a tap had been turned on. He had to stop the water flow as soon as possible as he was afraid his FSV might get stuck in the mud. He therefore tried unsuccessfully to turn the wheel of the hydrant valve, and he was then joined at the scene by Mr Tommy Carter, a fellow employee, who was carrying a roof bolt. The two men then used the roof bolt as a makeshift bar in another attempt to turn the wheel of the hydrant valve, but water still continued to escape. Mr Hunter then looked around for a hose, with the idea of channelling the escaping water onto the conveyor. He went some way inbye in an unsuccessful quest for a hose, and he then came back and set off outbye on the same mission, believing he could probably find one at J99's panels. Unfortunately he failed to spot a hose close to the hydrant itself. f

When he was 20 to 30 metres outbye he heard an almighty bang, like a bomb going off, and the sound of water screaming through the pipes. He looked back and saw a large cloud of dust. He shouted 'I'll get the water' and hurried off outbye to find a stop valve and shut off the water. As he hurried outbye he was saying to himself: 'I hope that Tommy is out of that.' J12 is about 307 metres from the accident scene, and when he got there he managed to turn the stop valve, with help from others, and shut the water off. It took him a good ten minutes to turn the water off. As he was doing this, he heard a message over the tannoy to the effect that a man had been injured. g

Once the water had been turned off, he began to walk back inbye. While he was on his way he met a workmate who told him that it looked like Tommy was h



a dead. His immediate reply was 'I killed him'. He told the judge: 'Everything went in slow motion from then on. It was like it wasn't happening to me. People were talking to me and at me and it was just buzzing round me. People's mouths were opening and closing and I could not hear.' He said he felt responsible. 'A man has died as a result of my hitting the hydrant.' He was prevented from going back to the scene of the accident and was escorted out of the pit. Those who attended the scene found that the force of the water when the hydrant burst had torn one of Mr Carter's arms right off, but Mr Hunter did not see this.

c Dr Peter Wood, a consultant forensic psychiatrist, told the judge about the effect of this incident on Mr Hunter. Although he knew it was a freak accident, he has felt particularly responsible and guilty about it, and he has been profoundly affected by the experience. He has not been able to sleep properly at night, and he has been preoccupied by his concerns in the daytime. He has not recovered emotionally from the experience. With considerable determination, and the support of his wife, he managed to get back underground a fortnight after the incident, and was able to resume working in similar surroundings. Although this caused him anxiety on a day to day basis, and he found it very difficult to work on his own underground, he coped with his work without breaking down. He lost weight, however, became generally strained and aged a good deal in the aftermath of the accident. Mrs Hunter told the judge that her husband had been a carefree person before the accident, but when he came home that day he was in tears, and for the next two weeks he was unfit for work. He was tearful and went over what had happened again and again.

f Dr Wood, who first saw Mr Hunter in March 1992, found that he had developed nervous problems, principally a reactive depression, in response to his exposure to the fatal accident situation in October 1990. He had an irrational feeling of responsibility for his colleague's death, and he remained saddened and preoccupied by the event 17 months later.

g In a report written three years later Dr Wood said that Mr Hunter had suffered a nervous illness due to his involvement in the accident. He tended to be anxious and preoccupied by memories of the event and his illness was in the mild to moderate range of severity in the first two years. He said that if a person's reaction is still displayed four years later it must be considered as pathological. The range of symptoms Mr Hunter displayed, at their particular severity, and with their persistence in time, all added together to form a mental illness. His guilty feelings were understandable and there was nothing psychologically abnormal about them, but their continuance three years after the accident was an example of psychopathology.

j At the trial, Dr Wood told the judge that initially there was a shock to Mr Hunter's nervous system. The events he had been a part of (and was still very much a part of, from a psychological point of view) had caused him very great distress. His reaction was partly connected with the severity of the injury to his fellow-worker and partly with his feelings of personal responsibility. His feeling of guilt was an abnormal or atypical bereavement reaction. It was a form of 'survivor guilt', which is a common feature of the psychopathology of survivors in armed conflict. His ability to socialise was sufficiently impaired to regard him as having a mental illness of mild severity.

Dr Baker, who gave evidence for the defendants, did not see Mr Hunter until December 1993, and he told the judge that he was willing to accept Dr Wood's history that Mr Hunter had had a mild to moderate depressive illness during the two years that followed the incident. The main difference of opinion between the two psychiatrists was whether that illness continued, and whether it was proper to describe Mr Hunter's feeling of guilt as pathological. a

The judge said that he preferred Dr Wood's evidence to that of Dr Baker. He summarised his evidence quite briefly as being to the effect that Mr Hunter's description of experiencing very acute detachment from reality after hearing that Mr Carter was dead was consistent with his being in a state of shock, and that he thereafter developed a psychiatric illness as a consequence. b

Section 83 of the Mines and Quarries Act 1954 provides that no internal combustion engine or locomotive shall be used below ground in a mine otherwise than in accordance with the provisions of regulations in that behalf, or with the consent of the minister or an inspector. The relevant consent, issued by the Mines Inspectorate, authorised the running of FSVs in roadways where there was a vertical clearance of at least 300 millimetres above every part of the vehicle and a minimum roadway width, in a road where there was a conveyor, of the vehicle width plus 0.6 of a metre. c  
d

The judge found that measurements taken after the accident showed that at the time of the accident clearances in the roadway were below the prescribed minimum. In particular the vehicle clearance was less than the prescribed minimum due to the hydrant projecting further into the roadway than it should have done. The judge was satisfied that this state of affairs had come about due to the gradual convergence of strata, which was a constant problem in this roadway, and not due to the kind of sudden and temporary strata movement which would have afforded an express exemption from the requirements of the consent. He held in those circumstances that British Coal had committed a breach of s 83 of the 1954 Act which was causative of the accident, and that they were also negligent in failing to maintain the minimum clearance at the accident site. He found Cementation negligent and in breach of statutory duty as Mr Hunter's employers on similar grounds, and rejected the allegations of contributory negligence which were levelled at the way Mr Hunter had loaded and driven the FSV. There is no appeal by either defendant against these findings. e  
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The judge held, however, that Mr Hunter did not qualify as either a primary victim or a secondary victim (within the definitions offered by Lord Oliver of Aylmerton in his speech in *Alcock v Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907 at 922–923, [1992] 1 AC 310 at 406–407). He said he was not a primary victim because he was not at any stage put in fear for his own safety and did not witness Mr Carter's accident. When he heard the noise of the water bursting from the range and saw the dust it threw up, he had felt no great anxiety, much less experienced shock. It was only after he had turned the water off and was returning to the scene that he suffered shock, and that not as a result of anything he saw, but as a result of something he was told. By that time, the judge held, he was not a participant in the event, since his participation had ceased when he turned off the water. h  
j

The judge then said, quite shortly, that he was not persuaded that Mr Hunter had made out his claim as a secondary victim any more than did the deputy in *Duncan v British Coal Corp* as reported in *Frost v Chief Constable of the South*

a Yorkshire Police [1997] 1 All ER 540, [1997] 3 WLR 1194. In that case a pit deputy was at the other end of a coal-face 275 metres away when one of his men was crushed to death. He was called to the scene by telephone and arrived there within four minutes.

b Mr Berrisford set out to attack the judge's findings both on the facts and on the law. He soon abandoned his attack on the factual findings, however, when he conceded that on his own client's evidence the judge was entitled to find that he had not suffered shock, or indeed anything resembling psychiatric injury, until he was told about Mr Carter's death while he was going back from J12 to see what happened. His challenge on issues of law was more formidable, and raised issues which have not previously arisen for decision in this court.

c Put shortly, he contended that Mr Hunter was entitled to be compensated as a primary victim because the law would regard him as a participant in the events that were triggered off by the defendants' negligence. Alternatively, Cementation owed him a contractual duty of care, and the psychiatric injury he suffered was a foreseeable consequence of their breach of duty. In the further alternative he was entitled to be compensated as a secondary victim. Mr d Berrisford was anxious that we should make a finding in his client's favour on his first contention since the House of Lords is due to review the decision of this court in *Frost v Chief Constable of the South Yorkshire Police* [1997] 1 All ER 540, [1997] 3 WLR 1194 later this year, and the law relating to his second contention cannot therefore be regarded as settled. He relied entirely on arguments based on the breach of a common law duty of care, and expressly disavowed any e separate argument based on the judge's findings of a breach of statutory duty.

f In advancing his first contention, Mr Berrisford relied almost exclusively on some obiter dicta of Lord Oliver of Aylmerton in the leading case of *Alcock v Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907 at 923–924, [1992] 1 AC 310 at 408. Lord Oliver had sought to divide the cases involving a direct assault on a plaintiff's mind or nervous system into two categories:

‘... those cases in which the injured plaintiff was involved, either mediately or immediately, as a participant, and those in which the plaintiff was no more than the passive and unwilling witness of injury caused to others.’ (See [1991] 4 All ER 907 at 923, [1992] 1 AC 310 at 407.)

g Because the appeals in *Alcock's* case fell into the second category, Lord Oliver said that the cases of the former type were not particularly helpful, except to the extent that they illustrated only a directness of relationship (and thus a duty) which was almost self-evident from a mere recital of the facts. He then referred briefly to *Dulieu v White & Sons* [1901] 2 KB 669, [1900–3] All ER Rep 353, where h the plaintiff was directly threatened when the runaway vehicle broke through the front of the public house where she was employed; *Bell v Great Northern Rly Co of Ireland* (1890) 26 LR Ir 428, where the plaintiff was personally threatened by a terrifying experience as a passenger on the defendant's railway; and *Schneider v Eisovitch* [1960] 1 All ER 169, [1960] 2 QB 430 where the plaintiff was herself j directly involved as a victim in the accident in which her husband was killed.

Lord Oliver ([1991] 4 All ER 907 at 923, [1992] 1 AC 310 at 408) went on to put the so-called ‘rescue cases’, of which he gave *Chadwick v British Transport Commission* [1967] 2 All ER 945, [1967] 1 WLR 912 as an example, into the same category. He said that it was well established that the defendant owed a duty of care not only to those who are directly threatened or injured by his careless acts



but also those who, as a result, are induced to go to their rescue and suffer injury in so doing. Lord Oliver then said: a

‘These are all cases where the plaintiff has, to a greater or lesser degree, been personally involved in the incident out of which the action arises, either through the direct threat of bodily injury to himself or in coming to the aid of others injured or threatened. Into the same category, I believe, b  
fall those cases such as *Dooley v Cammell Laird & Co Ltd* [1951] 1 Lloyd’s Rep 271, *Galt v British Railways Board* (1983) 133 NLJ 870 and *Wigg v British Railways Board* (1986) 136 NLJ 446 where the negligent act of the defendant c  
has put the plaintiff in the position of being, or of thinking that he is about to be or has been, the involuntary cause of another’s death or injury and the illness complained of stems from the shock to the plaintiff of the d  
consciousness of this supposed fact. The fact that the defendant’s negligent conduct has foreseeably put the plaintiff in the position of being an unwilling participant in the event establishes of itself a sufficiently proximate relationship between them and the principal question is whether, in the circumstances, injury of that type to that plaintiff was or was e  
not reasonably foreseeable. In those cases in which, as in the instant appeals, the injury complained of is attributable to the grief and distress of witnessing the misfortune of another person in an event by which the plaintiff is not personally threatened or in which he is not directly involved as an actor, the analysis becomes more complex. The infliction of injury on an individual, whether through carelessness or deliberation, necessarily f  
produces consequences beyond those to the immediate victim. Inevitably the impact of the event and its aftermath, whether immediate or prolonged, is going to be felt in greater or lesser degree by those with whom the victim is connected whether by ties of affection, of blood relationship, or duty or simply of business. In many cases those persons may suffer not only injured feelings or inconvenience but adverse financial consequences as, for instance, by the need to care for the victim or the interruption or non-performance of his contractual obligations to third parties. Nevertheless, except in those cases which were based upon some ancient and now outmoded concepts of the quasi-proprietorial rights of husbands over their wives, parents over their children or employers over their menial servants, the common law has, in general, declined to entertain claims for such consequential injuries from third parties save possibly where loss has arisen from the necessary performance of a legal duty imposed on such party by the injury to the victim. Even the apparent exceptions to this, the old actions for loss of a husband’s right to consortium and for loss of servitium of a child or menial servant, were abolished by the Administration of Justice Act 1982.’ (See [1991] 4 All ER 907 at 923–924, [1992] 1 AC 310 at 408–409.) g  
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I have quoted this passage at length because it illustrates vividly the reluctance of the common law to afford compensation in injury cases to those who are not personally threatened or personally involved as actors in an accident, even though the loss they suffer as a result of the injury to the primary victim is readily foreseeable. j

Lord Oliver was therefore postulating three different types of primary victim in whose favour the law will recognise a direct duty of care owed by the person



a who performs the act which occasions the victim's psychiatric injury: (i) those who are caused to fear physical injury to themselves; (ii) those who come to the rescue of the injured; (iii) those who believe that they are about to be, or have been, the involuntary cause of another's death or injury.

b Lord Oliver treated those in each category as 'mediately or immediately involved as a participant'. They must have been 'personally involved' or 'directly involved as an actor' in the incident out of which the action arose, and in the second and third of these categories it is the fact that the defendant's negligent conduct has foreseeably put them in the position of being an unwilling participant in the event that establishes of itself a sufficiently proximate relationship between them.

c Of the three cases to which Lord Oliver referred in identifying the third of these categories *Dooley v Cammell Laird & Co Ltd* [1951] 1 Lloyd's Rep 271 is the only one of which we were shown a full report. The plaintiff crane driver in that case recovered damages for breach of statutory duty against his employers, Cammell Laird, for nervous shock. He also recovered damages for negligence against Mersey Insulation, who were using one of Cammell Laird's cranes for loading material from the quay into the hold of a ship, and it is this part of Donovan J's decision which attracted Lord Oliver's attention. The plaintiff suffered his shock, which aggravated his pre-existing neurasthenia, because the rope to which a load was attached suddenly broke, and the load was precipitated into the hold. Although the plaintiff could not see if the load had hit anybody—and nobody was in fact injured—he felt wretched, and had been unable to return to work as a crane driver ever since. Donovan J held that this fear was not unreasonable in the circumstances, and that it had caused the plaintiff's nervous shock, and that this was a consequence which Mersey Insulation ought reasonably to have expected when it provided a weak rope to the sling. In this connection he applied the dictum of Lord Macmillan in *Hay (or Bourhill) v Young* [1942] 2 All ER 396 at 403, [1943] AC 92 at 104:

f 'The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.'

g In *Bourhill v Young*, of course, the pursuer failed on the facts because she was not so placed that there was any reasonable likelihood of her being affected by the deceased's careless driving.

h In *Wigg v British Railways Board* (1986) 136 NLJ 446 the plaintiff train driver recovered damages for the shock and trauma he suffered soon after his train was brought to an abrupt halt by the emergency brakes as it was leaving a station. A passenger trying to board a train had been dragged along the platform until he fell between it and the train, and when the driver found his body and stayed with it for ten minutes until help arrived he began to tremble from shock.

i In *Galt v British Railways Board* (1983) 133 NLJ 870 the plaintiff train driver suffered a shock as he rounded a bend when he saw two railwaymen on the track only 30 yards away from him when he was driving his train at 65 mph. He had a pre-existing condition which predisposed him to myocardial infarction and Tudor Evans J awarded him damages for the consequences of the coronary attack occasioned by this incident.

Following the decision in *Alcock's case*, in *Robertson v Forth Road Bridge Joint Board, Rough v Forth Road Bridge Joint Board* 1996 SLT 263 the First Division of the Court of Session dismissed the claims of two workmen whose colleague was blown off the Forth Bridge to his death. The court held that the requisite relationship of proximity for secondary victims did not exist. Lord Hope (at 268) referred to Lord Oliver's third category of primary victims and said:

'The plaintiff may actually have caused the death or injury or he may think that he is about to or has done so. Whichever of these alternatives applies is immaterial. What matters is that it was his own hand, or his own act, which was the cause or supposed cause of it. This is the essential characteristic which distinguishes the category from that of the bystander who, while present at the time of the accident and saw it happen, was not directly involved in it as the actor by whose hand the death or injury was caused to the third party.'

Lord Allanbridge (at 271) said that in his view Lord Oliver was—

'indicating that in cases of accidents at work it is only where a workman is placed in a position where he has reason to consider at the time of it that he himself was the involuntary cause of it, so that he suffered from such anxiety and guilt about it as to sustain this trauma, that his employers could be liable in damages for his psychiatric illness caused as a result of his witnessing the accident.'

I do not find anything in the judgments in this court in *Frost v Chief Constable of the South Yorkshire Police* [1997] 1 All ER 540, [1997] 3 WLR 1194, in which *Robertson's case* was dismissed, which advances this line of cases. In *Frost's case* the court was concerned with those who witnessed horrors, and Henry LJ's explanation ([1997] 1 All ER 540 at 555–556, [1997] 3 WLR 1194 at 1207–1208) of the nature of post-traumatic stress disorder in such a case shows that it was involved with a wholly different situation from the one we have to consider. In *Dooley's case* and *Galt's case* the plaintiffs, as crane driver and train driver respectively, were unquestionably direct participants in the action when as a result of what they saw from their driving seats they suffered the shock and resulting physical or psychiatric illness for which they were held to be entitled to recover. I find it hard to detect any general principle arising out of Tucker J's pre-*Alcock* judgment in *Wigg's case* in which he applied one of the tests appropriate for secondary victims and decided the case on orthodox foreseeability grounds. It is noteworthy that in *Alcock's case* [1991] 4 All ER 907 at 934, [1992] 1 AC 310 at 420 Lord Jauncey described *Dooley's case* as a 'very special case' (he did not refer to *Galt's case* or *Wigg's case*), and the other three members of the House did not mention this line of authority at all.

If one puts on one side the questions which may arise out of Mr Hunter's contractual relationship with Cementation, there is no case of which I am aware in which a plaintiff who was not present at the scene of an accident nor present thereafter as a rescuer, has been held entitled to recover damages as a primary victim of the accident for psychiatric injury which arose when the news of the accident was broken to him/her later. In both *Schneider v Eisovitch* [1960] 1 All ER 169, [1960] 2 QB 430 and the Australian case of *Andrews v Williams* [1976] VR 831 the plaintiffs were held entitled to recover as primary victims for the shock of hearing later that a very close relative (husband in one case, mother in the

a other) had died in an accident in which they themselves had been involved and suffered injuries.

The law's reluctance to recognise anxiety caused by survivor's guilt was evidenced in one Australian case in which a plaintiff claiming damages on this account did suffer injuries in a car accident in which the driver suffered catastrophic injuries. In *Rowe v McCartney* [1976] 2 NSWLR 72 the New South Wales Court of Appeal was concerned with a case in which the owner of a car somewhat reluctantly allowed a friend to drive her car on the basis that he would be careful. While the friend was driving, the car ran off the road and hit a telegraph pole. The driver became a quadriplegic as a result of his injuries, and the owner was less seriously injured. In addition to her physical injuries, however, she suffered a depressive neurosis caused by a feeling of guilt arising from the fact that if she had not allowed her friend to drive, the tragedy which had befallen him would not have occurred.

c The majority of the Court of Appeal (Moffitt P and Samuels JA, Glass JA dissenting) held that the nature of the harm the plaintiff suffered was not a foreseeable consequence of the events that happened, and they distinguished this type of case from the more familiar case, exemplified by *Hughes v Lord Advocate* [1963] 1 All ER 705, [1963] AC 837 where a foreseeable kind of injury is caused in an unforeseeable way.

Samuels JA ([1976] 2 NSWLR 72 at 89–90) said:

e 'It is necessary, first, to characterise the nature of the harm which the plaintiff did suffer—held in this case to have been unforeseeable—in order to determine whether that harm can reasonably be included in a wider, more general and foreseeable category. The harm which she sustained as a result of the events which happened was the onset of a complex or obsessive feeling of guilt or remorse which manifested itself symptomatically in a depressive illness. No doubt the feeling of guilt was a neurotic reaction to the circumstances, and was thus a mental illness. But I do not consider it to be an adequate answer to the present problem merely to seize upon that description, and allot the plaintiff's damage, without more, to the category of foreseeable harm. I do not see anything in *Mount Isa Mines Ltd. v. Pusey* ((1970) 125 CLR 383), for example, which compels such a step; indeed, Windeyer J's reasoning tends the other way. Certainly, if the infliction of a feeling of guilt was foreseeable, as the infliction of emotional shock was in *Mount Isa Mines Ltd. v. Pusey*, then the nature of the sequential symptoms would not be determinative; it would not matter what kind of psychiatric disability followed. But the question here, of course, is whether that initial injury was indeed foreseeable. The learned judge found that it was not, and that conclusion is not open to challenge. However, he did fail, with respect, to make the next inquiry: so it is thus necessary for me to decide whether the feeling of guilt was harm of a kind which was foreseeable. I do not think that it was. Granted that the harm suffered might be designated as mental illness and that mental illness was foreseeable, I take the view that, in this case, it is necessary and legitimate to penetrate the categories more closely. The plaintiff's agreement to let the defendant drive was a relevant cause of the harm in fact suffered, but was, or would have been, causally irrelevant to the mental damage which the defendant ought to have foreseen. The harm suffered was, in my opinion, of an entirely different kind from that to



which the defendant ought reasonably to have had regard as a likely consequence of his negligence.'

Moffitt P (at 76) agreeing, compared the case with the case of a mother who sues an insurance company through the agency of her son as defendant where the son injured himself upon a motor bike, a gift from his mother, and where she suffers psychiatric injury due to her neurotic blaming herself for her son's injury; or that of the mother who sues a motorist who negligently injures her child on the way to school, the mother suffering a psychiatric injury, not from nervous shock, but by self-blame for allowing her child to go to school. He then said:

'These classes of psychiatric injury are not, in my view, foreseeable. The tenuous connection between these types of psychiatric damage, which are directly connected with the plaintiff's own conduct and the plaintiff's abnormal reaction to it, places such damage into a class where such damage is not foreseeable. It was argued that the kind of injury sustained was simply some injury or at least some psychiatric injury to a passenger, which kind of injury, of course, is foreseeable if the driver is negligent. It was then argued that, as the plaintiff was a passenger, all injury sustained by her with any link with the negligent act, whether foreseeable or not, was compensable. Such an approach seeks to define the class by reference to the relationship of the injured person to the defendant, for example, passenger and driver or employee and employer. Upon such an approach, however, it seems to me the further question must arise, namely, whether there is included in this class of injury any injury, no matter how remotely linked, provided only it is sustained by a person who is a passenger or employee, or whether the injury must be one sustained by the person in the capacity of a passenger, namely, by reason of his being a passenger or employee. I would answer the question in favour of the latter alternative. The plaintiff's psychiatric injury, upon his Honour's findings, did not depend in any way upon her being a passenger. The relationship of the parties relevant to her injury, so far as there was any link with the accident, was that which arose out of her ownership of the car and her surrender of control of it to the defendant. However, her class of injury is wider than that of an owner of a car lending it to a person to drive, and falls in a class which, rather, is shared with the two examples I gave of the mother, than that shared with passengers.'

I do not suggest that the present case is on all fours with *Rowe v McCartney*, but the judgments of the majority in *Rowe's* case illustrate vividly the problems that are likely to occur while the law grapples on a case by case basis with the conundrum of identifying the categories of people who should be entitled to recover damages for guilt-induced depression following a serious accident. While it is true that on conventional principles of causation, Mr Carter's death would be found to have been 'caused' by the defendants' breach of duty to him in permitting a situation in which a hydrant jutted out into the path of Mr Hunter's FSV, the immediate circumstances of his death were that he somehow or other wrenched the hydrant in such a way that it burst when Mr Hunter was already 30 metres away from him going up the tunnel in search of a hose, and Mr Hunter was not detrimentally affected by the accident until very much later. There is no binding authority which compels this court to hold that Mr Hunter was personally involved or directly involved as an actor in the tragic incident in which Mr Carter met his death, and in the absence of binding authority I am not



a willing to find that he was. The law requires a greater degree of physical and temporal proximity than was present in this case before Mr Hunter could properly be treated as a direct, or primary, victim in Mr Carter's accident.

In my judgment it would be quite wrong for this court to push forward the frontiers of liability in the way advocated by Mr Berrisford, particularly as the case was not very fully argued, at a time when the Law Commission, whose  
b report on this topic has not yet been published, has just completed a major review of this area of the law. I am wholly unpersuaded that Mr Hunter is to be treated as a participant in the accident, as the law now stands, and the concept that he still believed himself to be still psychologically involved as a participant in an accident which had occurred at least a quarter of an hour before he was told that his workmate had died is not one which is currently recognised by  
c English law. It must of course be remembered that a direct victim can recover even if he/she is not a person of ordinary fortitude, so that this control mechanism would be wholly absent in 'survivor's guilt' cases if Mr Berrisford's submissions are correct. Employers will then be liable for damages suffered by the most nervous of their employees in such circumstances, since they must take  
d their direct, or primary, victims as they find them. The present law, of course, makes recovery less easy for a nervous wife or mother who suffers post-traumatic stress disorder but does not qualify as a direct victim.

I cannot believe that this would be a satisfactory form for the law to take, at any rate without a much greater understanding of the possible consequences of  
e a change of this type than is available to us in a single case. If Hobhouse LJ, whose judgment I have had the opportunity of reading in draft, is indeed correct in his understanding of the present state of the law, this may be just another of the odd consequences of the introduction of control mechanisms on policy grounds for secondary victims, which appealed to the majority of the House of Lords in *McLoughlin v O'Brian* [1982] 2 All ER 298, [1983] 1 AC 410, and was  
f further explained in *Alcock's* case itself. In my judgment, in our hierarchy of courts this is a matter for the House of Lords to decide.

In its commentary on the relevant part of Lord Oliver's speech in *Alcock's* case, the Law Commission said in para 5.37 of its Consultation Paper (Law Com No 137):

g 'We consider this to be a helpful approach. But it should be noted that, in contrast to the facts in *Dooley v Cammell Laird & Co Ltd* ([1951] 1 Lloyd's Rep 271), Lord Oliver's formulation, on the face of it, would allow an involuntary participant to recover even though the shock was not  
h experienced through his or her own unaided senses and even though he or she was not close to the accident in time and space. For example, it would cover the case of a signalman who, by reason of operating his employer's faulty equipment, reasonably believes that he has been instrumental in causing a train crash (out of sight and hearing) and suffers a shock-induced  
j psychiatric illness as a consequence. We believe that a signalman in that situation probably ought to be able to recover damages as there is no floodgates objection. We therefore do not regard Lord Oliver's formulation as being too wide-ranging. Our provisional view is that there ought to be a special rule, as set out by Lord Oliver in *Alcock*, applicable to involuntary participants. Do consultees agree?' (Commission's emphasis.)

Although in another capacity I was a signatory to that consultation paper, this was published in the course of a very thorough review of all the illogicalities in the existing law, with a view to suggesting to Parliament, if a case was made out for it, the redrawing of the law on more rationally coherent lines. The Commission was at that time concerned to find out whether the medical literature and surveys supported the central 'policy' fear that the floodgates of litigation would be opened if one simply treated psychiatric illness like any other personal injury, and it observed at para 5.67 of the paper that that sort of information is not easily available, if at all, to the judiciary when they decide individual cases. In my judgment it would be wrong for this court to anticipate the Law Commission's final conclusions on such a policy-charged matter, particularly as the Commission was also engaged in reviewing the appropriateness of the distinctions that currently have to be made between primary and secondary victims. If judges are to don a legislative mantle in this controversial field again, this, as I have said, is the proper function of the House of Lords and not of this court.

For similar reasons, even if the House of Lords were to hold that *Frost's* case [1997] 1 All ER 540, [1997] 3 WLR 1194 was correctly decided, I do not consider that the fact that the judge held Cementation, as Mr Hunter's employers, to be in breach of a contractual duty of care permits him to succeed.

Even if there was no break in the chain of causation between Cementation's breach of duty to him and Mr Carter's accident, this is a quite different situation from the one with which the Court of Appeal was concerned in *Frost's* case. There the majority of the court was prepared to hold that police officers who were exposed to scenes of horror in the course of their duties were entitled to recover damages because they were obliged to stay at the ground witnessing these scenes, and their post-traumatic stress disorder was a foreseeable consequence of their employers' breach of duty of care in exposing them to horrors like these when they negligently allowed too many people to enter the ground at a particular gate.

In *Young v Charles Church (Southern) Ltd* (1997) Times, 1 May this court allowed the appeal of a plaintiff who was working alongside a man who was electrocuted and killed when a pole he was holding came into contact with an overhead power line. The plaintiff was about 6 to 10 feet away with his back turned when the accident happened. He heard a loud bang and a hissing noise, and turned round to see that the pole held by his colleague had struck the electric wiring and that the ground round his colleague had burst into flames. The majority of the court held that he was a primary victim and the whole court held that they were bound by the decision in *Frost's* case to hold that the plaintiff's psychiatric injury was a foreseeable consequence of his employers' breach of duty of care and, indeed, their breach of statutory duty.

Here the facts are very different. Mr Hunter was not at the scene or in the area of real physical risk and did not himself witness what happened to Mr Carter when he was killed. His illness was not the conventional type of post-traumatic stress disorder. It was an abnormal reaction to the news of his colleague's death, triggered off (so far as the reaction was abnormal) by what Dr Wood, the psychiatrist who gave evidence on his behalf, described as an irrational feeling of responsibility. In my judgment the law should not treat this kind of abnormal reaction as a foreseeable consequence of Cementation's breach of a contractual duty of care. Even if the events immediately leading up to Mr Carter's death did

a not constitute a novus actus interveniens, the kind of mental illness Mr Hunter suffered was not, in the eyes of the law, a reasonably foreseeable consequence of the original breach.

Mr Berrisford tried gallantly to argue that even if Mr Hunter was not able to recover damages for the first two reasons he advanced, he should nevertheless be entitled to recover as a secondary victim. I can see nothing in the speeches of b the House of Lords in *Alcock's* case which would allow him to be treated as a secondary victim.

I would therefore dismiss this appeal.

c **SIR JOHN VINELOTT.** I have found the issue raised in this appeal one of some difficulty and my mind has fluctuated more than once in the course of the argument. I have however reached the conclusion on balance that this appeal must be dismissed.

The facts are very fully stated in the judgments of Hobhouse and Brooke LJ d and I do not need to repeat them. The question in this appeal can be shortly stated. It is whether, if (a) an employee plays a part in a sequence of events which leads to an accident in which a fellow employee is killed or seriously injured and (b) the accident is the result of some negligent act or omission on the part of the employer and is not caused or contributed to by any negligence on e the part of the employee and (c) the employee does not witness the accident but on learning of it and of the death or injury of the fellow employee suffers an emotional shock leading to a psychiatric illness, the employee can recover damages for the infliction of the psychiatric illness.

In answering this question, a convenient starting point is the decision of the House of Lords in *Alcock v Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907, [1992] 1 AC 310. That case stemmed from the disasters of the Hillsborough Stadium, where a large number of spectators were killed or f injured by crushing sustained in pens at the end of the stadium. The respondent chief constable admitted liability for negligence in respect of the deaths and injuries. Two of the plaintiffs were present at the ground in a stand from which they witnessed the disaster; one lost two brothers and the other a brother-in-law. Others saw the disaster on live television, or, having heard of it from others, saw a television replay. Two of them lost a son and one a fiancée; g they were amongst those who saw the disaster on live television. However, none of those who saw the disaster on television saw the suffering of recognisable individuals. The House of Lords held that none was entitled to damages for nervous shock. In his speech Lord Oliver, having first referred to cases where a plaintiff is put in fear for his or her own safety (*Dulieu v White & Sons* [1901] 2 KB 669, [1900–3] All ER Rep 353 and *Bell v Great Northern Rly Co of Ireland* (1890) 26 LR Ir 428) and to *Chadwick v British Transport Commission* [1967] 2 All ER 945, [1967] 1 WLR 912, where the plaintiff recovered damages 'for the psychiatric illness caused to her deceased husband through the traumatic effects of his gallantry and self sacrifice in rescuing and comforting victims of the h Lewisham railway disaster', went on to define a class of primary victims who were entitled to recover damages for nervous shock. This passage has already been cited but I will read it again. Lord Oliver ([1991] 4 All ER 907 at 923–924, j [1992] 1 AC 310 at 408) said:

'These are all cases where the plaintiff has, to a greater or lesser degree, been personally involved in the incident out of which the action arises,



either through the direct threat of bodily injury to himself or in coming to the aid of others injured or threatened. Into the same category, I believe, fall those cases such as *Dooley v Cammell Laird & Co Ltd* [1951] 1 Lloyd's Rep 271, *Galt v British Railways Board* (1983) 133 NLJ 870 and *Wigg v British Railways Board* (1986) 136 NLJ 446 where the negligent act of a defendant has put the plaintiff in the position of being, or of thinking that he is about to be or has been, the involuntary cause of another's death or injury and the illness complained of stems from the shock to the plaintiff of the consciousness of this supposed fact. The fact that the defendant's negligent conduct has foreseeably put the plaintiff in a position of being an unwilling participant in the event establishes of itself a sufficiently proximate relationship between them and the principal question is whether, in the circumstances, injury of that type to that plaintiff was or was not reasonably foreseeable.' a  
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Lord Oliver then distinguished a class of secondary victims where 'the injury complained of is attributable to the grief and distress of witnessing the misfortune to another person in an event by which the plaintiff is not personally threatened or in which he is not directly involved as an actor'. It is unnecessary to describe the 'control mechanisms' that have been held to limit the class of secondary victims entitled to compensation. d

Hobhouse LJ takes the second part of the passage from the speech of Lord Oliver which I have cited (beginning with the words: 'Into the same category'), as bringing into the category of primary victims cases where the plaintiff is an employee of the defendant and, as a result of the defendant's negligence, is put 'in the position of being, or thinking that he is about to be or has been, the involuntary cause of another's death or injury'. There is then 'proximity in law' sufficient to found liability though there may be no physical proximity. In my judgment if the passage I have cited is read as a whole together with the preceding paragraphs it is clear that Lord Oliver is dealing throughout with cases where there is physical proximity (cases where the plaintiff saw or heard or otherwise became aware through his unaided senses of the accident) and was either involved through the direct threat of bodily injury to himself or in coming to the aid of others injured or threatened or was put in 'the position of being, or thinking that he is about to be or has been, the involuntary cause of another's death or injury'. In the first of the two cases cited by Lord Oliver the shock to the plaintiff resulted from what he saw—in *Dooley's* case the danger to persons whom he thought would be working in the hold and in *Galt's* case the danger to the workmen whom the plaintiff saw on the railway line. In *Wigg's* case the plaintiff was an actor in the events which led to the death of a passenger and although he did not actually see the accident, he saw the immediate aftermath and the nervous shock he suffered stemmed from that and from his attempt to rescue and comfort the victim. It is true that in all these cases the plaintiff was an employee of the defendant and no doubt that will be a frequent if not invariable feature of similar cases. However, it is not, as I see it a necessary feature. That can be illustrated by reference to the facts of *Galt's* case. If the track and signalling equipment had been the responsibility of the defendant and the train the property and responsibility of a separate company (a situation which might well arise today) the defendant would be equally liable for the defect in the signalling equipment due to his negligence. e  
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a I can see nothing in *Robertson v Forth Road Bridge Joint Board*, *Rough v Forth Road Bridge Joint Board* 1996 SLT 263 which is inconsistent with this approach. The plaintiffs failed because although they were engaged in the operation of removing the metal sheet from the bridge and, in the case of *Rough*, saw Smith blown from the transit van, they did nothing which could lead them to believe and did not claim that they did believe that they were in any way responsible for it. Clearly, if *Rough* had been responsible for securing the metal sheet and had done so by means of a rope supplied for the purpose by his employers, which, unknown to him, was defective he would have recovered—not because he was an employee and Smith a fellow employee but because he saw the accident happen and would have had good reason for feeling that he had been, albeit it innocently, responsible for it.

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c *Frost v Chief Constable of the South Yorkshire Police*, *Duncan v British Coal Corp* [1997] 1 All ER 540, [1997] 3 WLR 1194 was another case which arose from the Hillsborough disaster. The four plaintiffs who recovered damages were all police officers and were on duty at the stadium and saw the disaster or its immediate aftermath. They were all involved in endeavouring to resuscitate victims and to identify them and to prevent further injury to the public. The decision of the Court of Appeal, as I understand it, was that the successful plaintiffs were bound in the course of their duty to be present at the stadium and to assist in containing the panic and inevitably witnessed the dreadful scenes of carnage which resulted from the negligence of the chief constable and his senior officers.

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f ‘They were ... at the ground in the course of duty, within the area of risk of physical or psychiatric injury and were thus exposed, by the first defendant’s negligence, to excessively horrific events such as were likely to cause psychiatric illness even in a police officer. There was therefore a breach of duty to such persons.’ (See [1997] 1 All ER 540 at 551, [1997] 3 WLR 1194 at 1205 per Rose LJ.)

Henry LJ said :

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j ‘I regarded them as participants for the following reasons. They were on duty under their service contracts. They were directly involved in the consequences flowing from their employers negligent actions in crowd control. They were on duty at the ground close to the centre of the horror, dealing with the dead and injured and the fans, whether distressed or abusive. They had no choice but to be there and be involved. It was that involvement which led to the frustrations at being ineffective and helpless to the guilt and shame of the fact that negligent police decisions had caused or contributed to the accident, to the hostility and abuse they suffered, to the long hours of exposure, to horrors from which any mere spectator could simply have averted his eyes. An off duty policeman at the match could, if his conscience permitted, have taken no part in the events whatever, and gone home with the crowd (the match was abandoned from 4.10 pm). No such course was open to those on duty.’ (See [1997] 1 All ER 540 at 560, [1997] 3 WLR 1194 at 1212.)

It is to my mind doubtful whether it was necessary or helpful to categorise the successful plaintiffs as primary or secondary victims. The categorisation of a plaintiff as a primary victim or a secondary victim and, in the latter case, the

question whether the 'control mechanisms' are satisfied are determinative in deciding whether psychiatric illness is foreseeable. However, in *Frost's* case it was admitted that 'some police officers of ordinary fortitude (suffer) psychiatric illness as a result of attending incidents involving death or serious injury or risk thereof'. Rose LJ ([1997] 1 All ER 540 at 544, [1997] 3 WLR 1194 at 1198) after referring to this admission added:

'Accordingly, in itself, foreseeability of psychiatric injury, at least by the first defendant, would appear to present no problem to the plaintiffs and, before us, it was not contended otherwise on behalf of the defendants. Accordingly, it is to the existence and breach of duty that I direct my consideration.'

Where the plaintiff learns of an accident caused by the negligence of his employer and without negligence on his part for which he feels some responsibility as an actor who played some part in the events leading to it and who learns of the accident after it has happened, psychiatric injury suffered by him by reason of his feelings of guilt or otherwise is too remote to found an action for damages.

It may be that the decision in *Frost's* case represents an extension of the cases in which damages for psychiatric illness following nervous shock can be recovered. I understand that the case is under appeal to the House of Lords. However, if it is an extension, it is a step in a different direction and does not, in my judgment, have any bearing on the facts of the instant case.

In my judgment, Judge Bentley QC reached the right conclusion and for the right reasons.

**HOBHOUSE LJ.** This appeal raises a question of the entitlement of an employee to recover in the tort of negligence for nervous shock and psychiatric injury. The relevant facts can be shortly stated.

The plaintiff, Mr John Hunter, and his fellow worker, Mr Carter, were employees of the second defendants, Cementation Mining Ltd, working in the first defendant's North Selby mine. No point is taken as between the first and second defendants and therefore the case can be considered solely by reference to the liability of the plaintiff's employer, the second defendants. In breach of their duty to their employees to provide them with a safe place of work, the defendants permitted a high pressure water hydrant to project excessively into and partly obstruct one of the narrow roadways in the mine. As a result, when the plaintiff was driving an FSV (a long thin flat-bed truck used in mines) carrying a load of girders along the roadway he struck and damaged the hydrant causing it to leak. The leak was sufficiently serious to risk flooding the floor of the roadway. The plaintiff and Mr Carter who was working in the vicinity reasonably attempted to stop the leak by using a roof bolt as a lever to tighten the valve of the hydrant; but they were unsuccessful and the hydrant continued to leak. The plaintiff then went to look for a hose with which to divert the water leaking from the hydrant out of harm's way. Whilst engaged in this search at a distance up the roadway of about 30 yards from the hydrant he heard a loud bang (or explosion), saw a cloud of dust and heard the sound of rushing water in the pipes. In fact Mr Carter had been seriously injured and killed by the bursting of the high pressure hydrant; it seems probable that he was standing in front of the hydrant still trying to stop the leak at the time the hydrant burst. The

a plaintiff, however, was not close enough to see this and assumed that Mr Carter was still alive, probably unhurt. He realised that the damaged hydrant must have burst but he did not feel that his own safety was threatened. He appreciated that his first priority now was to close off the pipe from which the water was escaping and, for this purpose, he went some 300 yards further up the roadway to where the relevant valve was and with the assistance of another  
b workman proceeded to close that valve. This was apparently a laborious and slow task. After some ten minutes when it was nearing completion, they heard over the tannoy that a man had been injured. Naturally the plaintiff was concerned that it was Mr Carter that had been injured and he went back down the roadway to see what had happened. Before he had gone about half way he  
c met a man coming in the opposite direction who told him that Mr Carter had been killed. It was this that triggered in the plaintiff the serious shock which resulted in his psychiatric injury. The plaintiff was escorted out of the mine in a shocked state without going any further. He never revisited the scene of the accident nor did he see the grievously injured body of Mr Carter.

d The judge expressly accepted the plaintiff's expert evidence that, after he heard that Mr Carter was dead, the plaintiff was 'in a state of shock and thereafter in consequence thereof he developed a psychiatric illness'. This finding has not been challenged by the defendants on this appeal and we heard no argument upon it.

e At the trial, as part of their case on contributory negligence, and on this appeal the defendants stressed the plaintiff's belief, they submitted well founded belief, that he was at least partly responsible for the accident and its aftermath including Mr Carter's death. Asked in evidence by his counsel how he felt at the time of being told of Mr Carter's death, the plaintiff replied 'responsible, responsible for his death because I were driving that machine. As a result of me hitting that hydrant, a man died. As a result of my driving, a man died, me hitting that  
f hydrant. You see, me hitting that hydrant were my responsibility ...' Counsel for the defendants re-emphasised this evidence by asking the plaintiff in cross-examination what he had said in response to being told that Mr Carter was dead. He answered that he had said: 'I killed him.' This evidence corresponded to his signed statement. His evidence was expressly accepted by the judge. The  
g judge clearly accepted this evidence although he concluded that, in view of the conditions under which the plaintiff was being required to work and the very considerable difficulties with which he was faced, he was to be acquitted of contributory negligence. The plaintiff although not legally to be blamed was the human agent whose act (colliding with the hydrant) had given rise to the accident.

h The judge also held that the defendants would have been liable in tort for the death of Mr Carter and that 'had the plaintiff sustained some physical injury as a result of the collision of the FSV with the hydrant or have been struck by the torrent of water which burst out of it he would clearly be entitled to recover damages in respect thereof'. He held that there had been no contributory  
i negligence on the part of either man in attempting to tighten the hydrant using the roof bolt. It is implicit that the judge was prepared to find that the accident to Mr Carter was a foreseeable consequence of the defendants' breach of duty and the plaintiff's collision with the hydrant. Legally, no distinction was to be made between the collision with and the bursting of the hydrant; it was a single sequence with the same effective cause. If the plaintiff had been present when



the hydrant burst and had seen Mr Carter killed and had as a result suffered nervous shock, the defendants would, as counsel for the defendants at one stage of her argument before us rightly recognised, have been liable to the plaintiff for that injury; it would have been foreseeable and within the scope of the duty of care which the defendants' owed him. a

Therefore, to summarise: (1) the defendants were in breach of their common law duty of care in relation to the safety of the plaintiff and Mr Carter. (2) As a result of that breach, the plaintiff was involved in an incident in which he collided with and damaged the high pressure hydrant. (3) As a result of the breach of duty and the collision, Mr Carter was killed. (4) At the time that Mr Carter was killed, the plaintiff was not in any actual or apprehended danger, did not see Mr Carter being killed and was unaware that he had been killed. But the plaintiff did know that the high pressure hydrant had burst and reasonably believed that the burst was a consequence (as was the case) of the collision with the hydrant in which he had been involved. (5) Over ten minutes later after the plaintiff had left the immediate vicinity and without returning to it, the plaintiff was told of Mr Carter's death. As a result of his feeling of responsibility for Mr Carter's death through having been a party to causing it, the plaintiff suffered nervous shock and psychiatric injury. b  
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The judge held that on these facts the defendants did not owe the plaintiff a relevant duty of care and entered judgment for the defendants. The plaintiff has appealed.

### *The law*

The legal problem in the present case arises from the fact that the plaintiff's claim does not satisfy the criteria for 'secondary victims' which were applied in *McLoughlin v O'Brian* [1982] 2 All ER 298, [1983] 1 AC 410 and *Alcock v Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907, [1992] 1 AC 310. This can be most clearly demonstrated from the speech of Lord Ackner in *Alcock's* case. There must be physical proximity of the plaintiff to the accident. e  
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'... the proximity to the accident must be close both in time and space. Direct and immediate sight or hearing of the accident is not required. It is reasonably foreseeable that injury by shock can be caused to a plaintiff, not only through the sight or hearing of the event, but of its immediate aftermath.' (See [1991] 4 All ER 907 at 920, [1992] 1 AC 310 at 404). g

The means by which the shock is caused must also be direct.

'... the shock must come through sight or hearing of the event or its immediate aftermath.' (See [1991] 4 All ER 907 at 921, [1992] 1 AC 310 at 405). h

'Even where the nervous shock and the subsequent psychiatric illness caused by it could both have been reasonably foreseen, it has been generally accepted that damages for merely being informed of, or reading, or hearing about the accident are not recoverable.' (See [1991] 4 All ER 907 at 917, [1992] 1 AC 310 at 400). j

There are similar statements in the other speeches: see e.g. Lord Keith ([1991] 4 All ER 907 at 914–915, [1992] 1 AC 310 at 397–398) and Lord Oliver ([1991] 4 All ER 907 at 926–927, 930, [1992] 1 AC 310 at 411–412, 416). All these statements are directed to the question whether there was sufficient legal proximity between



a the defendant and the plaintiff to establish the existence of the duty of care owed by the defendant to the plaintiff. (See per Lord Keith and Lord Oliver *passim*). The foreseeability of nervous shock is not alone enough. They were applying what Lord Wilberforce had said in *McLoughlin v O'Brian* [1982] 2 All ER 298 at 304–305, [1983] 1 AC 410 at 422–423:

b 'As regards proximity to the accident, it is obvious that this must be close in both time and space ... The shock must come through sight or hearing of the event or of its immediate aftermath.'

c Lord Ackner ([1991] 4 All ER 907 at 918, [1992] 1 AC 310 at 402) adopted and applied what Lord Atkin had said in *McAlister (or Donoghue) v Stevenson* [1932] AC 562 at 580, [1932] All ER Rep 1 at 11 about those to whom a duty of care is owed—they must be 'so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'.

d This too is directed to establishing legal *proximity* between the defendant and the plaintiff. As will be obvious legal *proximity* is not the same as and does not as such require physical proximity between the plaintiff and the accident or its immediate aftermath, although for 'secondary' victims in nervous shock cases such physical proximity is a requirement.

e It follows from this citation that the plaintiff in the present case cannot recover unless he can establish the requisite legal *proximity* in some other way. It must be borne in mind that the purpose of the *proximity* test is to establish the existence of the relevant duty of care owed by the defendant to the plaintiff. Where the plaintiff is a mere 'secondary' victim with no other nexus with the defendant (beyond mere foresight), he cannot establish the duty of care without showing legal *proximity* between the defendant and the plaintiff as defined in *Alcock's* case. The mere existence of an employer/employee relationship does not without more prove such *proximity*: see e.g. *Duncan v British Coal Corp* [1997] 1 All ER 540. This is so even though the defendant employer does in general owe duties of care to his employees, including the plaintiff. The plaintiff's injury, his nervous shock, does not come within the scope of the duty of care.

f The present case therefore concerns whether the facts bring the plaintiff within a category of employee plaintiff where the law recognises that legal *proximity* exists. Where the plaintiff comes within the category of a 'primary' victim as that term is used in *Page v Smith* [1995] 2 All ER 736, [1996] AC 155, or where he comes within the category of a rescuer (*Chadwick v British Transport Commission* [1967] 2 All ER 945, [1967] 1 WLR 912 and *Wigg v British Railways Board* (1986) 136 NLJ 446), or where he is within the area of physical risk created by the employer's breach of duty (*Young v Charles Church (Southern) Ltd* (1997) Times, 1 May), the employee can recover for nervous shock thereby caused. He may also recover, whether an employee or not, when he is put in fear of physical injury to himself (per Stuart-Smith LJ in *McFarlane v EE Caledonia Ltd* [1994] 2 All ER 1 at 10). But none of these categories assist the plaintiff in the present case.

j All that I have said about the position of the 'secondary' victim applies even where there is a relationship of love and affection between the 'secondary' and 'primary' victims. This was the decision in *Alcock's* case: see also *Ravenscroft v Rederiaktiebolaget Transatlantic* (1992) Times, 6 April. That the same principles *prima facie* apply to employee 'secondary' victims is also established. Even if the plaintiff had been the father or brother of Mr Carter, he would not have been

able to recover. He was not present at the accident to Mr Carter or its immediate aftermath; he did not see it; he was only told about it. He is expected to display the same phlegm as any other member of the public. a

But it appears that there is another recognised category which applies to employees and which potentially covers the plaintiff. This category is recognised and discussed in the speech of Lord Oliver in *Alcock's case*, the judgment of Lord Hope in *Robertson v Forth Road Bridge Joint Board*, *Rough v Forth Road Bridge Joint Board* 1996 SLT 263 and the judgment of Henry LJ in *Frost v Chief Constable of South Yorkshire* [1997] 1 All ER 540, [1997] 3 WLR 1194. In *Alcock's case* [1991] 4 All ER 907 at 923–924, [1992] 1 AC 310 at 408 Lord Oliver formulated the category as— b

‘where the negligent act of the defendant has put the plaintiff in the position of being, or of thinking that he is about to be or has been, the involuntary cause of another’s death or injury and the illness complained of stems from the shock to the plaintiff of the consciousness of this supposed fact.’ c

This covers the facts of the present case as spoken to by the plaintiff and accepted by the judge. The connecting factor serves to provide a nexus between the plaintiff’s injury and the defendants’ breach of duty. In the context of the employer/employee relationship, it requires the employer to contemplate that his breaches of duty may involve his employee as an unwilling participant in an accident which may cause injury to others, typically fellow employees. It applies whether or not there is in fact any ‘primary’ victim. It extends what would otherwise be the scope of the duty of care of the employer towards his employee. d

There are two first instance decisions which appear to exemplify the application of this principle. The first is *Dooley v Cammell Laird & Co Ltd* [1951] 1 Lloyd’s Rep 271, a decision of Donovan J sitting on circuit in Liverpool. The plaintiff was the operator of a dockside crane engaged in lifting equipment onto a vessel being fitted out in a shipyard. Owing to defective ropes supplied by his employer a load suspended from his crane fell into the hold of the vessel where other employees were working. In fact no one was injured but the plaintiff not unreasonably thought that they had been. He suffered nervous shock and psychiatric injury. Although the plaintiff had never himself been in any danger, Donovan J held that he was entitled to recover. He held that both physical and psychiatric injury were foreseeable consequences of the defendant’s negligence. He continued (at 277): e

‘Furthermore, if the driver of the crane concerned fears that the load may have fallen upon some of his fellow workmen, and that fear is not baseless or extravagant, then it is, I think, a consequence reasonably to have been foreseen that he may himself suffer a nervous shock. I therefore think there was a duty upon [the defendant] towards Dooley to use a sound rope for the purpose of hoisting the sling.’ f

The second case is *Galt v British Railways Board* (1983) 133 NLJ 870. The plaintiff was a train driver employed by the defendants. As he rounded a bend he suddenly saw two men who were also railwaymen standing in front of him on the track only 30 yards away. It was impossible for him to stop. He thought that they had been killed but in fact they got out of the way in time. Tudor g

a Evans J held that he was entitled to recover damages for the consequences of the nervous shock which he suffered; these included a consequent heart attack. As in *Dooley's* case no person other than the plaintiff had in fact been injured but the plaintiff believed that he had been instrumental in causing the death of or injury to fellow workmen albeit without any fault on his part. The report is very short and does not contain any explanation of the judge's reasoning. In each of these  
b two cases the plaintiff suffered nervous shock as a result of what he himself saw; neither raised the *Alcock* question.

Lord Oliver referred to a third case, *Wigg v British Railways Board* (1986) 136 NLJ 446, a decision of Tucker J that a train driver could recover damages for psychiatric injury suffered through having to assist a man who had fallen whilst trying to board his train. Tucker J treated the case as comparable to that of a  
c rescuer and the case clearly falls within the principles recognised in *Chadwick v British Transport Commission* [1967] 2 All ER 945, [1967] 1 WLR 912.

At the beginning of his speech in *Alcock's* case Lord Oliver set out the categories of the right to recover recognised in the already decided cases. Lord Oliver ([1991] 4 All ER 907 at 923, [1992] 1 AC 310 at 407) drew the distinction  
d between two classes of cases: 'those cases in which the injured plaintiff was involved, either mediately or immediately, as a participant, and those in which the plaintiff was no more than the passive and unwilling witness of injury caused to others'. He went on to deal with cases where the plaintiff was personally threatened by a terrifying experience (*Bell v Great Northern Rly Co of Ireland* (1890) 26 LR Ir 428) and cases where the psychiatric injury is accompanied by physical  
e injuries (*Schneider v Eisovitch* [1960] 1 All ER 169, [1960] 2 QB 430). Into the same category he put the rescue cases. Negligently causing injury to people may also foreseeably cause physical or psychiatric injury to rescuers. He continued ([1991] 4 All ER 907 at 923, [1992] 1 AC 310 at 408):

f 'These are all cases where the plaintiff has, to a greater or lesser degree, been personally involved in the incident out of which the action arises, either through the direct threat of bodily injury to himself or in coming to the aid of others injured or threatened.'

g He then said that he believed that the *Dooley's* case, *Galt's* case and *Wigg's* case fell into the same category and formulated the proposition which I quoted earlier, continuing—

h 'The fact that the defendant's negligent conduct has foreseeably put the plaintiff in the position of being an unwilling participant in the event establishes of itself a sufficiently proximate relationship between them and the principle question is whether, in the circumstances, injury of that type to that plaintiff was or was not reasonably foreseeable.' (See [1991] 4 All ER 907 at 924, [1992] 1 AC 310 at 408).

j Lord Oliver is thus treating the workman so affected as a participant not as a witness and therefore coming into the first of his two classes; he is equivalent to a 'primary' victim. Lord Jauncey also referred to *Dooley's* case as providing the necessary element of involuntary involvement in the accident and to the correspondence of this element of the employer/employee relationship to other bases giving the right to recover for psychiatric injury (see [1991] 4 All ER 907 at 934–935, [1992] 1 AC 310 at 420–421).



In my judgment the most illuminating contribution to this question is to be found in the judgment of Lord Hope in *Robertson's* case 1996 SLT 263. This was an employee/employer case. The plaintiff was one of a group of workmen working on the maintenance of the Forth Road Bridge whilst a gale was blowing. Owing to the employer's failure to provide a safe system of work one of the plaintiff's fellow workmen was blown out of a truck onto the side of the bridge and was killed. The plaintiff saw this and suffered nervous shock leading to psychiatric injury. He was at no time subjected to any physical risk arising from the defendant's breach of its duty to the man who died. The plaintiff played no part in causing or contributing to the incident. He was a mere observer. Lord Hope, and the Court of Session held that the plaintiff was not entitled to recover. Lord Hope grappled with the difficulties raised by the cases and the need to distinguish between bystanders (in the current terminology 'secondary' victims) and those more closely involved. He recognised that this question could arise not only as between various members of the public to whom the defendant owed no other duty of care and as between various fellow employees of the defendant employer. He considered the authorities including *Dooley's* case [1951] 1 Lloyd's Rep 271 and the speech of Lord Oliver in *Alcock's* case. He said (1996 SLT 263 at 268-269):

'In my opinion the feature common to all these cases which was observed by Lord Oliver is to be found in his use of the phrase "the involuntary cause of another's death or injury". The plaintiff may actually have caused the death or injury or he may think that he is about to or has done so. Whichever these alternatives applies is immaterial. What matters is that it was his own hand, or his own act, which was the cause or supposed cause of it. This is the essential characteristic which distinguishes the category from that of the bystander who, while present at the time of the accident and saw it happen, was not directly involved in it as the actor by whose hand the death or injury was caused to the third party ...

It seems to me that the principle which was expressed by Lord Porter in *Bourhill v Young* ([1942] 2 All ER 396 at 409, 1942 SC (HL) 78 at 98) applies equally to the relationship between employer and employee as it does to the relationship between a wrongdoer and anyone else who is merely a bystander or witness at the scene of the accident ... "... It is not every emotional disturbance or every shock which should have been foreseen. The driver of a car or vehicle, even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent towards one who does not possess the customary phlegm." ...

The existence of the relationship between employer and employee may be said to remove the risk of having to compensate the world at large, because it does to some extent restrict the numbers of persons who are likely to be involved in the incident. Nevertheless the numbers may still be very considerable if the enterprise is a substantial one and has numerous employees. Examples were mentioned in argument in the present case of employees of the defenders who happened to be on the opposite carriageway when the accident occurred, or were present on other parts of the bridge further away from the place where the accident happened, but



a who might nevertheless have claimed to have suffered psychiatric illness as a result of witnessing the event. It is difficult to see why the bystander in the case of a road accident should be denied his claim, when a bystander who happens to be an employee but has had nothing whatever to do with causing the incident is allowed to recover damages for this type of injury. There appears to be no logical stopping point once the bystander type of case is admitted in the case of employees. On the other hand cases of active participation in the event form a distinct category, for the reasons already mentioned by Lord Oliver. I conclude that where the employees are merely bystanders or witnesses, as the pursuers were in this case, the ordinary rule must apply. They must be assumed to be possessed of sufficient fortitude to enable them to endure the shock caused by witnessing accidents to their fellow employees. Unless they can bring themselves within one of the other recognised categories their claim for damages for this kind of illness must be refused ...

d I have not found anything in the pursuers' own evidence or in the medical reports which were lodged on their behalf to suggest that their psychiatric illness was caused by participation in the incident in the sense referred to by Lord Oliver, or to fear for their own safety. Nor is there any basis in the evidence for attributing their illnesses to a belief that they had been the unwitting cause of Smith's death.'

e In my judgment this analysis and conclusion is faithful to the principles formulated by Lord Oliver in *Alcock's* case [1991] 4 All ER 907 at 923–924, [1992] 1 AC 310 at 408.

f This also was the view of Henry LJ in *Frost's* case [1997] 1 All ER 540 at 562–563, [1997] 3 WLR 1194 at 1214–1215, where Henry LJ summarises the reasoning of Lord Hope including the recognition of the category of employee/employer cases which 'when properly understood were limited to cases where the plaintiff may have either caused the death or injury or believed that he was about to or had done so'. It appears that he accepts this reasoning.' (See also [1997] 1 All ER 540 at 566–567, [1997] 3 WLR 1194 at 1219, cf *Rose LJ* [1997] 1 All ER 540 at 549–551, [1997] 3 WLR 1194 at 1203–1204.)

g In my judgment, the effect of these statements of the law is to identify as the relevant factor the physical participation of the plaintiff in the event which resulted from the employer's breach of duty, which participation caused the plaintiff to believe that he was responsible for his fellow employee's death or injury. If so, the employer is liable for the nervous shock and psychiatric injury caused to the plaintiff as a result of his having participated in the event. It puts the plaintiff into the same class as a 'primary' victim; it puts him and his injury within the scope of the duty of care which the employer owes to him. The test then becomes one of causation; the *Alcock* criteria, or 'control mechanisms' (see *Page v Smith* [1995] 2 All ER 736 at 767–768, [1996] AC 155 at 197 per Lord Lloyd), cease to be determinative. Provided that the plaintiff can in the present case prove (as, on the judge's findings, he has proved) the causal relationship between the defendants' breach of duty and his participation in the incident and between that participation and his suffering nervous shock, and provided that he has proved the foreseeability of nervous shock to him as a possible consequence of the breach of duty, the plaintiff has discharged the burden of proof that rests upon him. He is entitled to recover damages for his injury from the defendants. It ceases to be relevant what the actual chain of causation was or whether it was

to be foreseen (*Hughes v Lord Advocate* [1963] 1 All ER 705, [1963] AC 837 and *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383): the class or type of injury was foreseeable as a consequence of the breach. The same conclusion is implicit in *Page's* case once it is recognised that the plaintiff's participation is what has brought his injury within the scope of the duty owed to him.

I recognise that there is no previously reported case the facts of which have necessitated the decision of the point raised by the present case. I also recognise that the law could have come to a different conclusion and have decided for policy reasons that the control mechanisms for 'secondary' victims were to be applied in this situation. But that would not in my judgment be a correct reading of the authoritative statement of the law by Lord Oliver in *Alcock's* case nor would it accord with the views of Lord Hope and Henry LJ. I observe that the view of the law I have derived from these authorities is also the view expressed by the Law Commission in its Consultation Paper *Liability for Psychiatric Illness* (Law Com No 137) para 5.37:

'... Lord Oliver's formulation, on the face of it, would allow an involuntary participant to recover even though the shock was not experienced through his or her own unaided senses and even though he or she was not close to the accident in time and space. For example, it would cover the case of a signalman who, by reason of operating his employer's faulty equipment, reasonably believes that he has been instrumental in causing a train to crash (out of sight or hearing) and suffers a shock-induced psychiatric illness as a consequence. We believe that a signalman in that situation probably ought to be able to recover damages as there is no floodgates objection. We therefore do not regard Lord Oliver's formulation to be too wide-ranging.'

I respectfully agree. I note that in the present case the explosion which caused Mr Carter's death was in fact within the hearing of the plaintiff and that the supposed accidents to the workmen in *Dooley's* case [1951] 1 Lloyd's Rep 271 and *Galt's* case (1983) 133 NLJ 870 did not in fact occur and were in fact out of the sight of the plaintiffs in those cases (otherwise they would have known that the workmen had not been killed or injured).

I have not, save for referring to the judgment of Henry LJ on this one point, referred to *Frost's* case [1997] 1 All ER 540, [1997] 3 WLR 1194. It is under appeal to the House of Lords. Although it was an employee/employer case, I do not consider that its decision provides the answer to the question raised by the present case.

Since preparing this judgment I have had the advantage of reading the draft judgment of Brooke LJ with whom and Sir John Vinelott I have the misfortune to disagree. Brooke LJ has drawn attention to the Australian case *Rowe v McCartney* [1976] 2 NSWLR 72 which was not referred to in argument. It provides an interesting example of a distinction that needs to be made. It was not an employee/employer case. The shock that was suffered was wholly independent of whether or not the plaintiff had been in the car at the time. It could fairly be said that the injury was outside the scope of any duty of care owed to the plaintiff. It is not in any way inconsistent with what Lord Oliver and Lord Hope have said. It is the participation of the employee in the relevant incident which creates the *proximity* between him and his employer. In *Rowe's* case there was, in the opinion of the court, no such participation. The point at which the

*a* Rowe decision impinges upon English decisions is *Page v Smith* [1995] 2 All ER 736, [1996] AC 155 and *Schneider v Eisovitch* [1960] 1 All ER 169, [1960] 2 QB 430.

*b* It follows that in my judgment the plaintiff has in the present case proved that he has suffered a foreseeable injury which was caused by the defendants' breach of the duty that they owed him and came within the scope of that duty. I consider that his appeal should accordingly be allowed and the case be remitted to the Queen's Bench Division or to the county court for the assessment of damages.

*Appeal dismissed.*

Dilys Tausz Barrister.



# Re Westmid Packing Services Ltd

## Secretary of State for Trade and Industry v Griffiths and others

COURT OF APPEAL, CIVIL DIVISION

LORD WOOLF MR, WALLER AND ROBERT WALKER LJJ

25, 26 NOVEMBER, 16 DECEMBER 1997

*Company – Director – Disqualification – Director unfit to be concerned in management of a company – Period of disqualification – Correct approach in determining appropriate period of disqualification – Matters to be taken into account – Company Directors Disqualification Act 1986, ss 6, 17.*

G, C and W were directors of WPS Ltd, G being the controlling influence behind the business of the company. In 1991 the company went into administrative receivership. Thereafter, the Secretary of State applied for disqualification orders against all three directors under s 6<sup>a</sup> of the Company Directors Disqualification Act 1986. The judge found that G, who did not contest the Secretary of State's application, had been guilty of serious misconduct in that he had consistently treated the company's assets as if they were his own, using the company's money for the liabilities and purposes both of associated companies controlled by him and of his unincorporated business, and disqualified him for nine years. The judge found that C and W had failed, as directors, to keep themselves properly informed of the true financial position of the company and so were unfit to be concerned in the management of a company and disqualified them for the statutory minimum period of two years. However, he also made an order under s 17<sup>b</sup> of the 1986 Act authorising C and W to be directors of and to be concerned in the management of a separate company which they controlled, CPS Ltd, which had acquired WPS Ltd's tangible assets and goodwill from the receivers in December 1991. C and W gave notice of appeal against their disqualification orders, but in the event decided not to pursue their appeal. The Secretary of State cross-appealed seeking to increase the period of disqualification.

**Held** – In determining the appropriate period of disqualification under the 1986 Act, the court should start with an assessment of the correct period to fit the gravity of the offence, bearing in mind that the period of disqualification had to contain deterrent elements, and then allow for mitigating factors, such factors not being restricted to the facts of the offence. The power to grant leave under s 17, though, was irrelevant, and the fact that the court was minded to grant such leave was no reason for deciding to impose the minimum period of disqualification. Relevant matters included the director's general reputation and conduct in discharge of the office of director, his age and state of health, the length of time he had been in jeopardy, whether he had admitted the offence, his general conduct before and after the offence and periods of disqualification

a Section 6, so far as material, is set out at p 126 j to p 127 a, post

b Section 17 is set out at p 127 b to e, post

a of any co-directors that might have been ordered by other courts. But the court should adopt a broad brush approach, so that detailed or repetitive evidence should not be allowed, and the citation of cases would in the great majority of cases be unnecessary and inappropriate. In the end, however, the period of disqualification was a matter for the discretion of the judge and the Court of Appeal could not intervene and substitute its own view unless the judge had erred in principle. In the instant case, in imposing the minimum period of disqualification, the judge had not erred in principle or been plainly wrong to do so. Accordingly, the Secretary of State's cross-appeal would be dismissed, and the appeal also by consent (see p 130 f to p 131 g, p 132 b g h, and p 133 a e to p 135 b, post).

b *Re Civica Investments Ltd* [1983] BCLC 456 and *Re Copecrest Ltd, Secretary of State for Trade and Industry v McTighe* (No 2) [1996] 2 BCLC 477 applied.

### Notes

For disqualification orders against company directors, see 7(2) *Halsbury's Laws* (4th edn reissue) paras 1417–1427, and for cases on the subject, see 9(2) *Digest* (2nd reissue) 119–123, 4159–4169.

d For the Company Directors Disqualification Act 1986, ss 6, 17, see 8 *Halsbury's Statutes* (4th edn) (1991 reissue) 786, 795.

### Cases referred to in judgment

*Barings plc, Re, Secretary of State for Trade and Industry v Baker* (29 July 1997, unreported), Ch D.

*Carecraft Construction Co Ltd, Re* [1993] 4 All ER 499, [1994] 1 WLR 172.

*Civica Investments Ltd, Re* [1983] BCLC 456.

*Copecrest Ltd, Re, Secretary of State for Trade and Industry v McTighe* (No 2) [1996] 2 BCLC 477, CA.

f *Country Farms Inns Ltd, Re, Secretary of State for Trade and Industry v Ivens* [1997] 2 BCLC 334, CA.

*Dawes & Henderson (Agencies) Ltd (in liq), Re, Secretary of State for Trade and Industry v Dawes* [1997] 1 BCLC 329.

*Grayan Building Services Ltd (in liq), Re, Secretary of State for Trade and Industry v Gray* [1995] 1 BCLC 276, [1995] Ch 241, [1995] 3 WLR 1, CA.

g *Lo-Line Electric Motors Ltd, Re* [1988] 2 All ER 692, [1988] Ch 477, [1988] 3 WLR 26.

*Pamstock Ltd, Re* [1994] 1 BCLC 716.

*Sevenoaks Stationers (Retail) Ltd, Re* [1991] 3 All ER 578, [1991] Ch 164, [1990] 3 WLR 1165, CA.

h *Swift 736 Ltd, Re, Secretary of State for Trade and Industry v Ettinger* [1993] BCLC 896, CA.

*Thorncliffe Finance Ltd, Re, Secretary of State for Trade and Industry v Arif* [1997] 1 BCLC 34.

### Cases also cited or referred to in skeleton arguments

j *A & C Group Services Ltd, Re* [1993] BCLC 1297.

*Bath Glass Ltd, Re* [1988] BCLC 329.

*City Equitable Fire Insurance, Re* [1925] Ch 407, [1924] All ER Rep 485, CA.

*Cladrose Ltd, Re* [1990] BCLC 204.

*Dawson Print Group Ltd, Re* [1987] BCLC 601.

*Douglas Construction Services Ltd, Re* [1988] BCLC 397.

*Dovey v Cory* [1901] AC 477, [1895–9] All ER Rep 724, HL.

*Drincqbier v Wood* [1899] 1 Ch 393.

*Majestic Recording Studios Ltd, Re* [1989] BCLC 1.

*Melcast (Wolverhampton) Ltd, Re* [1991] BCLC 288.

*Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] 2 All ER 563, [1983] Ch 258, CA.

*New Generation Engineers Ltd, Re* [1993] BCLC 435.

### Appeal and cross-appeal

By notice dated 2 June 1997 Roy Elliott Conway and John Thomas Wassell appealed from the order of Chadwick J made on 25 March 1997 whereby he ordered that they be disqualified as directors of Westmid Packing Services Ltd pursuant to s 6 of the Company Directors Disqualification Act 1997 for a period of two years, together with Sidney Griffiths, who was disqualified for a period of nine years. The Secretary of State for Trade and Industry cross-appealed against the period of disqualification. The appellants did not pursue their appeal, and Mr Griffiths took no part in the proceedings. The facts are set out in the judgment of the court.

*Michael Briggs QC* (instructed by *Lee Crowder*, Birmingham) and *Abbas Mithani* of that firm for Mr Conway and Mr Wassell.

*Nigel Davis QC* and *Martha Maher* (instructed by *Osborne Clarke*, Bristol) for the Secretary of State.

*Cur adv vult*

16 December 1997. The following judgment of the court was delivered.

**LORD WOOLF MR.** On 25 March 1997 Chadwick J made a disqualification order under s 6 of the Company Directors Disqualification Act 1986 in respect of three former directors of Westmid Packing Services Ltd (the company). They were Mr Sidney Griffiths, Mr Roy Conway and Mr John Wassell.

Section 1(1) of the 1986 Act is in the following terms:

'In the circumstances specified below in this Act a court may, and under section 6 shall, make against a person a disqualification order, that is to say an order that he shall not, without leave of the court—(a) be a director of a company, or (b) be a liquidator or administrator of a company, or (c) be a receiver or manager of a company's property, or (d) in any way whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company, for a specified period beginning with the date of the order.'

Section 6(1) and (4) is in the following terms:

'(1) The court shall make a disqualification order against a person in any case where, on an application under this section, it is satisfied—(a) that he is or has been a director of a company which has at any time become insolvent (whether while he was a director or subsequently), and (b) that his conduct as a director of that company (either taken alone or taken together with his conduct as a director of any other company or companies) makes him unfit to be concerned in the management of a company ...

a (4) Under this section the minimum period of disqualification is 2 years, and the maximum period is 15 years.'

The matters to which the court is to have regard in determining unfitness are set out in s 9 of and Sch 1 to the Act.

It is to be noted that a disqualification order prohibits various activities *without leave of the court*. Section 17 provides as follows in relation to leave:

b '(1) As regards the court to which application must be made for leave under a disqualification order, the following applies—(a) where the application is for leave to promote or form a company, it is any court with jurisdiction to wind up companies, and (b) where the application is for leave to be a liquidator, administrator or director of, or otherwise to take part in the management of a company, or to be a receiver or manager of a company's property, it is any court having jurisdiction to wind up that company.

c (2) On the hearing of an application for leave made by a person against whom a disqualification order has been made on the application of the Secretary of State, the official receiver or the liquidator, the Secretary of State, official receiver or liquidator shall appear and call the attention of the court to any matters which seem to him to be relevant, and may himself give evidence or call witnesses.'

d At the hearing before Chadwick J Mr Griffiths did not appear to contest the application for a disqualification order made against him. He had filed a great deal of evidence but it was not read because he was not there to be cross-examined. Mr Griffiths was at all times the controlling influence behind the business of the company, which was incorporated in 1976 and went into administrative receivership in 1991. It traded in the West Midlands in the business of industrial packing. Although Mr Griffiths was formally appointed as a director only in 1986, the judge was satisfied that he acted as a director from the start of trading in 1977. Mr Griffiths was disqualified for nine years.

e Mr Conway and Mr Wassell did contest the application. They disputed the grounds on which the Secretary of State contended that they were unfit to be concerned in the management of a company. The judge found one (and only one) of the grounds made out. It is that set out in para 44(b) of the affidavit of Mr Alistair Jones (a partner in KPMG Peat Marwick, Birmingham, and one of the joint administrative receivers). It alleged that they failed to keep themselves properly informed of the true financial position of Westmid. The judge was not satisfied that any of the allegations in para 44(a), (c), (d) and (e) had been made good. The judge did not make any express finding on the allegations in para 44(f)(i) and (iii), (g) and (h). That in para 44(f)(ii) was not pursued.

h In consequence of his finding on para 44(b) the judge concluded that Mr Conway and Mr Wassell were unfit to be concerned in the management of a company. The judge was therefore required by s 6 of the Act to make a disqualification order for a minimum period of two years. The judge disqualified each of them for the minimum period. He also, at the same hearing, and on an undertaking as to the furnishing copies of accounts, made an order under s 17 of the Act authorising Mr Conway and Mr Wassell to be directors of and to be concerned in the management of a company called Conway Packing Services Ltd (CPS). CPS is a company controlled by Mr Conway and Mr Wassell. It acquired Westmid's tangible assets and goodwill from the receivers



in December 1991. No criticism has been made of the appellants' conduct as directors of CPS. There is, on the contrary, evidence that they have run it properly and successfully. a

The effect of the judge's order was therefore to permit Mr Conway and Mr Wassell, through CPS, to continue to run the company's business in much the same way as before the receivership. Despite that, they both gave notice of appeal against the disqualification orders. The first ground of appeal (there were three principal grounds, elaborated in the notice of appeal) was that the judge had been wrong not to take account of the appellants' conduct as directors of CPS. The Secretary of State cross-appealed by a respondent's notice to increase the period of disqualification. The Secretary of State did not however appeal against the leave granted in respect of the appellants' directorships in CPS. b

The appellants have now decided not to pursue their appeal. That was because of the decision of this court in *Re Country Farms Inns Ltd, Secretary of State for Trade and Industry v Ivens* [1997] 2 BCLC 334. That case was concerned, essentially, with the correct construction of the words 'any other company' in s 6(1)(b) of the Act. The judgment of Morritt LJ (with which Leggatt and Brooke LJ agreed) goes fully into the authorities on that point and it is not necessary to go into them again on this occasion. But the Secretary of State pursues the cross-appeal. c

No challenge is made by either side to the primary facts as found by the judge. He saw the appellants and heard them cross-examined on their affidavits but their cross-examination was relatively short. Mr Jones was also cross-examined, but the cross-examination was not directed to his principal affidavit. Mr Nigel Davis QC (appearing with Ms Martha Maher for the Secretary of State) submits, rightly, that below, as in this court, the real issue has been, not as to the facts, but as to what view shall be taken of them, and what conclusion drawn. As Nicholls V-C said in *Re Swift 736 Ltd, Secretary of State for Trade and Industry v Ettinger* [1993] BCLC 896 at 897, the challenge is as to the seriousness, or lack of seriousness, which the judge attached to the shortcomings in the appellants' conduct as directors of the company. d

The appellants were directors of the company throughout its trading life. But their evidence, which was accepted by the judge, was that they were throughout treated more like employees than directors. Mr Griffiths (the controlling shareholder in a holding company which controlled the company and other associated companies) was the driving force. Mr Griffiths was, they say, a much-respected businessman and a pillar of the community. He had expensive possessions and pastimes. They were impressed by him and they trusted him. Now that it appears that he was thoroughly irresponsible and lacking in commercial morality (in Mr Conway's expression, though not the judge's, a fraudster), the appellants' position is that they have reason to be aggrieved and to feel themselves deceived. That may well be so, but it is by no means an adequate answer to the charges of unfitness made against them. e

Against Mr Griffiths the judge made findings of serious misconduct both in relation to the affairs of the company and in relation to the affairs of other associated companies which Mr Griffiths controlled. The judge's serious view of his conduct was reflected in the order disqualifying Mr Griffiths for a period of nine years, almost at the top of the middle bracket mentioned by this court in *Re Sevenoaks Stationers (Retail) Ltd* [1991] 3 All ER 578 at 581-582, [1991] Ch 164 at 174. f

a The judge found that Mr Griffiths consistently treated the company's assets as if they were his own. In particular, he used the company's money for the liabilities and purposes both of other companies in his group and of his unincorporated business (S Griffiths & Sons) so giving rise to substantial indebtedness to the company which was interest-free, unsecured and in the event largely irrecoverable. Indebtedness in respect of Mr Griffiths' own business exceeds £500,000. Mr Griffiths caused the company to enter in 1978 b into a cross-guarantee of associated companies' liabilities so as to produce a liability in excess of £430,000 with no countervailing advantage to the company. He allowed the company to continue trading at a time, from about 1988, when he must have known that the company was insolvent, and that its continued trading created losses for its creditors and brought benefits only for Mr Griffiths. c The judge made comparable findings in respect of Mr Griffiths' conduct towards two other group companies.

The judge then went on to consider the appellants. He said:

d 'The real criticism, in their case, is that they did not appreciate what Mr Griffiths was doing. In particular, they did not appreciate the extent to which the company's moneys were being used by Mr Griffiths for the benefit of his own business or the businesses of his associated companies. They did not know about the cross-guarantee given by the company to the bank.'

e The allegations designated (a) to (e) in para 44 of the affidavit of Mr Jones (and others on which the judge made no express finding in respect of the appellants) were against all three directors. Mr Griffiths also had two sons who were directors for some years but no disqualification order was sought against them. The principal allegations against the appellants were: (a) persistent breaches of ss 227, 241 and 242 of the Companies Act 1985 (in the case of the appellants the f first section should, it seems, have been s 226); (b) failure to keep themselves properly informed of the company's financial position; (c) causing the company to trade when they knew or should have known that it was insolvent; (d) continued insolvent trading; and (e) retention of crown moneys (the specified figure of over £335,000 may be excessive because the tax figure is not stated to be all in respect of PAYE and NIS, and it includes interest, while the figure for g VAT includes surcharges). As already noted the judge found only one of these established against the appellants, that is the failure to keep themselves properly informed about the company's financial position.

The judge's explicit or implicit conclusion that the other allegations were not made out against the appellants is challenged in the notice of appeal but Mr h Davis has realistically concentrated on the submission that two years was an insufficient period of disqualification even for the single allegation which was established against the appellants. Mr Davis has subjected the judge's decision to disqualify for the minimum period to some trenchant and well-argued criticism. He has described it (respectfully but forthrightly) as plainly wrong.

j Mr Davis started from the proposition that (as Nicholls V-C said in *Re Swift 736 Ltd* [1993] BCLC 896 at 899) Parliament's purpose in enacting the Act (and its predecessors starting with s 28 of the Companies Act 1976) was to raise standards in the conduct and responsibility expected of those who manage companies incorporated with the privilege of limited liability. That parliamentary purpose, and its importance, are further emphasised by the

mandatory minimum period introduced by s 6 of the present Act. Mr Davis also submitted, correctly, that the collegiate or collective responsibility of the board of directors of a company is of fundamental importance to corporate governance under English company law. That collegiate or collective responsibility must however be based on individual responsibility. Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them.

A proper degree of delegation and division of responsibility is of course permissible, and often necessary, but not total abrogation of responsibility. A board of directors must not permit one individual to dominate them and use them, as Mr Griffiths plainly did in this case. Mr Davis commented that the appellants' contention (in their affidavits) that Mr Griffiths was the person who must carry the whole blame was itself a depressing failure, even then, to acknowledge the nature of a director's responsibility. There is a good deal of force in that point.

Mr Davis developed this argument by pointing to five matters in particular : (1) the length of time for which the appellants were directors—that is 13 years; (2) that for the whole of that period the appellants never studied the company's annual financial statements or its accounting records; (3) that they signed at least some pages of the 1985 accounts (but did not ask to see the pages with notes as to the cross-guarantee); (4) that they knew of the need to file accounts (both were from 1979 directors of another company, Roy Conway Industrial Services Ltd); and (5) that had they insisted (as they should have done) on seeing annual financial statements they would have been on notice that the company was heavily dependent on the other companies in the group controlled by Mr Griffiths. Mr Davis also emphasised the grave financial consequences following from Mr Griffiths' misconduct and the appellants' neglect in monitoring it. It produced irrecoverable debts owed to the company and liabilities under the cross-guarantee given by the company to a total (in 1991) of the order of £1.5m, which brought the company to ruin.

It is common ground that the role of this court in reviewing on appeal the length of a period of disqualification was correctly stated in *Re Copecrest Ltd, Secretary of State for Trade and Industry v McTighe (No 2)* [1996] 2 BCLC 477 at 485 by Morritt LJ, who said:

"The period for disqualification is a matter for the discretion of the judge hearing the application to be exercised in accordance with the relevant principles. One such principle is the recognition of the categories of case indicated by this court in *Re Sevenoaks Stationers (Retail) Ltd* [1991] BCLC 325, [1991] Ch 164. Accepting the submissions made on behalf of the Official Receiver, Dillon LJ said ([1991] BCLC 325 at 328, [1991] Ch 164 at 174): "(i) The top bracket of disqualification for periods over ten years should be reserved for particularly serious cases. These may include cases where a director who has already had one period of disqualification imposed on him falls to be disqualified yet again. (ii) The minimum bracket of two to five years' disqualification should be applied where, though disqualification is mandatory, the case is, relatively, not very serious. (iii) The middle bracket of disqualification for from six to ten years should apply for serious cases which do not merit the top bracket." Unless the judge can be shown to have erred in principle, the length of the period of disqualification is essentially a matter for his discretion with which the



a Court of Appeal will not interfere. But if such an error is shown then this court is entitled and bound to intervene and substitute its own view for that of the judge: cf *Secretary of State for Trade and Industry v Ettinger*, *Re Swift 736 Ltd* [1993] BCLC 896 and *Secretary of State for Trade and Industry v Gray* [1995] 1 BCLC 276 at 285–287, sub nom *Re Grayan Building Services Ltd (in liq)* [1995] Ch 241 at 254–256.’

b We do not accept that the judge erred in principle in imposing the minimum period of disqualification, or that he was plainly wrong to do so. This court—without having seen the appellants giving evidence or heard submissions from counsel on his behalf as to the facts—is of the view that a longer period of disqualification, in the middle of the lower range, would have been more appropriate. But that is not enough to lead the court to interfere with the judge’s exercise of his discretion. We cannot say that the way that the judge exercised his discretion was wrong in principle and it is significant that the Secretary of State does not challenge the judge’s decision that the case falls within the minimum bracket.

d That is sufficient to dispose of this appeal. But we wish to ensure that our dismissal of the Secretary of State’s respondent’s notice does not convey the wrong message. We also wish to give some general guidance as to what is relevant and admissible evidence for the purpose of determining the length of the disqualification period, and for the purposes of any application under s 17 of the Act.

e (1) It is of the greatest importance that any individual who undertakes the statutory and fiduciary obligations of being a company director should realise that these are inescapable personal responsibilities. The appellants may have been dazzled, manipulated and deceived by Mr Griffiths but they were in breach of their own duties in allowing this to happen. They can count themselves fortunate to have received the minimum period of disqualification and to have had the benefit of immediate orders under s 17 of the Act.

f (2) Where the court knows or expects that an application under s 17 will be made immediately after, or soon after the making of a disqualification order, and the court is minded to grant leave under s 17, that is no reason for deciding to impose the minimum period of disqualification. An order under s 17 gives leave only in respect of one or more specified companies, and may be subject to quite stringent conditions. The power to grant leave under s 17 is irrelevant to determining the proper period of disqualification.

g (3) In *Re Lo-Line Electric Motors Ltd* [1988] 2 All ER 692, [1988] Ch 477 Browne-Wilkinson V-C said that the primary purpose of s 300 of the Companies Act 1985 was to protect the public against the future conduct of companies by persons whose past records as directors of insolvent companies showed them to be a danger to creditors and others. That statement has often been approved by this court. But there is often a considerable time lag between the conduct complained of, its discovery and the disqualification proceedings actually coming to court. We return below (para 9) to what can be done to avoid delay.

j One result of delay when it does occur is that there are occasions when disqualification must be ordered even though, by reason of the director’s recognition of his previous failings and the way he has conducted himself since the conduct complained of, he is in fact no longer a danger to the public at all. In such cases it is no longer necessary for the director to be kept ‘off the road’ for the protection of the public, but other factors come into play in the wider



interests of protecting the public, ie a deterrent element in relation to the director himself and a deterrent element as far as other directors are concerned. Despite the fact that the courts have said disqualification is not a 'punishment', in truth the exercise that is being engaged in is little different from any sentencing exercise. The period of disqualification must reflect the gravity of the offence. It must contain deterrent elements. That is what sentencing is all about, and that is what fixing the appropriate period of the disqualification is all about. What Vinelott J (in *Re Pamstock Ltd* [1994] 1 BCLC 716 at 737) called 'tunnel vision', ie concentration on the facts of the offence, is necessary when considering whether a director is unfit. In relation to the period of disqualification the facts of the offence are still obviously important but many other factors ought (and in reality do) come into play (see further paras 5 to 7 below).

(4) As will appear hereafter there is much in the judgment of Sir Richard Scott V-C in *Re Barings plc, Secretary of State for Trade and Industry v Baker* (29 July 1997, unreported) with which we agree, but the following observation may in our view need qualification. Sir Richard Scott V-C said:

'There is in my view no real place for discounts to be allowed to a director who has assisted the court in its disposal of court business by not disputing that which is indisputable. Plea bargains have no place in this jurisdiction.'

In the criminal sentencing context (which is clearly what the Sir Richard Scott V-C had in mind) there is no room for plea bargaining if by that it is meant some form of agreement as to the sentence if a plea is entered. But there can be negotiation as to the acceptability of an admission on a certain basis of fact, and that would seem to be as sensible in this context as in the criminal context. That is indeed already recognised in the *Carecraft* procedure (see *Re Carecraft Construction Co Ltd* [1993] 4 All ER 499, [1994] 1 WLR 172). Furthermore in the criminal context very little discount is given if there is an admission of what is 'indisputable', but an admission of what might otherwise have taken a great deal of time and expense to prove surely merits some recognition, provided of course that the starting point correctly reflects the gravity of the conduct. We do not consider that it would send out a wrong message to fix the period of disqualification by starting with an assessment of the correct period to fit the gravity of the conduct, and then allowing for the mitigating factors, in much the same way as a sentencing court would do. It would not, however, be right to allow the question whether a discretion is likely to be exercised under s 17 to come into the calculation at all. That question should be considered separately after a period of disqualification has been fixed.

(5) That leads on to the question of what categories of evidence should be admitted on the three (logically and procedurally) distinct issues: (i) is a director unfit within the meaning of the Act? (ii) if so, how long should be his period of disqualification? and (iii) at what stage (if any) of his disqualification, in respect of what company or companies and on what conditions, should leave be granted under s 17? Here we wish to discourage the belief that there is a complicated, arcane and inflexible code of evidential rules applicable in these cases. In most cases the essential thing will be for the court, with the assistance of the parties, to use common sense and to adopt a practical and flexible approach to case management, so as to confine the evidence to that which is probative (see *Re Dawes & Henderson (Agencies) Ltd (in liq), Secretary of State for Trade and Industry v*

a Dawes [1997] 1 BCLC 329). While the director's general reputation may be relevant on questions of the appropriate period of disqualification and leave under s 17 detailed or repetitive evidence should not be allowed.

(6) What matters are relevant to the length of the period of disqualification has been considered (at least in passing) by this court in *Re Grayan Building Services Ltd (in liq)* [1995] 1 BCLC 276, [1995] Ch 241 and at first instance in *Re Dawes & Henderson (Agencies) Ltd (in liq)* and in *Re Barings plc*. In *Re Grayan Building Services Ltd (in liq)* [1995] 1 BCLC 276 at 285, [1995] Ch 241 at 254 Hoffmann LJ, after citing *Re Swift 736 Ltd*, said:

c '... it must be remembered that a disqualified director can always apply for leave under s 17 and the question of whether he has shown himself unlikely to offend again will obviously be highly material to whether he is granted leave or not. It may be relevant by way of mitigation on the length of disqualification, although I note that the guidelines in *Re Sevenoaks Stationers (Retail) Ltd* [1991] BCLC 325, [1991] Ch 164 are solely by reference to the seriousness of the conduct in question.'

d Henry and Neill LJ agreed. But it is clear from the report in the *Re Sevenoaks Stationers (Retail) Ltd* that Dillon LJ (with whom Butler-Sloss and Staughton LJ agreed) was distinguishing between matters which (if admissible) would tend to increase the period of disqualification, and matters of mitigation. Dillon LJ's interlocutory question ([1991] Ch 164 at 170) must be read in the light of  
e counsel's argument. That is clear from a passage in Dillon LJ's judgment ([1991] 3 All ER 578 at 584, [1991] Ch 164 at 177). When it comes to mitigation (and to applications under s 17) the court is not restricted to the facts of the offence.

(7) In *Re Dawes & Henderson (Agencies) Ltd (in liq)* [1997] 1 BCLC 329 at 340 Blackburne J said:

f "Matters of mitigation" [the phrase used by Dillon LJ in *Re Sevenoaks Stationers (Retail) Ltd* [1991] 3 All ER 578 at 331, [1991] Ch 164 at 177] refers to matters relevant to the conduct that has been established.'

g That is no doubt so, but does not provide anything like a precise or exhaustive test. In *Re Barings plc* Sir Richard Scott V-C put it like this—

h 'But once that conclusion has, on the evidence, been arrived at, and the question is what period of disqualification should be imposed, then the issue, subject to the minimum and maximum limits set by Parliament, is one for the discretion of the court. I do not for my part see how it can be said that the evidence relating to the general ability and conduct as a director of the individual in question is necessarily irrelevant to the exercise of this discretion. I do not believe that discretion can be put into a closet from which general evidence of the sort I have described is excluded. Of course, not all evidence of character would be relevant. It would not be  
j relevant in the least whether the director was a good family man or whether he was kind to animals. But evidence of his general conduct in the discharge of the office of director goes to the question of extent to which the public needs protection against his acting in that office. It seems to me that evidence of that character is relevant to be taken into account by the court in exercising its discretion and cannot be excluded as being inadmissible.'

So far as there is any substantial difference between *Re Dawes & Henderson (Agencies) Ltd (in liq)* and *Re Barings plc* (and it is probably little more than a difference in emphasis), it is the views expressed by the Sir Richard Scott V-C in *Re Barings plc* which should be followed. A wide variety of matters—including the former director's age and state of health, the length of time he has been in jeopardy, whether he has admitted the offence, his general conduct before and after the offence, and the periods of disqualification of his co-directors that may have been ordered by other courts—may be relevant and admissible in determining the appropriate period of disqualification. We disagree with the view (that any period of de facto disqualification is irrelevant) expressed by Chadwick J in *Re Thorncliffe Finance Ltd, Secretary of State for Trade and Industry v Arif* [1997] 1 BCLC 34 at 45. The same matters may be relevant to an application under s 17, together with particulars of the responsibilities which the disqualified director wishes to be allowed to assume.

(8) This court was referred to the decision of Nourse J in *Re Civica Investments Ltd* [1983] BCLC 456 at 457–458, in which he said:

'It might be thought that [the appropriate period of disqualification] is something which, like the passing of sentence in a criminal case, ought to be dealt with comparatively briefly and without elaborate reasoning. In general I think that that must be the correct approach. More important, as more of these cases come before the court, it is obviously undesirable for the judge to be taken through the facts of previous cases in order to guide him as to the course he should take in the particular case before him. No doubt in this, as in other areas, it is possible that there will emerge a broad and undefined system of tariffs for defaults of varying degrees of blame, but there must come a point when it is no longer either necessary or desirable to go through the facts of previous cases. For my part I think that that point has now been reached.'

That was one of the earliest cases under s 28 of the Companies Act 1976, under which disqualification was not mandatory and there was no minimum period. However Nourse J's approach should be adopted in all cases involving disqualification. Nourse J's expectation about 'a broad and undefined system of tariffs' has been fulfilled by the decision of this court in *Re Sevenoaks Stationers (Retail) Ltd* [1991] 3 All ER 578, [1991] Ch 164. Nourse J may not have foreseen how (with the advent of new and specialised law reports) large numbers of disqualification cases would continue to be the subject of detailed reports but their existence makes his remarks all the more important. The principles applicable to the court's jurisdiction under the Act are now reasonably clear. The application of those principles to the facts of the particular case is a matter for the trial judge. The citation of cases as to the period of disqualification will, in the great majority of cases, be unnecessary and inappropriate.

(9) We are concerned at the delay in the hearing of these cases. Sometimes delay is unavoidable because of pending criminal proceedings. Sometimes respondents obtain over-indulgent extensions of time for putting in their evidence. All such delays are deplorable, especially as there is no power to suspend a director on an interim basis, even in proceedings alleging serious misconduct. We feel that over-elaboration in the preparation and hearing of these cases and a technical approach as to what evidence is and is not admissible is contributing to delay. What is required and what the court should confine the

*a* parties to, is sufficient evidence to enable the court to adopt a broad brush approach. This should be regarded, especially in relation to the period of disqualification, as a jurisdiction which the court should exercise in a summary manner and the court should confine the parties to placing before it the material which is needed to enable it to exercise the jurisdiction in that way.

We would dismiss the cross-appeal and (by consent) the appeal.

*b* *Appeal dismissed by consent. Cross-appeal dismissed.*

Kate O'Hanlon Barrister.



## Ali Shipping Corp v Shipyard Trogir

COURT OF APPEAL, CIVIL DIVISION

BELDAM, POTTER AND BROOKE LJJ

21 OCTOBER, 19 DECEMBER 1997

*Arbitration – Evidence – Confidentiality – Two arbitrations – Defendant in first arbitration also involved in second arbitration – Other parties in same beneficial ownership – Defendant wishing to make use in second arbitration of material generated in first arbitration – Whether such use of material would be in breach of implied obligation of confidentiality.*

Following a dispute between the plaintiffs, a company owned by GH Ltd, and the defendants arising out of a shipbuilding contract, an arbitration award was made in favour of the plaintiffs. Subsequently, a further dispute arose between the defendants and three other companies owned by GH Ltd, and that dispute also went to arbitration. The defendants wished to rely in the second arbitration on certain materials generated in the course of the first arbitration in support of a plea of issue estoppel, whereupon the plaintiffs applied and obtained ex parte an injunction restraining the defendants from doing so on the basis that use of the material would amount to a breach of the defendants' implied obligation of confidentiality in respect of the first arbitration. The plaintiffs thereafter applied inter partes to continue the injunction and by consent the application was treated as the trial of the action. The judge held that a term of confidentiality was not to be implied into an arbitration contract as a matter of course, but depended on the circumstances of the particular case and on whether the officious bystander would consider it necessary to give business efficacy to the contract. He concluded that it was not necessary to imply such a term into the first arbitration agreement since both negotiations and contracts were closely bound up together and all the companies were effectively in the same beneficial ownership and accordingly dismissed the plaintiffs' claim and discharged the injunction. The plaintiffs appealed.

**Held** – Having regard to the essentially private nature of an arbitration, a party thereto was, as a matter of law and a necessary incident of the arbitration contract, subject to an implied obligation of confidence not to make use of material generated in the course of the arbitration outside its four walls, even when required for use in other proceedings. That rule was subject to exceptions, for example where it was reasonably necessary for the protection of the legitimate interests of an arbitrating party, ie for the establishment or protection of that party's legal rights vis-à-vis a third party in order to found a cause of action against, or to defend a claim brought by, the third party. However, the fact that the parties to whom disclosure was contemplated were in the same beneficial ownership and management as the complaining party did not justify a further exception. It followed that the judge's approach had been wrong. Moreover, the material which the defendants sought to rely on was not reasonably necessary for the protection or enforcement of their rights, because the plea in respect of which disclosure was sought to be justified was essentially one of law, the materials by which its merits could be judged were all before the

a court, and that plea was unsustainable. The appeal would therefore be allowed and the injunction originally granted made final (see p 146 *e f j* to p 147 *b g h*, p 148 *j*, p 149 *a b f*, p 151 *c*, p 153 *j* and p 154 *b*, post).

Dictum of Parker LJ in *Dolling-Baker v Merrett* [1991] 2 All ER 890 at 899 and of Lord Bridge in *Scally v Southern Health and Social Services Board (British Medical Association, third party)* [1991] 4 All ER 563 at 571 applied.

b Dictum of Colman J in *Hassneh Insurance Co v Mew* [1993] 2 Lloyd's Rep 243 at 246 not followed.

### Notes

For the conduct of an arbitration, see 2 *Halsbury's Laws* (4th edn reissue) para 670–672.

c For obligations of confidence generally, see 8(1) *Halsbury's Laws* (4th edn reissue) para 401.

### Cases referred to in judgments

*Dolling-Baker v Merrett* [1991] 2 All ER 890, [1990] 1 WLR 1205, CA.

d *Eso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* (1995) 128 ALR 391, Aust HC.

*Hassneh Insurance Co v Mew* [1993] 2 Lloyd's Rep 243.

*Hyundai Engineering and Construction Co Ltd v Active Building and Civil Construction Pte Ltd* (9 March 1994, unreported), QBD.

*Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Rep 272.

e *Lister v Romford Ice and Cold Storage Co Ltd* [1957] 1 All ER 125, [1957] AC 555, [1957] 2 WLR 158, HL.

*Liverpool City Council v Irwin* [1976] 2 All ER 39, [1977] AC 239, [1976] 2 WLR 562, HL.

*London and Leeds Estates Ltd v Paribas Ltd (No 2)* [1995] 1 EGLR 102.

f *Oxford Shipping Co Ltd v Nippon Yusen Kaisha, The Eastern Saga* [1984] 3 All ER 835.

*Scally v Southern Health and Social Services Board (British Medical Association, third party)* [1991] 4 All ER 563, [1992] 1 AC 294, [1991] 3 WLR 778, HL.

### Cases also cited or referred to in skeleton arguments

*Adams v Cape Industries plc* [1991] 1 All ER 929, [1990] Ch 433, CA.

g *Bank of Tokyo v Karoon* [1986] 3 All ER 468, [1987] AC 45, CA.

*Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662, NSW SC.

*Devonald v Rosser & Sons* [1906] 2 KB 728, [1904–7] All ER Rep 988, CA.

*Evpo Agnic, The* [1988] 3 All ER 810, [1988] 1 WLR 1080, CA.

h *Gleeson v J Wippell & Co Ltd* [1977] 3 All ER 54, [1977] 1 WLR 510.

*House of Spring Gardens Ltd v Waite* [1990] 2 All ER 990, [1991] 1 QB 241, CA.

*Laughland v Stevenson* [1995] 2 NZLR 474, Auckland HC.

*Maritime Trader, The* [1981] 2 Lloyd's Rep 153.

### Appeal

j The plaintiffs, Ali Shipping Corp, appealed from the order of Clarke J given on 18 September 1997 whereby he discharged an ex parte injunction granted by Longmore J on 10 September 1997 restraining the defendants, Shipyard Trogir, from deploying in arbitrations against three Liberian companies certain materials generated in the course of an earlier arbitration between the plaintiffs and the defendants. The facts are set out in the judgment of Potter LJ.

Sydney Kentridge QC and Timothy Wormington (instructed by Ince & Co) for the plaintiffs. a

Julian Flaux QC and John Lockey (instructed by Stephenson Harwood) for the defendants.

*Cur adv vult*

19 December 1997. The following judgments were delivered. . b

**POTTER LJ** (giving the first judgment at the invitation of Beldam LJ). This is the plaintiffs' appeal from the order of Clarke J dated 18 September 1997 whereby he discharged an ex parte injunction previously granted by Longmore J on 10 September 1997 restraining the defendants from deploying in arbitrations against three Liberian companies certain materials generated in the course of an earlier arbitration between the plaintiffs and the defendants. The plaintiffs' inter partes application to continue the injunction having been treated by consent as the trial of the action, the judge dismissed the claims of the plaintiffs and ordered them to pay the defendants' costs of the action to be taxed if not agreed. Following judgment, the defendants undertook not to send any of the material to the arbitrators pending the hearing of this appeal. c  
d

#### *The background*

On 22 December 1988 the plaintiffs, Ali Shipping Corp (Ali), became party, by novation, to a shipbuilding contract between Liera Shipping Corp (Liera) and the defendants, Shipyard Trogir (the yard), by which the yard undertook to build a vessel referred to as hull 202 (the hull 202 agreement). On 29 April 1988 the yard had also entered into other shipbuilding contracts in respect of hull 200 and hull 201. These contracts were later novated in favour of Rula Shipping Corp (Rula) and Irma Shipping Corp (Irma) respectively. Subsequently, and in any event before 30 March 1990, the shares in the plaintiffs, Rula and Irma were all acquired by Greenwich Holdings Ltd (Greenwich). Greenwich also wholly owned Sea Tankers Management Co Ltd (Sea Tankers), who acted as agents and managers on behalf of Rula, Irma and Ali. e  
f

On 30 March 1990 addendum no 1 was agreed to the contracts for hull nos 200, 201 and 202 which contained various provisions including an increase in the contract price of each vessel from \$20,900,000 to \$21,900,000. g

Article 2 of addendum no 1 provided that Sea Tankers 'on behalf of Company(ies) to be nominated have agreed to enter into contracts for 3 x 333,800/43,000 MTDW'. Article 3 provided that all details and conditions were to remain 'strictly private and confidential' and art 4 provided that all other provisions in the hull 202 agreement were to remain 'in full force and effect'. The three contracts anticipated were subsequently entered into on 15 April 1990 in respect of hull nos 204, 205 and 206, the buyers being respectively Lavender Shipping Ltd (Lavender), Leeward Shipping Ltd (Leeward) and Leman Navigation Inc (Leman). Those companies were also wholly owned by Greenwich. They were single purpose companies the function of which was limited to acquiring and operating their respective hulls. Each of the shipbuilding contracts contained a London arbitration clause and was governed by English law. h  
i

The yard failed to complete hull 202 in accordance with the hull 202 agreement, and Ali rescinded the contract and claimed substantial damages.



a The dispute went to arbitration (the first arbitration) and the sole arbitrator, Mr Bruce Harris, on 14 April 1997 made an award (the first award) in favour of Ali for \$21,594,391 plus interest (amounting in all to \$34,000,000) and costs.

b In the first arbitration, the yard sought to defend Ali's claims for substantial damages on a variety of bases, including the fact that Lavender, Leeward and Leman had not paid the first instalments of the price of the contracts for hulls 204 to 206. In that connection the yard contended that its obligations to build hull 202 had become contractually dependent on performance of the subsequent contracts, and that the corporate veil should be pierced and all Greenwich-owned companies treated as one to permit the yard's plea of justification and/or set-off in respect of its claims against Lavender, Leeward and Leman under the hull 204 to 206 contracts. In a lengthy and fully reasoned award, Mr Bruce Harris rejected the yard's arguments. Although he was satisfied that Lavender, Leeward and Leman were all in breach of the hull 204 to 206 contracts in failing to pay the first instalments of the contractual price, he held that, whatever the position under the contracts for hulls 204 to 206, it was irrelevant to the issue of the defendants' liability under the hull 202 agreement. He refused to pierce the corporate veil, holding that the use of one-ship companies in connection with such transactions was a normal way of doing business, and that the contractual arrangements were made by the parties deliberately observing the separate nature of the legal personalities involved. He ruled that any claims which the yard might have in respect of hulls 204 to 206 could not be set off against the sums due to the plaintiffs under the hull 202 agreement.

f The yard made no payments in respect of the award. Instead they reactivated three arbitrations previously commenced against Lavender, Leeward and Leman in respect of the hull 204 to 206 contracts (the hull 204 to 206 arbitrations). Until February 1997 when points of claim were served, those arbitrations had not progressed since their commencement some six years before. In 1994, Lavender, Leeward and Leman had effectively gone into liquidation. We are told that their status in Liberian law is something short of that. However, it is clear that they are dormant save for the purpose of defending and counterclaiming in the hull 204 to 206 arbitrations. In June 1997 each served points of defence raising, inter alia, a number of matters which were the subject of investigation and/or findings in the first arbitration. Each defence pleaded that it was 'without prejudice to any application the Respondent ... may make under section 13A of the Arbitration Act 1950, as amended, for an order dismissing the claim ... on the grounds of inordinate and inexcusable delay'.

h The yard has applied for interim awards in the hull 204 to 206 arbitrations in respect of the first instalments of the contractual price under the respective shipbuilding contracts and for damages to be assessed in respect of the alleged repudiation of each of the contracts. In response, Lavender, Leeward and Leman have stated their intention to submit that the arbitrators have no jurisdiction to hear the yard's claims as presently formulated, alternatively to seek to strike out the yard's claims for want of prosecution. We have been informed that (by an order which is not before us) the arbitrators in the hull 204 to 206 arbitrations have ordered that, by a date now passed, but in suspense depending the outcome of this appeal, the yard are to serve all the evidence upon which they wish to rely in support of their application for an interim



award, following which Lavender, Leeward and Leman are to serve their evidence. a

On 5 September the yard served a draft affidavit of Mr Nicholas Phillips, the yard's solicitor (the truth of which has since been deposed to in his absence by a colleague) which set out the documents upon which the yard sought to rely pursuant to the arbitrators' order. The documents included certain materials generated in the course of the first arbitration and which, but for the discharge by Clarke J of the original injunction granted upon 10 September by Longmore J, the yard would be prevented from producing to the arbitrators, namely: (1) the award (including reasons) of Mr Harris in the first arbitration; (2) the written opening submissions of Ali in the first arbitration; (3) transcripts of the oral evidence given by certain witnesses for Ali in the first arbitration—Mr Maehle and Captain Hoem. b  
c

The yard state that they wish to rely upon those documents (collectively referred to as the Phillips material) as evidence in order to rebut various contentions being advanced for Lavender, Leeward and Leman in the hull 204 to 206 arbitrations, and to rely upon the reasons of Mr Harris in support of a plea of issue estoppel which the yard proposes to advance in the hull 204 to 206 arbitrations. d

Upon learning of these intentions, Ali's solicitors, who also act for Lavender, Leeward and Leman in the hull 204 to 206 arbitrations, sought and obtained the ex parte injunction from Longmore J on the basis that use of the material would amount to breach of the yard's implied obligation of confidentiality in respect of the first arbitration. e

#### *The relevance of the first arbitration material*

In the outline of issues contained in his award in the first arbitration, Mr Bruce Harris listed, inter alia at para 14(B), certain questions, which I shall set out below, together (in square brackets) with the answers provided: f

'(a) Did Ali contract as purchaser of hulls 204 to 206? [No]

(b) Did Ali agree (or is Ali estopped from denying that it agreed) to be jointly or severally liable for sums payable under the contracts for hulls 204 to 206? [No]

(c) Did Ali agree (or is Ali estopped from denying) that the Yard's obligation to build hull 202 was conditional upon either (i) performance of the buyer's obligations under the contracts for hulls 204 to 206 or (ii) payment of the first instalments under the contracts for hulls 204 to 206? [No] g

(d)(i) Are there grounds for lifting Ali's corporate veil? [Does not arise] (ii) If so, what are the consequences? [Does not arise] ... h

(i) Was there a stoppage of work in July 1992 without justification per clause XVI(b)? [Yes]

(ii) Was it justified: (a) By non-payments under contract for hulls 204-206? [No] ...' i

In relation to those issues Mr Harris heard evidence and submissions from both parties to the extent that they thought it necessary or relevant in relation to the contentions of Ali that Lavender, Leeward and Leman were justified in withholding payment under the contracts for hulls 204 to 206. The relevant evidence for Ali was given by Mr Maehle, a shipping broker, and Captain Hoem,

a Sea Tankers' fleet manager. In relation to the question of whether or not it was appropriate to pierce the corporate veil when dealing with matters of set off, Mr Harris found that Ali, Lavender, Leeward and Leman, and various other companies, including the management company, Sea Tankers, were 100% owned by Greenwich and that Mr Frederiksen was in turn the sole beneficial owner of Greenwich.

b In relation to the issues raised by the yard concerning the failure of Lavender, Leeward and Leman to pay their respective first instalments under the hull 204 to 206 contracts, Mr Harris said as follows:

c '... Those instalments were not paid then or at all. I do not think I need to go into why that was or may have been, nor the excuses which were given by Sea Tankers (though I accept that they seem to have been without any merit): probably all I need to find for the purposes of this arbitration is that the first instalments were never paid ... I should perhaps deal briefly with the failure to pay the relevant instalments. On the evidence before me it appeared clear that those representing the buyers of hulls 204 to 206 clearly considered that the contracts for those ships had become fully binding and indeed I consider that they had. It also appeared clear that the excuses raised on behalf of those buyers for not paying the first instalments under those contracts were bad and that the failures to pay those instalments amounted to breaches of contract. If—contrary to my view—  
d it is necessary for the purpose of this case that I make findings in respect of these matters, I should be taken as having reached conclusions according with the indications given in the previous two sentences. I appreciate, of course, that nothing I say can bind the parties to those contracts.'

e The yard wish to use those particular findings in the award, as well as various statements and admissions contained in the transcripts of the evidence of Mr  
f Maehle and Captain Hoem called for Ali, in support of the yard's case that Lavender, Leeward and Leman have no real defence to the yard's claims in the hull 204 to 206 arbitrations. The yard says that the contents of those documents support its case that (1) the issue whether the companies were in breach of the contracts for hulls 204 to 206 in not paying instalments due was determined by Mr Harris, so as to create an issue estoppel as between the yard and the three  
g companies, and (2) that, even if there is no issue estoppel, the underlying material demonstrates that the three companies were indeed in breach of the contracts for hulls 204 to 206 and have no defence to the yard's claims.

#### *The decision of Clarke J*

h Before Clarke J, Ali relied, as it has relied in this appeal, upon the decision of this court in *Dolling-Baker v Merrett* [1991] 2 All ER 890 esp at 899, [1990] 1 WLR 1205 esp at 1213 in the passage in the judgment of Parker LJ to the following effect:

j 'As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must ... be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award—and indeed not to disclose in any other way what evidence had been given by

any witnesses in an arbitration—save with the consent of the other party, or pursuant to an order or leave of the court. The qualification is necessary, just as it is in the case of the implied obligation of secrecy between banker and customer ... That the obligation exists in some form appears to me to be abundantly apparent. It is not a question of immunity or public interest. It is a question of an implied obligation arising out of the arbitration itself. When a question arises as to production of documents or indeed discovery by list or affidavit, the court must ... have regard to the existence of the implied obligation—whatever its precise limits may be. If it is satisfied that, despite the implied obligation, disclosure and inspection is necessary for a fair disposal of the action, that consideration must prevail. But in reaching a conclusion, the court should consider, amongst other things, whether there are other and possibly less costly ways of obtaining the information which is sought and which do not involve any breach of the implied undertaking.’ a  
b  
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Ali also relied upon the recognition and development of that principle in *Hassneh Insurance Co v Mew* [1993] 2 Lloyd’s Rep 243 and *Insurance Co v Lloyd’s Syndicate* [1995] 1 Lloyd’s Rep 272, in which Colman J considered the limitations or exceptions to the principle. In particular, in the *Hassneh* case [1993] 2 Lloyd’s Rep 243 at 249 he held that an exception arose: d

‘If it is reasonably necessary for the establishment or protection of an arbitrating party’s legal rights vis-à-vis a third party ... that the award should be disclosed to that third party in order to found a defence or as the basis for a cause of action ...’ e

Colman J derived that exception from the parallel of the banker’s duty of confidence to his customer referred to by Parker LJ in the passage earlier quoted from *Dolling-Baker’s* case. In the *Insurance Co* case [1995] 1 Lloyd’s Rep 272 at 275 Colman J went somewhat further and held that the test of ‘reasonable necessity’ applied only to disclosure where it was ‘unavoidably necessary’; this led him (at 276) to conclude that— f

‘it is sufficiently necessary to disclose an arbitration award in order to enforce or protect the legal rights of a party to an arbitration agreement only if the right in question cannot be enforced or protected unless the award and reasons are disclosed to a stranger to the arbitration agreement. The making of the award must therefore be a necessary element in the establishment of the party’s legal rights against the stranger. This is the furthest boundary to the qualification which business efficacy will support.’ g

Finally, reliance was placed by Ali upon the decision of Mance J in *London and Leeds Estates Ltd v Paribas Ltd (No 2)* [1995] 1 EGLR 102, where the confidentiality of witness statements in arbitrations was strongly asserted in a case in which production of such statements under subpoena in subsequent court proceedings was none the less ordered ‘in the public interest’. h

Before Clarke J, the stance of the yard was to recognise that the material generated in a commercial arbitration was covered by a duty or implied obligation of confidentiality, subject to the right of the yard to argue before a higher court that English law should follow the approach of the High Court of Australia in *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* (1995) 128 ALR 391, in which the majority of the High Court rejected i



a the English judicial view that a general duty of confidence exists, albeit subject to limited exceptions and qualifications.

b The yard none the less argued that, in English law, the doctrine of confidentiality only applies in respect of 'third party strangers' to the arbitration and should not be applicable in a case such as the present where disclosure was proposed to be made to and/or used against an entity which, in reality, was not a stranger but in the same beneficial ownership as the other party to the arbitration.

c The yard also asserted that, even if disclosure in the hull 204 to 206 arbitrations might otherwise constitute a breach of a duty of confidentiality owed to Ali, the circumstances of the case fell within a recognised exception to such duty because disclosure was reasonably necessary for the protection of the yard's rights against a third party. Finally, it was argued that the circumstances of the case fell within a further exception to the rule of confidentiality, namely public policy and/or that the facts were such that the case was not an appropriate one for injunctive relief.

d In dealing with the above submissions, Clarke J referred to the judgments of Colman J in the *Hassneh* case [1993] 2 Lloyd's Rep 243 at 246 and the *Insurance Co* case as having based the obligation of confidence, as well as the exceptions to it, upon a term of the arbitration contract necessarily to be implied on grounds of business efficacy, or, to put it another way, 'to make the contract work'. Having referred to the yard's arguments, which included the submission that on the particular facts of the case there was no basis for implying a term into the arbitration agreement between the yard and Ali to prevent disclosure of the documents to Lavender, Leeward or Leman, or to arbitrators appointed between the yard and any of them, Clarke J said:

f 'He [Mr Flaux] submits that in all the circumstances of this case the implication of such a term would make no commercial sense. Alternatively, he submits that it would not be a breach of any obligation of confidentiality for the yard to disclose such documents in an arbitration with Lavender, Leeward or Leman. None of the cases to which I was referred was concerned with a case of this kind. Whether and what term of confidentiality should be implied into the arbitration agreement in any particular contract cannot be answered by saying that a particular term is always to be implied whatever the circumstances. Whether the particular term should be implied in a particular case will, in my judgment, depend upon the circumstances of that case, since the question is whether it is necessary to imply such a term to give business efficacy to the particular contract. Put another way, if the officious bystander were asked whether such a term would be implied he would answer the question by reference to the circumstances surrounding the particular contract.'

j The judge then turned to consider the full circumstances of the case. He referred to the fact that at the time of the negotiation of the addendum, which he regarded as the material time, all the negotiations took place between Sea Tankers and the yard in a context where, although each buyer was to be a separate legal entity, the negotiations concerning the contracts for hulls 200 to 202 were concluded at the same time and by the same persons as those for hulls 204 to 206, it being a matter of indifference which particular companies should be the buyers of which hulls. As the judge put it:



'No distinction was drawn at that time between documents in the possession or custody or power of each of the shipping companies. They were all in the custody and possession of Sea Tankers. There is no evidence that the owning companies had separate personnel. All their operations were carried out by Sea Tankers, no doubt on the instructions of Mr Frederiksen. While it was no doubt intended that the liability of each buyer should be separate under each shipbuilding contract, no one could or, in my judgment, would have supposed, as at March 1990, that a statement made by a representative of Sea Tankers for the purpose of the subsequent arbitration between the yard and Ali should be confidential to Ali and not available to the other buyers. If any of the interested parties, including Mr Frederiksen, Sea Tankers, any of the buying companies or the yard, or indeed the officious bystander had been asked in March 1990 whether Lavender, Leeward or Leman were entitled to see a statement made by Captain Hoem of Sea Tankers or by Mr Maehle of the brokers relating to the negotiations with the yard in March 1990, which was relevant to the negotiations leading both to the addendum to the existing contracts for hulls 200 to 202 and to the new contracts for hulls 204 to 206, they would be likely to have regarded it as a silly question. But, if they had been pressed for an answer, they would all have said "Of course". They would not, in my judgment, have said "Of course not" because it would lead to a practically absurd result and make no commercial sense ... If Ali's arguments were correct and if, say, Lavender (or more likely Sea Tankers on behalf of Lavender) unreasonably insisted on a separate arbitration hearing from that in which, say, Leeward was a party, the evidence adduced in the Lavender arbitration could not be used in the Leeward arbitration even though identical issues were involved and each party was being directed by the same individuals. Any implied term which led to that result would, in my view, be neither necessary nor indeed reasonable. Equally, in my judgment it is not necessary to imply a term into the arbitration agreement between Ali and the yard that it would be a breach of the duty of the yard to disclose such documents to the buyers of hulls 204 to 206 in circumstances where, as the points of defence show, both negotiations and the contracts were closely bound up together and where, as I have stated more than once, all the companies were effectively in sole beneficial ownership of and under the control of one man. It follows in my judgment that no term can be implied preventing disclosure by the yard to arbitrators in a dispute with those buyers. If Ali could disclose the documents to the other buyers (as in my judgment it could), I can see no reason why the yard should not disclose the same documents to arbitrators in a dispute with those buyers.'

Finally, the judge stated that he did not consider his conclusion was in any way inconsistent with the reasoning or conclusions of Colman J or the Court of Appeal in the cases already referred to. He said that a term should certainly be implied into all the contracts imposing a duty of confidence on the yard and the respective buyers sufficient to ensure that documents disclosed in any of the arbitrations should not be disclosed to 'third parties', in the sense of anyone other than the respective buyers or the arbitrators in the arbitration and stated that, to imply or give effect to the obligation of confidence so limited, was in his view consistent with common sense and commercial and business reality.

*The arguments in this court*

- a In pursuing this appeal, Mr Kentridge QC, on behalf of Ali, has, perhaps unsurprisingly, not sought to enter upon the merits of his client's position in relation to confidentiality as adumbrated by the judge. He does not dispute that Ali, Lavender, Leeward and Leman are all part of the same shipping stable, administered by the same management company under the same corporate umbrella of 100% ownership by Greenwich and that all are 'one-ship' Liberian companies, the *raison d'être* of which is simply the pursuit of a claim (in the case of Ali) and the defence of a claim (in the case of the others), all through the evidence of the same personnel and the services of the same solicitor. It is not suggested that there is, or can be, any prejudice to Ali in any sense beyond the fact that the arbitrators will be made aware of the Phillips' material, they in turn becoming bound by obligations of confidentiality not to disclose the existence or contents of the documents outside the confines of the arbitration.
- c

- d Mr Kentridge takes his stand on a matter of principle. He argues first (and to this extent Ali's position has moved on since the hearing below) that the implied term of confidence in relation to arbitration proceedings attaches as a matter of law rather than as a matter of business efficacy in all the circumstances of the case. He submits that the Phillips' material is plainly material in respect of which the yard are under an obligation of confidence to Ali arising out of the first arbitration not to disclose material outside the confines of that arbitration, subject only to exceptions which, in his submission, do not apply in this case. Mr
- e Kentridge further submits that it is not necessary to show prejudice when, as here, the object of the injunction sought is to restrain breach of a negative obligation and he justifies the grant of the relief on the basis of a *quia timet* order against the threat of a knowing breach of a confidential obligation. He also attacks the position of the yard as being one whereby the yard, having failed in the first arbitration, none the less seeks to obtain assistance from the award of
- f the arbitrator while refusing to honour it by payment.

- The position of the yard is as follows. (1) It accepts for the purposes of this appeal that, in what it calls 'the ordinary case' of a commercial arbitration, there is a duty of confidentiality not to disclose the evidence, award or reasons to a third party stranger, although it reserves the right to argue before the House of
- g Lords, should the matter not end in this court, that the approach of the English cases to which I have referred is not correct and that the approach of Mason CJ and the majority in the *Esso Australia* case is to be preferred. (2) It seeks to support the judge's approach to the implied term of confidentiality on the basis of the 'officious bystander' test ie as a matter of business efficacy, its nature and extent being variable according to the circumstances of the particular case.
- h (3) Alternatively, if the approach of the judge was wrong and the implied term attaches as a matter of law rather than business efficacy, then none the less the judge's decision is to be supported on the basis that no breach of confidentiality is involved when the parties to whom disclosure is contemplated are not in any real sense 'third party strangers' but are in the same beneficial ownership and management as the complaining party. (4) In any event, disclosure and/or use of the Phillips' materials is 'reasonably necessary' for the protection or enforcement of the yard's rights in pursuit of its claims against Leeward, Lavender and Leman and hence within the exception recognised in the *Hassneh* case and the *Insurance Co* case. In particular, without being able to deploy the Phillips' materials: (i) the yard would be unable to pursue its allegation of issue
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estoppel and abuse of process before the arbitrators; (ii) it would be hindered in demonstrating that the purported defences raised in the current arbitrations are without merit and thus would be prevented from complying with the order of the arbitrator to produce at this stage all the yard's evidence relied upon in support of its application for an interim award; (iii) it would be hindered in defending the application to dismiss for want of prosecution. (In this connection, it is submitted that, in relation to the yard's intention to use the disputed materials to advance those matters before the arbitrators, it is not for the court to determine whether the yard's case in relation to those matters is well founded, thereby usurping the role of the arbitrators.) (5) It would be contrary to the public interest to permit Ali to suppress evidence given in the first arbitration by the very persons whose evidence will be relied on in the current arbitrations when any material alterations in their testimony should be before the arbitrators in their truth-seeking exercise. (6) Finally, it is said that Ali, as a single purpose, no-ship company in the same beneficial ownership as the respondents, has no legitimate interest in restraining the disclosure of the disputed material and that the court should, in its discretion, deny injunctive relief. I shall deal with the yard's submissions in order.

#### *The nature of the implied term*

I deal under this heading with the yard's submissions (1) and (2). As Leggatt J stated in *Oxford Shipping Co Ltd v Nippon Yusen Kaisha, The Eastern Saga* [1984] 3 All ER 835 at 842 the privacy of arbitrations is a concept that 'derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them'. It is implicit in this, as he held in that case, that strangers shall be excluded from the hearing and conduct of the arbitration and that neither the tribunal nor any of the parties can insist that the dispute should be heard or determined concurrently with or even in consonance with another dispute, however convenient that course may be to the parties seeking it and however closely associated the disputes in question may be. In *Dolling-Baker v Merrett* [1991] 2 All ER 890 at 899, [1990] 1 WLR 1205 at 1213, shortly before the passage which I have already quoted, Parker LJ referred to 'the essentially private nature of an arbitration' which he coupled with the implied obligation of a party who obtains documents on discovery not to use them for any purpose other than the dispute in which they were obtained, in order to arrive at his decision in that case. Thus, the principle which he propounded did not depend upon any inherent confidentiality in the material protected (which he expressly rejected), although the implied obligation arising was broadly similar in effect. So far as the juridical nature of that implied term is concerned, while I note that in *Hassneh Insurance Co v Mew* [1993] 2 Lloyd's Rep 243 at 246 Colman J remarked that the 'implication of the term must be based on custom or business efficacy' I consider that the implied term ought properly to be regarded as attaching as a matter of law. It seems to me that, in holding as a matter of principle that the obligation of confidentiality (whatever its precise limits) arises as an essential corollary of the privacy of arbitration proceedings, the court is propounding a term which arises 'as the nature of the contract itself implicitly requires'—*Liverpool City Council v Irwin* [1976] 2 All ER 39 at 44, [1977] AC 239 at 254 per Lord Wilberforce and *Lister v Romford Ice and Cold Storage Co Ltd* [1957] 1 All ER 125 at 132–133, [1957] AC 555 at 576–577 per Viscount Simonds. As Lord Bridge observed in *Scally v Southern Health and Social Services*



a *Board (British Medical Association, third party)* [1991] 4 All ER 563 at 571, [1992] 1 AC 294 at 307, a clear distinction is to be drawn—

b 'between the search for an implied term necessary to give business efficacy to a particular contract and the search, based on wider considerations, for a term which the law will necessarily imply as a necessary incident of a definable category of contractual relationship.'

c In my view an arbitration clause is a good example of the latter type of implied term. The distinction referred to by Lord Bridge in *Scully's* case is of some practical consequence in this case. That is because considerations of business efficacy, particularly when based notionally upon the 'officious bystander' test, are likely to involve a detailed examination of the circumstances existing at the time of the relevant contract (in this case the original agreement to arbitrate), whereas the parties have indicated their presumed intention simply by entering into a contract to which the court attributes particular characteristics. While acknowledging that the boundaries of the obligation of confidence which thereby arise have yet to be delineated (cf *Hyundai Engineering and Construction Co Ltd v Active Building and Civil Construction Pte Ltd* (9 March 1994, unreported) per Phillips J), the manner in which that may best be achieved is by formulating exceptions of broad application to be applied in individual cases, rather than by seeking to reconsider, and if necessary adapt, the general rule on each occasion in the light of the particular circumstances and presumed intentions of the parties at the time of their original agreement.

e As to those exceptions, it seems to me that, on the basis of present decisions, English law has recognised the following exceptions to the broad rule of confidentiality: (i) consent, ie where disclosure is made with the express or implied consent of the party who originally produced the material; (ii) order of the court, an obvious example of which is an order for disclosure of documents generated by an arbitration for the purposes of a later court action; (iii) leave of the court. It is the practical scope of this exception, ie the grounds on which such leave will be granted, which gives rise to difficulty. However, on the analogy of the implied obligation of secrecy between banker and customer, leave will be given in respect of (iv) disclosure when, and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party. In this context, that means reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-à-vis a third party in order to found a cause of action against that third party or to defend a claim (or counterclaim) brought by the third party (see the *Hassneh* case).

g In that connection, I make two particular observations. Although to date this exception has been held applicable only to disclosure of an award, it is clear (and indeed the parties do not dispute) that the principle covers also pleadings, written submissions, and the proofs of witnesses as well as transcripts and notes of the evidence given in the arbitration (see *Dolling-Baker's* case). Second, I do not think it is helpful or desirable to seek to confine the exception more narrowly than one of 'reasonable necessity'. While I would indorse the observations of Colman J in the *Insurance Co* case [1995] 1 Lloyd's Rep 272 at 275 that it is not enough that an award or reasons might have a commercially persuasive impact on the third party to whom they are disclosed, nor that their disclosure would be 'merely helpful, as distinct from necessary, for the protection of such rights', I would not detach the word 'reasonably' from the



word 'necessary', as the passage just quoted appears to do. When the concept of 'reasonable necessity' comes into play in relation to the enforcement or protection of a party's legal rights, it seems to me to require a degree of flexibility in the court's approach. For instance, in reaching its decision, the court should not require the parties seeking disclosure to prove necessity regardless of difficulty or expense. It should approach the matter in the round, taking account of the nature and purpose of the proceedings for which the material is required, the powers and procedures of the tribunal in which the proceedings are being conducted, the issues to which the evidence or information sought is directed and the practicality and expense of obtaining such evidence or information elsewhere. a  
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Finally, in at least one decision, the English court has tentatively recognised a further exception (v) where the 'public interest' requires disclosure: see *London and Leeds Estates Ltd v Paribas Ltd (No 2)* [1995] 1 EGLR 102. In that case Mance J, ruling upon the validity of a subpoena, held that a party to court proceedings was entitled to call for the proof of an expert witness in a previous arbitration in a situation where it appeared that the views expressed by him in that proof were at odds with his views as expressed in the court proceedings. Mance J observed (at 109): c  
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'If a witness were proved to have expressed himself in a materially different sense when acting for different sides, that would be a factor which should be brought out in the interests of individual litigants involved and in the public interest.' e

It seems to me clear that, in that context, Mance J was referring to the 'public interest' in the sense of 'the interests of justice', namely the importance of a judicial decision being reached upon the basis of the truthful or accurate evidence of the witnesses concerned. Whereas the issue in the *Paribas* case related to a matter of expert opinion rather than objective fact, I see no reason why such a principle, which I would approve, should not equally apply to witnesses of fact who may be demonstrated to have given a materially different version of events upon a previous occasion. As a matter of terminology, I would prefer to recognise such an exception under the heading 'the interests of justice' rather than 'the public interest', in order to avoid the suggestion that use of that latter phrase is to be read as extending to the wider issues of public interest contested in the *Eso Australia* case. In that case, only the dissenting judgment of Toohey J appears to me to treat the law of privacy and confidentiality in relation to arbitration proceedings on lines similar to English law. While it may well fall to the English court at a future time to consider some further exception to the general rule of confidentiality based on wider considerations of public interest, it is not necessary to do so in this case. f  
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If I have stated the position in English law correctly, I consider that the yard's concession in this appeal as to the existence of the implied term of confidentiality in commercial arbitrations is well advised. On the other hand, it does not seem to me that the judge's approach on the basis of the 'officious bystander' test was correct. His proper starting point would have been to assume an implied obligation of confidence, subject to proof of circumstances apt to bring the yard within one of the recognised exceptions, or otherwise justifying the withholding of injunctive relief. i

*'Third party strangers'*

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So far as the yard's submission (3) is concerned, I observe by way of preliminary that, to date, the confidentiality rule has been founded fairly and squarely on the ground that the privacy of arbitration proceedings necessarily involves an obligation not to make use of material generated in the course of the arbitration outside the four walls of the arbitration, even when required for use

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in other proceedings (subject to the exceptions already discussed).

In considering the question of relief, the court has not hitherto undertaken any detailed examination of the objecting party's motives for seeking to uphold such privacy. No doubt the court ordinarily acts on the working assumption that, in agreeing to arbitration, each party considers that his interests will be best served by privacy and that both parties recognise and undertake mutual obligations of confidentiality, subject only to such exceptions as the court may recognise. Because the doctrine rests upon the assumption that the parties have a legitimate interest in privacy which the court will protect, an exception based on the subsequent need to protect the inconsistent interest of one party alone is properly formulated in terms of reasonable necessity rather than mere convenience or advantage. Further, where exceptional circumstances are asserted, it will usually be appropriate for the court to limit its task to establishing whether such circumstances have been made out, and not to explore the motives of the objecting party or whether the court considers that his interests will in fact be prejudiced by disclosure. In the ordinary way, prejudice will be presumed and, unless excepting circumstances are established, confidentiality will be upheld.

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Are there good reasons why that principle should not apply or, put another way, should a further exception be created to the confidentiality rule, simply because the parties to whom disclosure is contemplated are in the same beneficial ownership and management as the complaining party? I do not think so. I say that for two particular reasons. First, whatever the position in this case, it is possible to envisage a situation where, despite the feature of common beneficial ownership between them, one entity may wish to keep private from another the details of materials generated in an earlier arbitration. Second, where the problem arises in relation to disclosure in later proceedings, to propound such an exception is to leave out of account that (as appears to be the position in this case) the real interest of the objecting party is to withhold disclosure of such materials from the subsequent decision maker. In this context the latter is the 'third party stranger' in respect of disclosure to whom the objecting party seeks protection. While such motives may not be 'worthy' in the broad sense, and certainly do not assist the course of justice, they may yet be a permissible tactic in advancing or protecting the interests of the objecting party. The fact that the arbitrator in the subsequent proceedings will in turn be bound by duties of confidentiality is no cure for the damage which the objecting party perceives may be caused to his interests from an adverse decision resulting from, or influenced by, the disclosure sought to be made. Unless the stance of the objecting party can be shown to be fraudulent or in the nature of an abuse of process, then the court should be prepared to grant injunctive relief, subject only to proof of a recognised exception to the rule of confidentiality.

*Reasonable necessity*

Thus it seems to me that it is necessary to consider whether or not the yard can show, as they contend under submission (4), that use of the Phillips material is reasonably necessary for the protection or enforcement of the yard's rights in the hull 204 to 206 arbitrations. a

There can be no doubt that, if the Phillips material cannot be used by the yard, its assertion of issue estoppel and abuse of process will not be able to be pursued before the arbitrators. However, Mr Kentridge for Ali meets that difficulty in this way. He invites the court to look at the award in the first arbitration and to hold that, by simple application of the principles of issue estoppel, it is apparent that those allegations cannot succeed. Indeed, he suggests that the plea of issue estoppel, which does not so far appear in the pleadings in the hull 204 to 206 arbitrations, is no more than a ruse by which to get the material before the arbitrators for the purpose of prejudice. He points out that, for an issue estoppel to be established on the basis of the findings in the first arbitration, it would be necessary for the yard to show that (i) the very issues pleaded in the hull 204 to 206 arbitrations were decided in the first arbitration; (ii) the parties to the first arbitration, or their privies, were the same persons as the parties or their privies in the hull 204 to 206 arbitrations; and (iii) the decision in the first arbitration was a final one. b  
c  
d

Mr Kentridge submits that it is plain that those requirements cannot be satisfied. He accepts that, in respect of (i), the issue whether Lavender, Leeward and Leman were in breach of the contracts for hulls 204 to 206 was raised. However, he points out that it was dealt with by Mr Harris in paras 32 and 49 of his award in the first arbitration only in the broadest of terms and to the extent considered necessary by the arbitrator in relation to Ali's obligations under the hull 202 agreement as amended. He goes on to submit that it is clear that (ii) cannot be satisfied because the parties in the first arbitration and the hull 204 to 206 arbitrations are different. Although conceding that Ali on the one hand and Lavender, Leeward and Leman on the other are all in the common beneficial ownership of Greenwich and have at all material times shared common managers, Mr Kentridge relies upon the finding in the first arbitration (which he says was plainly correct) that this is not a case where the corporate veil can be brushed aside or the independent legal existence of the corporate entities ignored. Finally, as to (iii), Mr Kentridge submits that the finding of Mr Harris on the question of the adequacy of the reasons why Lavender, Leeward and Leman withheld payment was not intended, and specifically did not purport, to be a final finding as between those three companies and the yard. e  
f  
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In response to these points, Mr Flaax QC has argued first, that where a bona fide plea by way of claim or defence has been raised in proceedings in support of which it is necessary to adduce material used in a previous arbitration, such plea should be taken at face value as a matter required to be adjudicated before the arbitrators; he submits that, on an application of this kind, the court should not entertain the merits of the plea. Second, he has argued that while, on the face of it, the parties and their privies are not the same, for the court so to conclude is to ignore or beg the question, which the yard wishes to recanvass before the hull 204 to 206 arbitrators, whether, in the circumstances of this case, it is right for the arbitrators to pierce the corporate veil and to treat Lavender, Leeward and Leman as no more or other than manifestations of Greenwich or Mr Frederiksen. h  
i



a As to Mr Flaux's first point, I would accept that, in the ordinary way on an application of this kind, the court should approach any averment pleaded by counsel in an arbitration as raised bona fide and (if disputed) as creating an issue for decision by the arbitrator. As Colman J observed in the *Hassneh* case [1993] 2 Lloyd's Rep 243 at 249, when considering the question whether or not disclosure of an award to a third party was reasonably necessary for the protection of the disclosing party's rights: 'That Counsel has advised the  
b arbitrating party of such reasonable necessity should in practice normally be conclusive of the matter.'

c However, there may arise cases, and in my view this is one, where the plea in respect of which disclosure is sought to be justified is essentially one of law, and the materials by which its merits can be judged are all before the court. In such a case, if the court is satisfied that the plea is unsustainable and that for the arbitrators to uphold it would be a clear error of law, then the court is plainly in a position to rule that disclosure is not reasonably necessary for protection of the disclosing party's rights. That seems to me to be the position here.

d In that connection, I would first observe that Mr Flaux's submissions are not advanced in support of a plea of estoppel set out and defined with appropriate precision and particularity in a pleading already before the arbitrators; that at least would enable this court to consider the precise nature and extent of the issue(s) in respect of which an estoppel is said to arise. Instead he has asserted and sought to justify an intended plea in general terms which have not encouraged precision of thought or argument as to its validity. None the less,  
e on the basis of the material referred to before us, I can see no prospect of success for a future plea of issue estoppel, however formulated, given the terms in which the findings of Mr Harris were couched in the first arbitration award.

f Whether or not Mr Harris was right in his decision that the case was not one in which it was appropriate to pierce the corporate veil (and nothing which Mr Flaux has submitted causes me to doubt the correctness of that decision), it is quite plain that his view that the parties must be treated as separate legal entities (albeit acting through the same, or largely the same, personnel) conditioned his whole approach to any findings which he made on the question of the excuses advanced by Lavender, Leeward, or Leman for non-payment. In para 32 of his  
g award, Mr Harris appears to have regarded it as unnecessary to make any findings in that respect; moreover, in para 49, his findings that the excuses were bad were made in very general terms and subject to his express observation that nothing he said could bind Lavender, Leeward and Leman. It does not seem to me that findings of that kind, in the context in which they were made, can be said to satisfy the requirements of issue estoppel in respect of the detailed  
h defences raised in the hull 204 to 206 arbitrations. Accordingly, I am not prepared to find that the use in evidence of the Phillips material can be justified on the basis of a proposed plea of issue estoppel.

i Nor, as matters presently stand, do I consider that a case of 'reasonable necessity' can be made out on the basis that the Phillips material is needed to demonstrate that the defences raised are without merit. That is plainly so in respect of the award in the first arbitration which, absent any viable plea of *res judicata*, is strictly irrelevant to the task of the hull 204 to 206 arbitrators, which is to come to their own decision on the factual evidence placed before them. Equally, to the extent that the yard seeks to disclose and rely upon the evidence of Mr Maehle and Captain Hoem as part of a 'package' necessary to demonstrate

issue estoppel, their use cannot be justified. However, Mr Flaux has sought to justify the use of the transcripts on the grounds that it is plain that Mr Maehle and Captain Hoem are the very witnesses upon whom Lavender, Leeward and Leman must rely to make out the grounds of their defence. That being so, he says it is right that the arbitrators should have before them the evidence of those witnesses on issues which are essentially similar to those to which they spoke in the first arbitration. Either, says Mr Flaux, they will give similar evidence in the hull 202 to 204 arbitrations, in which case the arbitrators will (as Mr Harris did earlier) reject the validity of the pleas based on that evidence, or they will give different evidence, in which case their earlier evidence will properly be before the court in the interests of justice in order to demonstrate their lack of veracity or reliability.

Leaving aside the question of admissibility, that argument has superficial attractions to the extent that use of the Phillips material might well save time and expense and reduce the danger of inconsistent findings as between the hull 202 to 204 arbitrators and Mr Harris upon the various areas of dispute common to the first and later arbitrations. However, in the absence of agreement between the parties, I do not think that convenience and good sense are in themselves sufficient to satisfy the test of 'reasonable necessity'. The principle of privacy in relation to arbitrations inevitably throws up problems of this kind, as Mr Kentridge has pointed out. He submits that it would be wrong for this court to permit what is essentially a pre-emptive strike by the yard in the hull 204 to 206 arbitrations, simply on grounds of procedural convenience and evidential short cut.

Mr Kentridge analyses the position of the yard in this way. Its own claim is a straightforward one based upon non-payment of a sum due under the express terms of the shipbuilding contracts, together with a claim for repudiation based on letters received from the respondent renouncing the shipbuilding contracts, which repudiation was accepted by a letter from the yard. Such factual evidence as the yard seeks to introduce on background matters which relate to the negotiation and history of the contracts and the ability of the yard to perform the various contracts, is all evidence which will come from their own witnesses. The evidence given by Mr Maehle and Captain Hoem for Ali at the first arbitration is evidence which is subject to an obligation of confidentiality unless or until a situation arises in which it appears that they are proposing to give inconsistent evidence for Lavender, Leeward and Leman in the hull 204 to 206 arbitrations. That position has not yet arisen, and Mr Kentridge submits there is no present reason to suppose it will do so. If the evidence they give is consistent, then the time to demonstrate its inadequacy as a defence will be in final submissions to the arbitrator. If the evidence given is inconsistent, then Mr Kentridge concedes that, in the interests of justice, the yard would be entitled to disclose and rely on the previous inconsistent statement or evidence in the hull 204 to 206 arbitrations, but not until then.

I think Mr Kentridge is right. I have considerable sympathy with the position of the yard. It wishes to obtain an interim award in respect of payments which on the face of it are due under the terms of the hull 204 to 206 shipbuilding contracts, and in relation to which a number of defences have been mounted which plainly did not appeal to Mr Harris when he was considering them collaterally or incidentally to the issues between the yard and Ali in the first arbitration. For that purpose the yard is anxious to put the Phillips material

a before the hull 202 to 204 arbitrators in an attempt to obtain an interim award on a basis analogous to RSC Ord 14 proceedings for summary judgment in the High Court, in which the plaintiff seeks to establish from statements or admissions made by a defendant in other proceedings that his pleaded defence is either not advanced bona fide or can be demonstrated to be without substance. However, quite apart from problems of admissibility, the yard faces two  
b substantial difficulties in that attempt. First, the arbitrators do not, without the consent of the parties, have any power equivalent to that of the High Court under Ord 14. Second, the materials sought to be relied on were generated in the course of an arbitration with a third party who is unwilling to waive confidentiality. That being so, the ability of the yard to make use of those materials must be governed by the principle of confidentiality already discussed.  
c That principle seems to me to preclude disclosure of the transcripts, at least at this stage of the proceedings.

I make that proviso because the submission of Mr Flaux that the yard will be hindered in defending any future application by Lavender, Leeward and Leman to dismiss the claims of the yard for want of prosecution raises different  
d considerations. This court asked Mr Kentridge in the course of argument whether those three companies were indeed intending to pursue such an application. At that point Mr Kentridge, or rather those instructing him, retreated behind the chinese wall which, notionally at least, divides the interests of Ali from the interests of the three companies upon this application; they were unable to give the court an answer. That gives rise to an unsatisfactory position  
e because, should an application to strike out be made, and should it appear that Mr Maehle and Captain Hoem are indeed the material witnesses to be called in support of the respondents' case in the hull 204 to 206 arbitrations, it seems to me that the yard may well be justified in disclosing and relying upon their evidence in the first arbitration, in order to rebut any suggestion of evidential  
f prejudice by reason of delay. If it were asserted that the memory of witnesses had dimmed, the quality, nature and substance of their evidence upon the issues raised in the hull 202 to 204 arbitrations would be highly relevant. In those circumstances therefore, it seems to me that the yard would be likely to succeed in establishing that disclosure was reasonably necessary in protection of its litigation interests.

g Turning briefly to the yard's submissions (5) and (6), these have essentially been covered in the course of dealing with submissions (1) to (4). If it appears that Lavender, Leeward and Leman will be seeking to rely upon evidence which is significantly at odds or inconsistent with the evidence of witnesses in the first arbitration, then it would indeed be contrary to the interests of justice to allow  
h Ali to seek to suppress that earlier evidence. However, that is not a position which has been reached or, in my view, ought to be assumed at this stage. Finally, for the reasons already stated, I do not think it right to say that Ali has no 'legitimate interest' in seeking to restrain the disclosure of the Phillips material. While, in broad terms, the position of Ali appears to be more tactical  
j than meritorious, it is based upon an assertion of principle which, in my view, entitles Ali to relief.

That said however, it seems to me both sensible and appropriate that the injunction originally granted by Longmore J should be made final, subject to argument as to its precise wording and in particular subject to an appropriate reservation or proviso to preclude the necessity for the yard to return to the



court for exemption from its terms in respect of the transcripts of evidence, should the respondents in the hull 204 to 206 arbitrations make an application to dismiss the yard's claim for want of prosecution, or should any witness for the respondents supply statements or give evidence inconsistent in some relevant respect with evidence which he gave in the first arbitration. Such a proviso ought to be capable of agreement between the parties but, if not, it should be resolved by further argument. Subject to those observations, I would allow the appeal. a  
b

**BROOKE LJ.** I agree.

**BELDAM LJ.** I also agree. c

*Appeal allowed.*

Kate O'Hanlon Barrister.

## R v Chalkley

## R v Jeffries

COURT OF APPEAL, CRIMINAL DIVISION

AULD LJ, IAN KENNEDY AND BLOFELD JJ

6 NOVEMBER, 19 DECEMBER 1997

*Criminal law – Appeal – Appeal against conviction – Appeal following plea of guilty – Defendant changing plea after ruling by judge on admissibility of evidence – Whether plea ‘founded upon’ judge’s ruling – Whether court having power to quash conviction which was safe but in some other way unsatisfactory – Criminal Appeal Act 1968, s 2(1).*

*Arrest – Arrest without warrant – Grounds for arrest – Arrest which was otherwise lawful effected to prevent further crime by arrested person – Whether arrest rendered unlawful.*

*Criminal evidence – Exclusion of evidence – Application to exclude evidence on ground of unfairness – Whether judge should conduct balancing exercise when determining application – Police and Criminal Evidence Act 1984, s 78.*

The defendants, C and J, were charged with conspiracy to commit robbery. At the trial the prosecution proposed to adduce evidence of covertly obtained tape recordings of conversations between the defendants which was highly damaging to the defence case. The evidence had been obtained because the regional crime squad had reason to believe that the defendants were involved in the planning of robberies and had decided that they posed a serious threat which could only be forestalled by placing a listening device in one of their homes. They obtained the necessary authorisation and, in order to be able to install the device in C’s home, decided to arrest him and his partner in connection with credit card frauds about which local police had earlier received information but had taken no action. At the start of the trial, an application was made on behalf of the defence under s 78(1)<sup>a</sup> of the Police and Criminal Evidence Act 1984 to exclude the evidence of the tape recordings. The judge rejected that application and the defendants, taking the view that any defence they might have sought to advance was thereby rendered hopeless on the facts, changed their pleas to guilty. On their appeals against conviction, the following issues arose: (i) whether a defendant, who had pleaded guilty because the judge had rejected his application to exclude evidence which he considered rendered his defence hopeless on the facts could appeal against conviction, irrespective of whether the judge’s ruling was correct; (ii) whether, under s 2(1)<sup>b</sup> of the Criminal Appeal Act 1968 (as amended by the Criminal Justice Act 1995), the Court of Appeal could quash a conviction which it considered to be safe, but which it regarded in some other respect as ‘unsatisfactory’; (iii) whether an arrest which would otherwise be lawful was rendered unlawful because it was effected in order to enable the investigation of

<sup>a</sup> Section 78(1) is set out at p 162 j, post

<sup>b</sup> Section 2(1), so far as material, provides: ‘... the Court of Appeal—(a) shall allow an appeal against conviction if they think that the conviction is unsafe; and (b) shall dismiss such an appeal in any other case’.

and/or prevention of other serious crime by the arrested person; and (iv) whether it was appropriate, on an application to exclude evidence under s 78 of the 1984 Act, for the judge to conduct a balancing exercise similar to that on an application to stay criminal proceedings for abuse of process.

**Held** – (1) The Court of Appeal was entitled under s 2(1) of the Criminal Appeal Act 1968 as amended to quash a conviction based on a plea of guilty where that plea had been tendered mistakenly or without intention to admit guilt of the offence charged. Before the amendment, the court had also been so entitled where the plea had been ‘founded upon’ a material irregularity or erroneous ruling of law: that could occur either where, in the light of the admitted facts, the erroneous ruling left the defendant at trial with no legal basis for an acquittal, or, on a broader interpretation of the expression ‘founded upon’, where a plea of guilty had been influenced by an erroneous ruling of law. However, it was only where the erroneous ruling had rendered acquittal legally impossible, rather than where it made the case against the defendant factually overwhelming, that a guilty plea could properly be said to have been ‘founded upon’ the ruling, and the preference for that narrower interpretation remained under the new test of safety of the conviction. Accordingly, in the instant cases, the defendants’ pleas of guilty could not properly be said to have been ‘founded upon’ a ruling of the judge (see p 165 a to f, p 166 j to p 167 a g, p 169 c to g and p 171 j, post); *R v Eriemo* [1995] 2 Cr App R 206 applied; *R v Hunt* [1986] 1 All ER 184, *R v Preston* (1992) 95 Cr App R 355 and *R v Blackledge* [1996] 1 Cr App R 326 considered.

(2) Following the amendment of s 2(1) of the 1968 Act, the court had no power to allow an appeal if it did not consider the conviction to be unsafe but was in some other way dissatisfied with what had occurred at the trial, since the former tests of ‘unsatisfactoriness’ and ‘material irregularity’ were no longer available, save as aids to determining the safety of a conviction. The circumstances of the instant cases, however, would not have justified the exercise of such a power even if it had still been available (see p 172 j and p 174 c, post); *R v Mahdi* [1993] Crim LR 793 and *R v Bloomfield* [1997] 1 Cr App R 135 not followed.

(3) A collateral motive for an arrest on otherwise good grounds did not necessarily make it unlawful. In the instant case, therefore, where the police had had reasonable grounds for arresting C in connection with the credit card frauds, and had informed him of those grounds, the judge had correctly ruled that the arrest was lawful, notwithstanding that the police had been motivated in arresting him by a desire to prevent further and more serious crime (see p 176 j and p 177 e to g, post); *Christie v Leachinsky* [1947] 1 All ER 567 considered.

(4) The determination of the fairness of admitting evidence under s 78 of the 1984 Act was distinct from the exercise of discretion on an application for a stay of criminal proceedings as an abuse of process, since the latter might involve not only consideration of the potential fairness of a trial, but also the balancing of the interest of prosecuting a criminal to conviction against that of discouraging abuse of power. Since, in the instant cases, the judge had balanced countervailing considerations in considering the admissibility of the evidence of the tape recordings, the proper course was for the court to make its own decision about the fairness of admitting the evidence, which, nevertheless, accorded with that of the judge. In the circumstances, the appeals would be dismissed (see p 178 f to j and p 180 b to e, post); *R v Sang* [1979] 2 All ER 1222 and *R v Khan (Sultan)* [1996] 3 All ER 289 applied.



**Notes**

- a** For the Criminal Appeal Act 1968, s 2, see 12 *Halsbury's Statutes* (4th edn) (1997 reissue) 375.

For the Police and Criminal Evidence Act 1984, s 78, see 17 *Halsbury's Statutes* (4th edn) (1993 reissue) 228.

**b Cases referred to in judgment**

*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223, CA.

*Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138, sub nom *R v Horseferry Road Magistrates' Court, ex p Bennett* [1993] 3 All ER 138, [1994] 1 AC 42, [1993] 3 WLR 90, HL.

- c** *Callis v Gunn* [1963] 3 All ER 677, [1964] 1 QB 495, [1963] 3 WLR 931, DC.

*Christie v Leachinsky* [1947] 1 All ER 567, [1947] AC 573, HL.

*Coyne v UK* (26 September 1977).

*DPP v Shannon* [1974] 2 All ER 1009, [1975] AC 717, [1974] 3 WLR 155, HL.

*Holgate-Mohammed v Duke* [1984] 1 All ER 1054, [1984] AC 437, [1984] 2 WLR 660,

- d** HL

*Matto v Wolverhampton Crown Court* [1987] RTR 337, DC.

*Murray v UK* (1996) 22 EHRR 29, ECt HR.

*Plange v Chief Constable of South Humberside Police* (1992) Times, 23 March.

*R v Bhachu* (18 November 1994, unreported), CA.

- e** *R v Blackledge* [1996] 1 Cr App R 326, CA.

*R v Bloomfield* [1997] 1 Cr App R 135, CA.

*R v Dann* [1997] Crim LR 46, CA.

*R v Emmett* [1997] 4 All ER 737, [1997] 3 WLR 1119, HL.

*R v Eriemo* [1995] 2 Cr App R 206, CA.

- f** *R v Forde* [1923] 2 KB 400, [1923] All ER Rep 477, CA.

*R v Graham* [1997] 1 Cr App R 302, CA.

*R v Greene* [1997] Crim LR 659, CA.

*R v Heston-Francois* [1984] 1 All ER 785, [1984] QB 278, [1984] 2 WLR 309, CA.

*R v Hunt* [1986] 1 All ER 184, [1986] QB 125, [1986] 2 WLR 225, CA; *rvsd* [1987] 1 All ER 1, [1987] AC 352, [1986] 3 WLR 1115, HL.

- g** *R v Khan (Sultan)* [1996] 3 All ER 289, [1997] AC 558, [1996] 3 WLR 162, HL.

*R v Latif, R v Shahzad* [1996] 1 All ER 353, [1996] 1 WLR 104, HL.

*R v Llewellyn* (1978) 67 Cr App R 149, CA.

*R v McIlkenny* [1992] 2 All ER 417, CA.

*R v Mahdi* [1993] Crim LR 793, CA.

- h** *R v Middlebrook* (18 February 1994, unreported), CA.

*R v Payne* [1963] 1 All ER 848, [1963] 1 WLR 637, CCA.

*R v Preston* (1992) 95 Cr App R 355, CA; *affd* [1993] 4 All ER 638, [1994] 2 AC 130, [1993] 3 WLR 891, HL.

*R v Sang* [1979] 2 All ER 1222, [1980] AC 402, [1979] 3 WLR 263, HL; *affg* [1979] 2

- j** All ER 46, [1980] AC 402, [1979] 2 WLR 439, CA.

*R v Smith (Winston)* (1975) 61 Cr App R 128, CA.

*R v Staines, R v Morrissey* [1997] 2 Cr App R 426, CA.

*R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256, [1923] All ER Rep 233, DC.

*R v Vickers* [1975] 2 All ER 945, [1974] 1 WLR 811, CA.

*Saunders v UK* (1996) 2 BHRC 358, ECt HR.

*Schenk v Switzerland* (1988) 13 EHRR 242, ECt HR.

## Appeals

Tony Michael Chalkley and Tony Brisbane McEwan Jeffries appealed against their convictions, on pleas of guilty, following a ruling by Judge Crane at the Crown Court at Peterborough, of conspiracy to commit robbery, for which they were each sentenced to ten years' imprisonment. The facts are set out in the judgment of the court.

*Timothy Cassel QC* (assigned by the *Registrar of Criminal Appeals*) for Chalkley.

*Tim Brown* and *Rebecca Litherland* (assigned by the *Registrar of Criminal Appeals*) for Jeffries.

*Howard Morrison* (instructed by the *Crown Prosecution Service*, Cambridge) for the Crown.

*Cur adv vult*

19 December 1997. The following judgment of the court was delivered.

**AULD LJ.** In late October 1996, before Judge Crane in the Crown Court at Peterborough, the appellants, Jeffries and Chalkley, stood trial on their pleas of not guilty to a charge of conspiracy to commit robbery between 1 January 1993 and 9 December 1994. The evidence that the prosecution proposed to adduce in support of its case consisted of police observations of the movements of the two men, covertly obtained tape recordings of their conversations during the period of the alleged conspiracy, the finding in their possession of firearms and other paraphernalia of robbery and certain admissions to prosecution witnesses.

At the start of the trial Richard Benson QC and Timothy Cassel QC, counsel for the appellants, asked the judge to exclude the tape recorded conversations from the evidence to be put before the jury. They were highly damaging to the defence case, consisting of many discussions planning robberies and referring to past robberies. Mr Benson and Mr Cassel did not challenge their authenticity, content or effect. However, they maintained that they had been obtained unlawfully and in breach of the two men's right to privacy enshrined in art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969). They said that the judge should exclude the evidence under s 78 of the Police and Criminal Evidence Act 1984 because it would be unfair to them to admit it.

On 24 October 1996 the judge, having heard evidence about the obtaining of the recordings and surrounding circumstances, rejected the defence submission. Jeffries was so dismayed by the ruling that he failed to surrender to his bail on the following day. However, he did surrender on the next working day, and on 30 October he and Chalkley changed their pleas to guilty. They clearly did so because the judge's ruling had made hopeless on the facts any defence that they might have sought to advance. And they did so on a basis that was apparently accepted by Howard Morrison, counsel for the prosecution, namely that they had planned robberies with the use of firearms, that they had had firearms, that they had not committed or attempted any robbery, that they had not threatened anyone with the firearms and that they had not been violent to anyone. Mr Benson and Mr Cassel then addressed the judge in mitigation on that basis and the judge sentenced each of them to ten years' imprisonment.

They now appeal against conviction by leave of the single judge.

*The issues*

- a The appeal raises four main issues of importance.

The first is whether appellants, who have pleaded guilty because the judge rejected their application to exclude evidence which they considered rendered their defence hopeless on the facts, can challenge their convictions by way of appeal, irrespective of the correctness or otherwise of the judge's ruling.

- b If they can go behind their pleas of guilty in that way, the second issue is whether it is appropriate for a judge, when deciding under s 78 whether it would be fair to admit evidence, to conduct a balancing exercise of the sort applicable in applications to stay proceedings for abuse of criminal process.

- c The third issue is whether an otherwise lawful arrest is unlawful because the motive for it is to enable investigation and/or prevention of other serious crime by the arrested person.

The fourth issue is whether the Court of Appeal can quash a conviction which it considers to be safe but which it regards in some other respect as 'unsatisfactory'.

*d The facts*

- e The circumstances giving rise to the making of the covert recordings, as revealed by the *voire dire* and found by the judge, were as follows. On 17 March 1994 watching officers of the Cambridgeshire Constabulary saw Jeffries and Chalkley and others set out in the early hours of the morning obviously dressed and equipped to commit robbery. They went to a post office sorting house at St Neots where, on the arrival of a post office van, they made a move towards attacking it. However, they abandoned the attempt and made off when they became aware of the presence of the police. Chalkley later told a prosecution witness of the plan and of its abandonment for that reason.

- f In June 1994 there was a robbery at a supermarket in Eaton Socon. The Regional Crime Squad, who had just become involved, believed that the appellants were involved and that they were planning more robberies, involving the use of firearms, in the area.

- g The squad decided that the threat was so serious that they would only be able to forestall it and bring the two appellants and others to conviction by placing a hidden battery-powered listening and recording device in one of their homes. They decided on Chalkley's home and on a plan to install the device inside it when he and the woman with whom he lived, Shani Carter, and their two young children were absent. The plan was to arrest Chalkley and Carter in connection with another matter and to remove them and their children temporarily from the house. The judge accepted, on the evidence before him, that the arrest of both
- h in that way was 'the only practicable method' of successfully installing the device.

- i Det Con Harrison of the Regional Crime Squad applied to the Chief Constable of Cambridgeshire for authority to install the device in Chalkley's home, making plain how he and his fellow officers intended to go about it. This is how the judge described this part of the story:

- j 'Det Con Harrison told me that when he saw the chief constable to obtain the authorisation they discussed how a listening device might be placed in the home of Mr Chalkley, which was what was desired, and Det Con Harrison told me that he mentioned that an inquiry into a credit card matter might be used; the implication is to effect the arrest of adults in the house and enable the police to get in. It is not suggested by anyone that the chief



constable specifically authorised that, but he plainly gave his mind to the question of possible methods, according to Det Con Harrison, and I accept Det Con Harrison's evidence on that point.' a

On 21 June 1994 the chief constable authorised the operation.

The plan to arrest the two in connection with 'a credit card matter' did not depend on a 'trumped-up' allegation. An officer in the intelligence bureau of the Cambridgeshire Constabulary, Woman Det Con Fletcher, had much earlier, in March 1994, received information that Chalkley had been fraudulently using someone else's Barclays Bank credit card to obtain goods and that Carter had been in some way involved. However, such inquiries as she and other Cambridgeshire officers had made into the matter at that time had not gone far, and it had been allowed to lapse without arrest or even interview of either of them. No doubt, police interest in it was overtaken by their investigation of Chalkley's suspected role in the series of armed and planned robberies in the area. b c

However, in June 1994 Det Con Harrison and Det Con Fletcher decided to resurrect the matter by re-opening their investigation of it with a view to using it as an excuse to arrest both Chalkley and Carter and remove them from the house for long enough to enable the regional crime squad officers to install the listening device. Det Con Fletcher initiated some inquiries by Cambridgeshire officers into Chalkley's suspected use of the credit card. The result of the inquiries convinced her and Det Con Harrison that there were grounds for arresting Chalkley and Carter on suspicion of conspiracy to defraud Barclays Bank, the credit card issuer. Det Con Fletcher briefed three officers of the Cambridgeshire force, telling them, as the judge accepted, that she had information of matters that, in her view, gave reasonable grounds for arresting the pair, but told them nothing of the regional crime squad's plan behind it. d e

On 8 July 1994, early in the morning, those officers arrested Carter in the house and took her to the police station, arranging for a neighbour to look after the children for the day. Shortly afterwards they arrested Chalkley when he finished work at the end of his night shift and took him also to the police station. The officers informed each of them on arrest that they, the officers, had reasonable grounds for suspecting them to be guilty of conspiracy to defraud Barclays Bank. They also seized Chalkley's keys to the house and to his car and took possession of the car. Shortly afterwards officers from the regional crime squad used the seized house key to enter the house and install the device. They also arranged the cutting of a copy of the key for their later use. f g

Meanwhile, at the police station, the Cambridgeshire officers put Chalkley and Carter into custody while they made further inquiries about the alleged credit card offence. Two of them obtained a witness statement from an employee of one of the chain stores concerned. Later in the day, between 4 and 5 pm, they interviewed each of them. Chalkley made no comment and Carter denied any involvement. It was not until the evening that they were allowed to return home, Carter at about 6.30 pm and Chalkley at about 9.15 pm, when the police returned to him his keys and his car. The police did not charge them, but released them on bail subject to a condition of reporting at the police station. h j

Over the next six weeks the listening device produced, as we have indicated, a wealth of evidence in the form of conversations between Jeffries and Chalkley, of their involvement in the planning of past and future robberies. At the end of that period, on 24 August, the officers of the Cambridgeshire police interviewed Chalkley and Carter again when they reported at the police station in accordance

a with the condition of their bail. In the interviews the officers touched briefly on the matter of the fraudulent use of the credit card, but nothing further emerged. They were not then or ever charged with any offence in connection with it. However, during the interview an officer or officers of the regional crime squad used the duplicate key that they had made on their first visit to Chalkley's home to re-enter it to renew the battery on the listening device.

b Chalkley and his girlfriend returned home still unaware of the presence of the device, and for another month until Jeffries' and his arrest in late September 1994, it continued to yield much highly incriminating evidence against both men. During that period the officers of the regional crime squad again entered the house clandestinely to renew the battery.

c *The judge's findings of fact*

The judge, in deciding whether to admit or exclude the evidence, considered the factors that the chief constable should have had in mind when authorising the installation of the listening device and also the means, the arrest of Chalkley and his girlfriend, by which it was to be achieved.

d As to the first, there was no statutory provision governing the use by the police of such a device, but there were and are Home Office guidelines. Those guidelines recognise that the use of surveillance equipment may encroach on the privacy of others, in particular of the person under surveillance. For that reason no doubt they provide that the authorising officer, before sanctioning its use, must be satisfied that it meets certain criteria. The material criteria are: (i) that the investigation concerns serious crime; (ii) that normal methods of investigation have been tried and have failed, or must from the nature of things be unlikely to succeed if tried; (iii) that there must be good reason to think that use of the equipment would be likely to lead to an arrest and a conviction; (iv) that the use of the equipment must be 'operationally feasible'; (v) that, in judging  
f how far the seriousness of the crime under investigation justifies the use of particular surveillance techniques, the authorising officer should satisfy himself that the degree of intrusion into the privacy of those affected by the surveillance is commensurate with the seriousness of the offence; and (vi) that where the targets of the surveillance might reasonably assume a high degree of privacy, for example in their homes, this means should be used only for the investigation of  
g major organised conspiracies or other particularly serious offences, especially crimes of violence.

As we have mentioned, Det Con Harrison gave evidence about his request to the chief constable for authorisation to install the device and of the chief constable's grant of authorisation on 21 June 1994. There was no evidence before  
h the judge from the chief constable on the matter, but there appears to have been no dispute that he had followed the guidelines, save possibly in relation to the guidance that he should be satisfied that the operation would be 'operationally feasible'. Counsel for the appellants suggested that those words required him to consider what, if any, unlawfulness was involved as well as feasibility in the sense  
j of practicability. The judge was satisfied, as the passage from his ruling we have quoted makes plain, that the chief constable did have regard to the proposed means of achieving the installation. He also expressly found that it was the only operationally feasible or practicable method. He said:

'Mr Harrison tells me that other methods of entry were considered, but ultimately the removal of the adults was considered to be the only feasible

method. I did not require him to discuss in evidence other possible methods, but I have no difficulty in accepting that the installation of a device inside the house was considered best. And I have no difficulty in accepting that it could not be installed unless the adults were guaranteed to be elsewhere. Indeed, if one thinks about it there had to be not only an absence of the adults, but some reason that might be apparent to those concerned ... [for] the police being in the premises or being seen going to the premises. I accept therefore that by 7 July, the day before the installation took place, the possibility of an arrest of both Mr Chalkley and his partner, Shainee Carter, was the only practicable method.'

As to the circumstances of and reasons for the arrests, the judge found: (i) that, despite conflicting descriptions of the person or persons who had fraudulently used the credit card, the Cambridgeshire officers were entitled to rely on Det Con Fletcher's instructions to them of her information and on certain of their own inquiries as grounds for suspecting Chalkley and Carter of conspiracy to make fraudulent use of the card; (ii) that those officers were ignorant of the regional crime squad's intention to take advantage of the arrest as a means of enabling them to install the device; and (iii) that they had no reason to think, when they made the arrests, that there was no possibility of charges following, as had been the case in *Plange v Chief Constable of South Humberside Police* (1992) Times, 23 March.

#### *The judge's ruling on the lawfulness of the arrests*

The judge, in reliance on those findings of fact, held that the arrests were lawful:

'I take the view that the officers who carried out the arrests had reasonable grounds for suspecting those they arrested, so did Det Con Fletcher and Det Con Harrison ... The true situation is this: that the police were not acting in bad faith in the sense that anyone knew that there were no grounds or that there was doubt about the grounds, or that the grounds did not exist. I think all those things were true. The question is what difference does it make that the arrests would not have taken place, in other words the matter would not have been revived had it not been for the wish to get Mr Chalkley and Miss Carter out of the house. I regard Mr Harrison as having been perfectly frank with the court that although it was not a device in the sense that it was a bogus reason for arrest the true motive was to get them out of the house and he has made no bones about that.'

#### *The judge's approach to s 78*

The judge went on to consider the effect of that conclusion on the decision he had to make under s 78(1) of the 1984 Act on the fairness of admitting into evidence the recorded incriminating conversations of the appellants. It provides:

'In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.'



a The judge considered first *R v Sang* [1979] 2 All ER 1222, [1980] AC 402, which concerned an unsuccessful application to exclude evidence where it was claimed there had been incitement by an agent provocateur, the leading pre-s 78 authority on the limits of a trial judge's common law discretion to exclude evidence obtained by improper or unfair means. He also considered *R v Khan (Sultan)* [1996] 3 All ER 289, [1997] AC 558, which concerned an unsuccessful application to exclude evidence obtained from a covert listening device fixed to the outside of a private house, the House of Lords' reaffirmation of the *Sang* principle and its application to the s 78 test of fairness, in particular as to 'the circumstances in which the evidence was obtained'.

b The judge concluded that s 78 had clarified the basis on which a judge could exercise his discretion to exclude evidence so as to include consideration of the circumstance in which it was obtained, and that *R v Khan* had put that beyond doubt. However, he looked to two abuse of process authorities, *Bennett v Horseferry Road Magistrates Court* [1993] 3 All ER 138, [1994] 1 AC 42 and *R v Latif, R v Shahzad* [1996] 1 All ER 353, [1996] 1 WLR 104, for guidance on how to exercise that discretion. He drew from those authorities an indication that he should conduct a balancing exercise of the countervailing circumstances to enable him to decide whether the balance favoured the effective prosecution of crime or, given the defence submissions about the police conduct, the public interest in discouraging abuse of power. In conducting that exercise he acknowledged that he should have regard to the individual's right to privacy enshrined in art 8 of the European Convention of Human Rights. He neatly summarised, in the following words, the effect of the judicial balancing act upon which he was embarked: 'The principles that I derive from those cases, particularly the recent cases in the House of Lords, is that the end does not justify the means, and depends on what the end is, and what the means are.'

f Adopting that approach, he considered that the following circumstances were relevant to his decision: (i) the evidence amounted to confessions of serious crime and of conspiratorial discussions evincing an intention to commit robbery and the possible use of firearms; (ii) there was no suggestion of improper inducement or incitement by the police officers or anyone in authority to commit the offence; (iii) the police's conduct in installing the device did not induce Jeffries or Chalkley to talk of their criminal past and future when otherwise they would not have done so; (iv) there was no dispute about the content of the conversations; (v) the prosecution and the police had been frank with the court; (vi) the decision to install the device was made in accordance with the Home Office guidelines; and, (vii) though the arrest in each case was instigated 'for a purpose other than the one it was designed for', namely to secure entry to the house and to install the device there, the arrests themselves were lawful and the motive was not improper. It was, as the judge put it, 'to enforce the law to protect the public in a case where firearms were alleged to be involved'.

g He held, however, that there had been breaches of the provisions of the 1984 Act and/or of the ordinary civil law and of art 8 of the European Convention of Human Rights in the temporary seizure of Chalkley's car and his keys, in the making and use of a copy key to effect a trespass in the house, in the actual installation of the device there and in the further two clandestine visits to renew the battery.

j Having set out all those factors the judge concluded that the evidence should be admitted. He said:

'It [the installation of the device] was undertaken in relation to very serious offences and not merely very serious offences that were alleged to have occurred previously, they were being investigated, but to very serious offences possibly involving public danger which might be going to occur in the future and which needed if possible to be proved or detected. Plainly ... the unlawful actions by the police must not be seen to be condoned. There are standards to be upheld ... in the criminal justice system. The criminal justice system though must be effective in detecting serious crime. It doesn't seem to me that any right thinking person who knew the facts as I have outlined them would find their conscience disturbed by the use of the methods, admittedly unlawful to the extent that I have indicated, by the police in this case. And nor, apart possibly from the taking of the car, which in a sense is a side issue, did the police go further down the avenue of unlawfulness than was necessary to carry out this operation.'

### *The effect of the pleas of guilty*

The first and possibly determinative issue is whether the court can quash a conviction where the appellant has changed his plea to guilty because of the trial judge's refusal to exclude evidence which is so damning to his case that he and his advisers consider his conviction is inevitable.

All save one of the authorities on the issue have been governed by the old formula of s 2(1) of the Criminal Appeal Act 1968 or its predecessor that, subject to the proviso of no miscarriage of justice, an appeal against conviction should be allowed: (a) if the 'conviction' (substituted for 'verdict' by the Criminal Law Act 1977, s 44) was 'unsafe or unsatisfactory'; or (b) if 'the judgment of the court of trial should be set aside on the ground of a wrong decision of any question of law'; or (c) if there was 'a material irregularity in the course of the trial'. The sole test in the new s 2(1), substituted from 1 January 1996 by the Criminal Appeal Act 1995, is whether a conviction is 'unsafe'.

This much simpler form is much the same as the intertwined and overlapping provisions of the old test, as was intended by the Royal Commission in recommending it, the government in promoting it, the senior judiciary in supporting its parliamentary passage and Parliament in enacting it (see *Archbold's Criminal Pleading, Evidence and Practice* (1997 edn) para 7-46). In *R v Graham* [1997] 1 Cr App R 302 Lord Bingham CJ, giving the judgment of the court, considered the general effect of the new provision, albeit in a wholly different context from this. He said (at 308):

'The new provision, the subject of a penetrating analysis by Sir John Smith QC ([1995] Crim LR 920), is plainly intended to concentrate attention on one question: whether, in the light of any arguments raised or evidence adduced on appeal, the Court of Appeal considers a conviction unsafe. If the Court is satisfied, despite any misdirection of law or any irregularity in the conduct of the trial or any fresh evidence, that the conviction is safe, the Court will dismiss the appeal. But if, for whatever reason, the Court concludes that the appellant was wrongly convicted of the offence charged, or is left in doubt whether the appellant was rightly convicted of that offence or not, then it must of necessity consider the conviction unsafe. The Court is then subject to a binding duty to allow the appeal ... Where the condition in section 2(1)(a) as it now stands is satisfied, the Court has no discretion to exercise.'

a Section 2(1) in its old and new forms respectively entitled and entitle the Court of Appeal to quash as unsafe a conviction based on a plea of guilty where the plea was mistaken or without intention to admit guilt of the offence charged. In the case of the old form, it was commonly said, in reliance on a passage from the judgment of Woolf LJ in *R v Preston* (1992) 95 Cr App R 355 at 381, drawing on an observation of Robert Goff LJ in *R v Hunt* [1986] 1 All ER 184 at 188, [1986] QB 125 at 132, that it might also do so where it was 'founded upon' a material irregularity or, as Mr Cassel submitted, upon an erroneous ruling on a point of law.

b As we have said, the test now is simply whether the conviction is 'unsafe'. But, in order to understand the role of the pre-1 January 1996 jurisprudence in applying that test it is important to understand what was meant by a plea of guilty being 'founded upon' such a ruling. There are two possibilities.

c The first is where, in the light of the admitted facts, the erroneous ruling left the defendant at trial with no legal basis for a verdict of not guilty. Put the other way round on appeal when the error is corrected, it is 'that upon the admitted facts' the appellant 'could not in law have been convicted of the offence charged'. That is how the test was seen in the early part of this century by Avory J in *R v Forde* [1923] 2 KB 400 at 403–404, [1923] All ER Rep 477 at 479. In our view, it is what Viscount Dilhorne had in mind in *DPP v Shannon* [1974] 2 All ER 1009 at 1037, [1975] AC 717 at 757, when he said that the court had power to quash a conviction on a plea of guilty 'if either there had been a wrong decision on a question of law or a material irregularity in the course of the trial' (see also [1974] 2 All ER at 1028–1029, [1975] AC 717 at 748 per Lord Morris). It was undoubtedly what Robert Goff LJ intended in his use of the expression 'founded upon' in *R v Hunt*, because there the judge's ruling of law had left the defendant with no legal escape from conviction.

d The second and broader meaning of the expression 'founded upon' in this context is 'influenced by', that is, where a plea of guilty was influenced by an erroneous ruling of law. This is seemingly the meaning of Woolf LJ in the following passage in his judgment in *R v Preston* (1992) 95 Cr App R 355 at 381, when, after referring to the words of Viscount Dilhorne in *DPP v Shannon* and Robert Goff LJ in *R v Hunt*, he said:

f 'In our judgment before an appellant who has pleaded guilty can rely upon an erroneous ruling on a point of law or a material irregularity, he must show that his plea "was founded" upon the erroneous ruling of law or the material irregularity. In this case, although we do not know precisely what passed between counsel and his client, we accept that the appellant's decisions were possibly *influenced* by the rulings which the judge made.' (Our emphasis.)

g The rulings in question were made in chambers in the absence of the defendant and his solicitors and imposed restrictions on what defence counsel could inform the defendant and his solicitor.

j The second and broader meaning is the one Mr Cassel urged upon the court. And it is how the Court of Appeal and the House of Lords were apparently content to apply it, in the absence of the point being taken, in *R v Khan (Sultan)* (see also *R v Sang* [1979] 2 All ER 46 at 48–49, [1980] AC 402 at 405–406 per Roskill LJ, giving the judgment of the Court of Appeal).

An authority arguably in support of that submission is *R v Blackledge* [1996] 1 Cr App R 326 (the *Ordtec* case). There, the defendants were charged with conspiring



to export goods to Iraq in breach of government prohibition. They pleaded not guilty, their defence being that in truth there was no prohibition because the government had determined to turn a blind eye to such exportations. They sought a stay of the prosecution as an abuse of process because the prosecution had failed to produce witnesses or to disclose government policy and guideline documents that might support their case. The prosecution said that there were no such witnesses or documents, incorrectly as was later revealed in the *Matrix Churchill* case and the inquiry of Sir Richard Scott, and the judge rejected the applications to stay the proceedings. Had such witnesses been produced or documents disclosed, they would have assisted the defence case. Their absence was prejudicial, but not necessarily fatal, to it. However, as a result of the judge's ruling and of indications from the prosecution and him respectively that pleas of guilty would result in a sympathetic presentation of the prosecution case and in suspended sentences, the appellants changed their pleas to guilty.

This court held on appeal that the prosecution's failure of disclosure was a material irregularity. Lord Taylor CJ gave the judgment of the court. He referred (at 338) to Woolf LJ's test in *R v Preston* of the appealability of a conviction based on a plea of guilty where it is 'founded upon' an erroneous ruling or law or a material irregularity and said: 'Even without the documentation, the appellants could have run their defence and given evidence in support of it.' He then continued (at 338–339):

'It is stressed, however, that in addition to being deprived, so to speak, of ammunition, the appellants were put into a difficult dilemma. For the offences charged, they could have been sentenced to a substantial period of imprisonment. At the time of the trial, after the second Gulf War, they had an understandable fear as to what sentence a court might consider properly reflected public disapproval of assistance to Saddam Hussein. In those circumstances, the prospect of a muted presentation of the facts by the prosecution, followed by a suspended sentence, put pressure on the appellants to go quietly ... There must understandably have been concern that conviction after a trial might have attracted an immediate prison sentence in contrast to a suspended sentence on a plea. We have considered the aggregate of all the unusual circumstances of this case—the material irregularity, the judge's ruling based on an unawareness by him and by prosecuting counsel of the undisclosed documents, and finally the pressure added to those factors by the discussions leading to the changes of plea. We consider the pleas of guilty were "founded on" the material irregularity and the judge's ruling coupled with the pressure to which we have referred. In the result, we cannot regard the convictions as safe and satisfactory. Accordingly, the appeals must be allowed.'

In our view, the early authorities to which we have referred and others to which we are about to refer demonstrate the logical imperative of the first, narrow, construction of the expression 'founded upon' in this context. It is only where an erroneous ruling of law, coupled with the admitted facts, makes acquittal legally impossible that a plea of guilty can properly be said to have been 'founded upon' the ruling so as to enable a successful appeal against conviction. The fact that an erroneous ruling of law as to the admissibility of certain prosecution evidence drives a defendant to plead guilty because it makes the case against him factually overwhelming will not do. It does not make it impossible

a for him to maintain his innocence as a matter of law or of fact, it merely makes it harder.

b That distinction was clearly drawn by this court in *R v Vickers* [1975] 2 All ER 945, [1975] 1 WLR 811, where, before arraignment, the judge heard submissions of law on admitted facts. The judge ruled that if those admitted facts were proved or admitted in the forthcoming trial they would amount to an admission or  
c conclusive evidence of the accused's commission of the charged offence. The accused, on the advice of his counsel and in the light of that ruling, pleaded guilty. Scarman LJ, giving the judgment of the court, dismissed his appeal against conviction. In doing so he commented on the dangers of seeking the judge's ruling before arraignment, but expressed the view that ss 1 and 2(1)(b) of the 1968 Act, as they then were, entitled the court to consider whether there had been 'a wrong decision of any question of law' and required it to allow the appeal if 'the agreed facts disclosed no offence known to the law' (see [1975] 2 All ER 945 at 949, [1975] 1 WLR 811 at 816). He said:

d '... the agreed facts disclosed a case to answer. We doubt if the judge was entitled to go so far as to say that they were conclusive of guilt—not because we disagree with the view of the facts formed by the judge but because we believe the question was, on a correct analysis, one of fact even though there was also a question of law—namely, the meaning of the 1971 Act. No point, however, turns on the judge expressing the view that the admitted facts were conclusive. The appellant pleaded guilty because, on advice, he had no  
e answer if *the agreed facts* disclosed a case to answer.' (See [1975] 2 All ER 945 at 951, [1975] 1 WLR 811 at 818; our emphasis.)

f The key to proper understanding of Scarman LJ's reasoning in those passages lies in his reference to 'the agreed facts'. And it is in that sense that his remarks, on the desirability of conducting the exercise after arraignment should be regarded: 'If a ruling is later given, which in the view of himself and his advisers is fatal to his defence, the accused can then change his plea.' (See [1975] 2 All ER 945 at 950, [1975] 1 WLR 811 at 816.)

g There was thus a clear distinction between the case of a plea of guilty on undisputed facts where, following a judge's ruling of law, he was not in law entitled to an acquittal and that of a plea of guilty following a ruling where the facts alleged to constitute the offence were in dispute and the ruling, though damaging to his case on the facts, left it open to him to argue them before the jury. This distinction has been sharply drawn by this court in three recent decisions, only the last of which fell to be considered under the new wording of s 2(1) of the 1995 Act.

h The first case was *R v Eriemo* [1995] 2 Cr App R 206, in which the applicant, who was indicted jointly with others for burglary, pleaded guilty after the judge had lawfully refused his application for separate trial. The Court of Appeal refused his application for leave to appeal. Glidewell LJ (at 210), giving the judgment of the court, said:

j 'There are a number of decisions of this Court in cases where the lower court has decided an issue of law in a way which is conclusive *on the established facts* as to the guilt of the particular defendant. If the decision on a question of law is wrong that can constitute a material irregularity in the course of the trial ... But in our view where what has happened is that the judge is asked to exercise a discretion, it being agreed that he has a discretion,

and he has indeed exercised it one way or the other, then the result of that exercise of discretion cannot be said to be—to use Lord Scarman's phrase [in *R v Vickers*]<sup>a</sup>—“so fatal to the defendant's defence that it effectively concludes the trial”. The only proper course in those circumstances, and the one that should be followed if this situation arises in the future, is for the defendant who has made the application to continue with his plea of not guilty. If he then be convicted, of course, he can seek leave to appeal in the ordinary way.<sup>b</sup> But if he pleads guilty this plea is an admission to the facts with which he is charged. The question which arose before the judge in the present case as to whether he should properly be tried ... with another young man, can make no difference to the effect of his plea of guilty. Accordingly, in our view, the argument that is sought to be raised in the present case is not one which is open to this applicant at all, he having pleaded guilty and thus admitted the facts charged against him.’ (Our emphasis.)<sup>c</sup>

We have some reservations as to the distinction made by Glidewell LJ in that passage between a wrong decision on a question of law and, inferentially, a wrong exercise of discretion. The latter, if not exercised in accordance with law or if it is perverse, may have constituted a wrong decision on a question of law.<sup>d</sup> But that is not the distinction of importance which we believe lay at the heart of Glidewell LJ's reasoning, namely the conclusiveness of a ruling against a defendant on undisputed facts as distinct from evidential strengthening of the prosecution case where material facts remain in dispute. Note his use of the words ‘established facts’ in the first sentence of the passage.<sup>e</sup>

The second case was *R v Bhachu* (18 November 1994, unreported), in which the defendant pleaded guilty after the judge had wrongly allowed the prosecution to adduce evidence of admissions he had made to the police as a result of an inducement. McCowan LJ, giving the judgment of the court, dismissed his appeal, stating:

‘... how does the matter stand after the judge's ruling? If it is that on the admitted facts there is no defence, then the proper course for the defendant is to plead guilty. Indeed he can do nothing else. If he does he retains his right to appeal on the ground that that was a wrong ruling in law. But that was not this case. The judge was not saying that the defendant was guilty on the admitted facts. It was fully open to the defendant ... to continue fighting the case. All that had happened was that his chances of acquittal had been reduced ... That is to be contrasted with the situation where the judge has ruled that on the admitted facts the man is guilty. The defendant there is in the position that he has to accept the ruling and cannot argue otherwise before the jury.’<sup>f</sup>

The third case is *R v Greene* [1997] Crim LR 659, decided under the new s 2(1) of the 1995 Act, in which the defendant changed his plea of not guilty to guilty following the judge's ruling that evidence of a confession was admissible. His appeal against conviction was dismissed. Astill J, giving the judgment of the court, the other members of which were Rose LJ and Stuart White J, said:<sup>g</sup>

‘The crucial event was the change of plea to guilty. If a defendant submits that admitted facts do not in law amount to the offence charged and the trial judge rules otherwise, then it is not difficult to see how an appeal against conviction can lie after a plea of guilty. In those circumstances there remains no issue of fact for the jury to try. But where the admissibility of a confession<sup>h</sup>



a is in issue and the trial judge rules that it should be admitted, as he did in this case, the truth of the contents of the confession, although having no relevance in the *voire dire*, remains a matter to be tried by the jury. A plea of guilty in those circumstances serves as an admission of the truth of the contents of the confession. It is not a plea entered where there is no remaining issue to be tried by the jury because it remains open to the defence  
b to invite the jury not to rely on the truth of the confession despite the fact that, contrary to submissions, the trial judge ruled that it was admissible.'

How applicable is the reasoning in those three authorities to the test of safety under the new s 2(1) where there is a plea of guilty following an erroneous ruling, whether or not categorised as a ruling on a question of law? As Lord Bingham CJ  
c said in *R v Graham*, the test of unsafety in its present form or as part of the old formula may be satisfied whether or not there has been a wrong decision on a question of law or a material irregularity. In that respect, the new provision does not, in substance, change the law. However, the single word 'unsafe', uncluttered by other similar notions serving the same end, should, as Sir John  
d Smith put it in his article 'Appeals against conviction' [1995] Crim LR 920 at 925, 'concentrate the mind on the real issue in every appeal from the outset'.

In appeals against conviction following a plea of guilty, the somewhat mechanical test of whether a change of plea to guilty was 'founded upon' a particular feature of the trial, namely a wrong direction of law or material irregularity, gives way to the more direct question whether, given the  
e circumstances prompting the change of plea to guilty, the conviction is unsafe. However, even when put that way, the good sense of preferring the narrower interpretation, which we have identified, of the expression 'founded upon' lingers on. Thus, a conviction would be unsafe where the effect of an incorrect ruling of law on admitted facts was to leave an accused with no legal escape from a verdict  
f of guilty on those facts. But a conviction would not normally be unsafe where an accused is influenced to change his plea to guilty because he recognises that, as a result of a ruling to admit strong evidence against him, his case on the facts is hopeless. A change of plea to guilty in such circumstance would normally be regarded as an acknowledgement of the truth of the facts constituting the offence charged.

g We qualify the above propositions with the word 'normally', because there remains the basic rule that the court should quash as unsafe a conviction where the plea was mistaken or without intention to admit guilt of the offence charged.

Here, Mr Cassel and Mr Brown have informed the court that, following the judge's ruling, they advised the appellants to plead guilty with a view to  
h challenging the ruling on appeal and to save the time and expense of a long trial. They say that, in giving that advice, they had in mind the authorities of *DPP v Shannon*, the *Ordtec* case and *R v Khan (Sultan)*, and were in ignorance of *R v Bhachu* and *R v Greene* (the latter had yet to be decided). Mr Cassel relied, in particular, on the similarly expressed approach of the accused and their advisers  
i in *R v Khan (Sultan)*, and on the absence of any point taken about it in that case. He and Mr Benson said that the appellants pleaded guilty on that basis and did not thereby intend to admit their guilt.

However, as they have also told us, that is not the way in which they put the matter to the judge when they addressed him in mitigation. In their submissions to him they acknowledged the guilt of the appellants of the conspiracy charged, urging only that their involvement and intentions were not as serious as the

prosecution case, particularly the evidence of the tape recordings, might have suggested. a

Mr Morrison, for the Crown, acknowledged that it was plain that the judge's ruling of the admissibility of the tape recorded conversations had prompted the changes of plea to guilty. He said that that evidence, unchallenged as to its authenticity, content or effect, was overwhelming evidence of the appellants' guilt of conspiracy to rob. He maintained that the pleas of guilty amounted to an admission that the tape recorded conversations established their involvement in that conspiracy. He also relied upon the appellants' counsel's speeches in mitigation as a plain indication that the pleas were an acknowledgement of guilt, albeit prompted by the judge's ruling. He produced for the court transcripts of those speeches. They show that counsel, having indicated that the pleas flowed from the ruling, went on to advance various matters of mitigation amounting to plain admissions of guilt based, not only on the tape recorded conversations, but also on the other prosecution evidence of police observations and the discovery of the firearms. b  
c

Thus, Mr Benson, for Jeffries, invited the judge to give him good credit for his plea of guilty, explaining that it had not been tendered earlier because he (Mr Benson) had advised Jeffries not to plead guilty until he had a ruling on the admissibility of the tape recorded conversations. He went on to minimise the seriousness of the conspiracy, adding that Jeffries' record of previous convictions was such that he was 'totally out of his depth when involved in this conspiracy'. Mr Benson then sought to make good that proposition by describing what Jeffries had and had not agreed and done in pursuance of the conspiracy. He emphasised his involvement with Chalkley and his excitement in the planning of the robberies and the obtaining of the firearms and other equipment for them, and acknowledged his part in at least one overt act, the abortive raid on the St Neots Post Office. Before turning to Jeffries' personal circumstances, Mr Benson said: d  
e

'One thing that has impressed me is that since he decided to plead guilty, I will come to that again in a moment, because it was a voluntary plea, he has not expressed one word of self pity. His main considerations have been for his mother and his children and the hurt that he has caused those close to him and his family ... He knows now that the moment of judgment has come and that there is not anybody to put in as much time as he had been putting in to help his mother. That is another reason why he feels particularly ashamed of his activities and fearful of the obvious lengthy prison sentences that your Honour is going to have in mind. It is for those reasons ... he is not expressing one word of self pity. He acknowledges that he has brought that harm and hurt to the people around him.' f  
g  
h

Finally, Mr Benson said about Jeffries' failure to surrender to his bail on the day after the judge's ruling:

'... he was dismayed and frightened if your Honour ruled the admissibility of those covert tapes. He realised that the game was up. He needed time to think. He was surrounded by his co-accused. He needed some sanctuary to come to terms with what was inevitably going to happen. He telephoned his solicitors ... and was given the obvious advice. He thought about it ... When he turned up he had already decided to plead guilty on the terms that your Honour knows and he has maintained that resolve since then.' j

a Mr Cassel adopted on behalf of Chalkley what Mr Benson had said about 'the pleas of guilty tendered' and added some comments of his own. These included the following:

b 'I am sure that there is no question here of any violence having been committed on anybody or any guns used in relation to attempted or actual robbery that took place during the course of this conspiracy ... it is not often in a conspiracy case that a judge in passing sentence knows quite so much of the circumstances of the planning of robbery. Your Honour has had the opportunity not only of hearing Mr Morrison today open various extracts from the taped conversations, but your Honour will have had the opportunity also of reading of [the] whole of those taped conversations. We c would submit this on behalf of Mr Chalkley; that it is plain from those taped transcripts and from the police observations that Mr Chalkley was not the prime mover in this conspiracy. We would put it in this way, that he joined a conspiracy which had been put to him by another or by others. That is plain, we submit, on the face of the taped conversations.'

d There is nothing in the transcript of those submissions to support Mr Cassel's suggestion that he and Mr Benson put the matter to the judge on the basis that the plea was not a true acknowledgement of guilt, but merely a tactical and expedient way of enabling them to challenge the ruling in the Court of Appeal whilst saving everybody the time and expense of a long trial (as had been made e plain in *R v Khan (Sultan)* [1996] 3 All ER 289 at 292–294, [1997] AC 558 at 572–574 per Lord Nolan), quite the contrary. Even if they communicated that intention to the judge in some other way, we confess to some surprise that leading counsel of such experience could advise lay clients to plead guilty and mitigate to the court on the basis of their guilt if their instructions were to the contrary.

f We can only proceed on the basis that Mr Benson and Mr Cassel, in their advice to the appellants and in their submissions to the judge, acted in accordance with the instructions of the appellants. Such a stance is consistent only in the circumstances of this case with the appellants' clear recognition that the tape recorded evidence against them was so powerful a demonstration of their guilt that their continued denial of it would be hopeless.

g We are not impressed with the suggestion, whether or not expressed at the time, of expediency as a justification for their change of plea, that is, the claimed saving of the time and cost of a possibly abortive trial. If that were a justification in itself, it would be open to any defendant, who having unsuccessfully sought to exclude evidence against him, to change his plea to guilty because of its damning h nature with a view only to seeking to overturn his conviction on the point of admissibility on appeal. If he were allowed to go behind his plea of guilty in such a way, it would deprive the trial jury of determining his guilt or innocence on the evidence ruled admissible by the judge. And, in the event of success or failure of the appeal on the point of admissibility, it could enable him to encumber a second j jury with the task. In our view, the proper course would have been that indicated by Glidewell LJ in *R v Eriemo* [1995] 2 Cr App R 206 at 210. The appellants should have maintained their pleas of not guilty, if that was truly their stance, fought the case and, in the event of conviction, then sought leave to appeal.

This is not, therefore, a case in which the appellants can succeed on the basis that their convictions are unsafe because their pleas of guilty were, in the proper sense of the old test, 'founded upon' the judge's ruling.



There are two other possibilities. The first is that the appellants misunderstood the effect or object of their pleas of guilty as the result of counsel's advice to them, namely that their pleas were induced by mistake of law or fact (see *R v Emmett* [1997] 4 All ER 737 at 739–746, [1997] 3 WLR 1119 at 1120–1127 per Lord Steyn, and per Sir John Smith in his commentary on *R v Greene* [1997] Crim LR 659). However, even if counsel advised them that they could challenge their conviction notwithstanding their admission of guilt by way of pleas of guilty, they cannot rely on such a procedural or tactical error to go behind pleas which their counsel on their instructions put to the judge in mitigation as genuine acknowledgements of guilt. Wrong advice or no as to their prospect of a successful appeal, they pleaded guilty because they were guilty and because, having regard to the judge's ruling, they knew that they had no practical chance of acquittal.

The other, and final, possibility is Mr Cassel's suggestion, which overlapped with his argument on the issue of the admissibility of the evidence, that the appellants' pleas of guilty were induced by oppression and/or that the circumstances of the ruling and their reaction to it, taken as a whole, entitle the court to go behind those pleas. It should be noted that the oppression of which Mr Cassel complained was not oppression by the judge or any special circumstances in the conduct of the proceedings, but that of the police in obtaining and relying on evidence which, he submitted, the judge had wrongly admitted.

Such a suggestion necessitates a return to the removal of the word 'unsatisfactory' from s 2(1) of the 1968 Act as a ground of appeal against conviction. The new provision, in confining the test to one of safety of the conviction, may be, in this respect, narrower than before, depending on whether the word 'unsatisfactory' signified an additional and independent ground for quashing a conviction or merely another way of saying 'unsafe'.

There are only one or two reported instances of the former interpretation: *R v Llewellyn* (1978) 67 Cr App R 149 and *R v Heston-Francois* [1984] 1 All ER 785, [1984] 1 WLR 309. However, more often than not the court appears to have used the formula 'unsafe or unsatisfactory' conjunctively or the two words interchangeably, most notably and recently in *R v McIlkenny* [1992] 2 All ER 417 at 427–432 (the *Birmingham Six* case) per Lloyd LJ, giving the judgment of the court. A similar problem arises with the removal of the apparently separate ground for quashing a conviction, the presence of 'a material irregularity in the course of the trial'. Has their disappearance, along with the catch-all proviso directing the court to the presence or absence of a miscarriage of justice, removed its ability to quash a conviction where, for example, although it is satisfied that the conviction is safe, it is of the view that justice has not been seen to be done, thereby preventing it from resort to Lord Hewart CJ's famous axiom in *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256, [1923] All ER Rep 233 (see *R v Smith (Winston)* (1975) 61 Cr App R 128 and the commentary of Sir John Smith on *R v Dann* in [1997] Crim LR 46 at 47–48)?

In our view, whatever may have been the use by the court of the former tests of 'unsatisfactor[ine]ss' and 'material irregularity', they are not available to it now, save as aids to determining the safety of a conviction (see the penetrating and engaging analysis of Sir Louis Blom-Cooper QC in 'The Birmingham Six' and other cases, *Victims of Circumstance* (1997) ch V). The court has no power under the substituted s 2(1) to allow an appeal if it does not think the conviction unsafe but is dissatisfied in some way with what went on at the trial. The editors

a of the third supplement to *Archbold* (1997 edn) para 7-45 refer to this as a 'minor, but important, respect' in which the 1995 substitution has done more than just change the wording of the 1968 Act. Whilst we agree that it is an important change, it may not be 'minor', particularly in those cases where, although the court is of the view that justice has not been seen to be done, it is satisfied that it has been done—that is that the conviction is safe. All of this is, however, subject  
b to what the court will make of art 6(1) of the European Convention of Human Rights, entitling everyone charged with a criminal offence to a fair trial, when it becomes part of our domestic law. Such European Court of Human Rights jurisprudence on the point as there is suggests that procedural unfairness not resulting in unsafety of a conviction may be marked in some manner other than by quashing the conviction. (See *Murray v UK* (1996) 22 EHRR 29, *Saunders v UK*  
c (1996) 2 BHRC 358 at 377 (para 86), *R v Staines*, *R v Morrissey* [1997] 2 Cr App R 426 and *Coyne v UK* (26 September 1977). For a helpful summary of these recent authorities and the light that they may shed on the notion and effect of unsatisfactoriness of a conviction regardless of its safety, see Sir Louis Blom-Cooper QC, pp 74–77.)

d An early case under the new statutory formula is *R v Bloomfield* [1997] 1 Cr App R 135, where the accused sought a stay of prosecution on the ground of abuse of process because the prosecution had reneged on an indication to the court that it intended to offer no evidence against him. His application failed and he thereupon pleaded guilty. On appeal against conviction, the court (Staughton LJ, Ian Kennedy J and Judge Crane) quashed the conviction on the ground that,  
e whether or no he had suffered prejudice—

'it would bring the administration of justice into disrepute if the Crown Prosecution Service were able to treat the court as if it were at its beck and call, free to tell it one day that it was not going to prosecute and another day that it was.' (See [1997] 1 Cr App R 135 at 143.)

f The court appears to have acknowledged the unsure jurisprudential basis for the decision because it went on to express the following caution, expressly referring to a similar approach of the court (Lord Taylor CJ, Pill and Sedley JJ) in *R v Mahdi* [1993] Crim LR 793:

g 'Of course the circumstances of each case have to be looked at carefully, and many other factors considered. As the Court said in the *Mahdi* decision, we are not seeking to establish any precedent or any general principle in regard to abuse of process. We simply find that in the exceptional circumstances of this case an injustice was done to this appellant. In those  
h circumstances the appropriate course is to allow the appeal and quash this conviction.'

j In our view, whatever may have been the legal justification for such a flexible approach in *R v Mahdi*, when s 2(1) included the possibly separate notion of an 'unsatisfactory' conviction, there is no room for it now when the single test is one of 'unsafe[ness]' of the conviction. We respectfully agree with the following reasoning and criticism of the decision by the editors of the third supplement to *Archbold* (1997 edn) para 7-45:

'Whilst the prosecution's conduct, viewed as a whole, was undoubtedly unbecoming (and may have constituted grounds for granting a stay ...), this is a questionable basis for quashing the conviction. Apart from being misled

into thinking that he was going "to get away with it", it is difficult to see what injustice the accused had suffered. Neither the misconduct of the prosecution, nor the fact that there has been a failure to observe some general notion of "fair play" are in themselves reasons for quashing a conviction. Section 2(1) of the 1968 Act is quite specific that the *only* ground for quashing a conviction (since the amendment by the *Criminal Appeal Act* 1995) is that the court thinks the conviction is "unsafe". This, it is submitted, is clearly intended to refer to the correctness of the conviction (*i.e.* a conviction is unsafe if there is a possibility that the defendant was convicted of an offence of which he was in fact innocent). Unfortunately, the Court of Appeal, in their judgment, do not address this point.' (Editors' emphasis.)

Accordingly, we are of the view that there is no statutory scope now for the court to consider, on appeal against conviction on a plea of guilty, circumstances of the *Ordtec*, or even the *R v Mahdi* or *R v Bloomfield*, nature where they do not go to the safety of the conviction. Even if there were, the circumstances of this case would not qualify for such unusual treatment.

We hold that the appellants' appeals against conviction fail because, by their pleas of guilty, they intended to admit and have admitted their guilt, and that their convictions are, therefore, safe.

#### *The fairness of admitting the evidence*

Mr Cassel and Mr Brown have attacked what Mr Cassel called the judge's 'purported exercise of his discretion' to admit the evidence of the tape recorded conversations. Mr Cassel's submission, which Mr Brown adopted, was that the judge based his decision on an erroneous ruling of law that Chalkley and Carter were lawfully under arrest when the regional crime squad officers installed the listening device in their home. He argued that the judge should have found their arrest to have been unlawful and that such illegality, together with the other unlawful behaviour that he did identify, amounted to oppressive conduct requiring the exclusion of the evidence produced by the device. Mr Cassel said that the effect of the judge's reliance on such an error of law in reaching his decision meant that it was no decision at all or, as he put it, no 'exercise of his discretion' at all. He said that, therefore, he was not asking the court to rule that the judge's decision was so unreasonable that the court should intervene, but that the court should intervene anyway and exercise its own discretion in the matter.

Mr Cassel submitted initially that the court, in deciding on the question of fairness in admitting this evidence, had to undertake a balancing act of the sort conducted by the judge by reference to *Bennett's* case and *R v Latif*, *R v Shahzad*. He put in the balance in favour of the appellants the arrests, which he maintained were unlawful, and the other unlawful conduct of the police, all of which he described as 'oppression'. He put in the balance in favour of the Crown the public interest in the apprehension and conviction of dangerous criminals. On that approach he maintained that the conduct of the police, in particular, the unlawful deprivation of liberty of Chalkley and Carter, was so oppressive that it outweighed the countervailing public interest in bringing allegedly dangerous criminals to justice. However, towards the end of his submissions he hardened his argument to maintain that where, as here, there was 'oppression' of any kind, there was no need for a balancing exercise at all. He said that, if the proper view of the police conduct is that it was 'oppressive' in any respect, the court must



a exclude evidence obtained by means of it, however much in the public interest the oppressive conduct may have been.

The first matters for consideration are whether the judge was correct on the facts as he found them to rule that police had lawfully arrested Chalkley and Carter, and whether, in the circumstances of the case, it matters. As to the lawfulness of the arrests, the question is whether it was sufficient for the judge to rely, as he did, on his finding that all the officers concerned had reasonable grounds for suspecting their fraudulent use of the credit card, when he also found that that was not their real motive for making the arrests.

b Section 24(6) of the Police and Criminal Evidence Act 1984 empowers a police officer to arrest without warrant a person for an arrestable offence if he has reasonable grounds for suspecting that he is guilty of that offence. The period of arrest continues until the arrested person has been released without charge or is remanded in custody or on bail by a magistrate (see *Holgate - Mohammed v Duke* [1984] 1 All ER 1054 at 1056, [1984] AC 437 at 441 per Lord Diplock).

c The fact that the Cambridgeshire police officers who made the arrests may have been ignorant of the real motive for them does not entitle the court to focus just on their role and understanding of the matter, and the judge did not do that. He clearly treated the Cambridgeshire Constabulary, acting through its chief constable and Det Con Fletcher, and in co-operation with Det Con Harrison of the regional crime squad, as having a 'corporate' state of mind for the purpose of testing the legality of the arrests. As to satisfaction of s 24 of the 1984 Act, 'reasonable grounds for suspecting' Chalkley and Carter to be guilty of an arrestable offence, we cannot fault the judge's conclusion that all the officers concerned had such grounds. In particular, we agree with him that Det Con Fletcher's information, which she passed to Det Con Harrison and to the Cambridgeshire officers who were to make the arrests, constituted reasonable grounds for suspecting the involvement of the two in the credit card fraud. And we can see no basis for rejecting the judge's conclusion that they did not know or believe, when making the arrests, that there was no possibility of charges for those offences following, as in *Plange v Chief Constable of South Humberside Police* (1992) Times, 23 March.

f But what about the real or main purpose of the arrests? Is it enough to avoid illegality, as the judge found, that, although that purpose had nothing to do with the suspected offences the subject of the arrests, it had all to do with the laudable motive of securing the appellants' apprehension for, and the prevention of further, far more serious crimes?

g Mr Cassel submitted that the answer is No for a number of reasons.

h First, he argued that, however laudable the purpose might have been, it was irrelevant to the decision whether to exercise the power of arrest in the circumstances. He referred to the following passage from the speech of Lord Diplock in *Holgate-Mohammed v Duke* [1984] 1 All ER 1054 at 1057, [1984] AC 437 at 443:

i '... the discretion [to arrest] must be exercised in good faith ... "he [sc the exerciser of the discretion] must exclude from his consideration matters which are irrelevant to what he has to consider".'

Second, Mr Cassel submitted that the arrests were illegal because the arresting officers had not informed Chalkley and Carter of the true reason for their arrest. Whilst, on a narrow view of the matter, they may have told them of the ground, in the sense of a valid legal ground for the arrests, as required by s 28(3) of the

1984 Act, they did not tell them the true reason for their ostensible reliance on that ground. He referred to the celebrated authority of *Christie v Leachinsky* [1947] 1 All ER 567, [1947] AC 573 and, in particular, to the following two of a number of propositions of Viscount Simon:

‘1. If a policeman arrests without warrant on reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized.’

2. If the citizen is not so informed, but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment.’ (See [1947] 1 All ER 567 at 572, [1947] AC 573 at 587.)

Lord Simonds also expressed the same principle in broad but, as we shall see, not unqualified, terms. He said that ‘a man is not to be deprived of his liberty except in due course and process of law’ and ‘if a man is to be deprived of his freedom, he is entitled to know the reason why’ (see [1947] 1 All ER 567 at 575, 576, [1947] AC 573 at 592, 595).

Accordingly, Mr Cassel submitted, the unlawful means by which the police had obtained the tape recorded evidence included the unlawful arrests of Chalkley and Carter, and that illegality, coupled with the deceit, amounted to oppressive conduct. He maintained that the judge’s ruling that the arrests were lawful was wrong in law and that, therefore, he had not exercised a proper discretion in the matter. He said that it followed that this court could look at the matter anew and make its own decision as to the fairness of admitting the evidence.

Mr Morrison submitted that the arrests were lawful in that the police officers had reasonable grounds for suspecting Chalkley and Carter to have committed the credit card fraud. He maintained that the fact that the real reason for the arrests was to enable the police to bring the two appellants to justice for far more serious offences and to stop them committing them did not make the arrests unlawful. In the alternative, he submitted that, even if the arrests were unlawful, the police did not behave oppressively; they did all that they could to minimise such illegality as there was, and they did what they did in a good cause and as the only practicable way of achieving it. On that approach, he maintained that the judge conducted properly the balancing exercise described by Lord Steyn in *R v Latif*, *R v Shahzad* and that his view as to the lawfulness of the arrests did not vitiate his decision. In short, he submitted that, although the possibly wrongful deprivation of liberty was a serious matter, the reality is that it was only for a short period and was far outweighed by the public benefit of ultimately removing persons from society bent on a course of serious robberies, involving the use of firearms and possible serious injury or death to innocent people.

In our view, the judge correctly held that the arrests were lawful. We acknowledge the importance of the liberty of the subject. It is a fundamental right of which he may only be deprived by the due process of law, which process includes an entitlement to be told why he is being deprived of it. However, a collateral motive for an arrest on otherwise good and stated grounds does not necessarily make it unlawful. It depends on the motive. That is clear from the materially different facts of *Christie v Leachinsky* [1947] 1 All ER 567, [1947] AC 573

a and the qualified manner in which the members of the judicial committee expressed the important principle for which the case is famous.

First, as to the facts, there, the police informed Leachinsky of a ground of arrest which was not a valid ground for it; here the suspected credit card fraud was a valid ground for the arrests. There, there was an alternative and valid ground for arrest of which the officers had not informed him; here there was no alternative  
b ground or reason, valid or invalid, for arrest as distinct from the object of removing Chalkley and Carter from their house for a while to enable the installation of the device.

Second, Viscount Simon, Lord Simonds and Lord du Parc (with whom Lord Thankerton and Lord Macmillan agreed) were all of the view that there were qualifications and possible exceptions to the general principle that the police, in  
c making an arrest, should be motivated only by matters relevant to the suspected offence and should tell the subject the true reason for it. Viscount Simon said ([1947] 1 All ER 567 at 573, [1947] AC 573 at 588):

d 'There may well be other exceptions to the general rule in addition to those I have indicated, and the above propositions are not intended to constitute a formal or complete code, but to indicate the general principles of our law on a very important matter.'

Lord Simonds and Lord du Parc ([1947] 1 All ER 567 at 575 and 581–582, [1947] AC 573 at 592 and 603–604) allowed for the legality of arrest and detention by the  
e police of a man on one charge on which they have reasonable grounds for suspecting his guilt, but with the real or main purpose of enabling them to investigate another, possibly more serious, offence of which they have as yet no such grounds and with a view to preventing his escape from justice. As Lord Simonds observed ([1947] 1 All ER 567 at 575, [1947] AC 573 at 593): 'In all such  
f matters a wide measure of discretion must be left to those whose duty it is to preserve the peace and bring criminals to justice.' The reasoning for that well-known and respectable aid to justice, 'a holding charge', seems to us equally appropriate to circumstances where, as here, the police have, and have so informed the subject(s) when arresting them, reasonable grounds for doing so, but were motivated by a desire to investigate and put a stop to further, far more serious, crime. Accordingly, we agree with the judge's ruling that the arrests  
g were lawful.

However, even if, contrary to our view, the arrests were unlawful because the reason for them was irrelevant to the stated grounds for them and/or because the police did not tell Chalkley and Carter the true reason, we do not consider that our approach to the judge's decision should be any different. On the facts as he  
h found them, the categorisation of the arrests as unlawful would not affect the quality of the police conduct that he went on to consider. Even though we are concerned with the citizen's fundamental right to freedom, it does not seem to us that the label of unlawfulness in the circumstances makes that conduct any more or less oppressive or deceitful, or whatever pejorative adjective is in play, so as to  
j unbalance or render incomplete or improper the judge's reasoning or 'exercise of discretion' on the matter.

We also say here, though it is strictly more relevant to Mr Cassel's submission about the balancing exercise undertaken by the judge, that we reject as contrary to the wording of s 78 and the authorities that any conduct which may be typified as 'oppressive' automatically requires exclusion of evidence obtained thereby. Just as the labelling of conduct as unlawful does not necessarily affect its character



for this purpose, nor does the application to it of the epithet 'oppressive' automatically override the fundamental test of fairness in admission of evidence. Oppressive conduct, depending on its degree and/or its actual or possible effect, may or may not affect the fairness of admitting particular evidence. The test for the judge was what was fair 'having regard to all the circumstances', and the single criterion for this court is the safety of the convictions.

But for the way in which the judge, fortified by his ruling as to the lawfulness of the arrests, framed his reasoning as part of an exercise in balancing countervailing circumstances, as is done in abuse of process cases, we would see no basis upon which the court could substitute its own decision for his. There can be no doubt that, in his recital of the various circumstances, he dealt fully and reasonably with all those going to the question of fairness of the admission of the evidence. And it may be that we could say that his decision was not unreasonable in a *Wednesbury* sense (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223) by a process of 'filleting' his reasoning to confine it to matters relevant to that question. However, his treatment of all those matters and others as part of a balancing exercise has given us some reason to pause.

We have put the words 'exercise of discretion' in this context in quotation marks because, as the court said in *R v Middlebrook* (18 February 1994, unreported), the task of determining admissibility under s 78 does not strictly involve an exercise of discretion. It is to determine whether the admission of the evidence—

'having regard to all the circumstances, including the circumstances in which the evidence was obtained ... would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.'

If the court is of that view, it cannot logically 'exercise a discretion' to admit the evidence, despite the use of the permissive formula in the opening words of the provision that it 'may refuse' to admit the evidence in that event.

The determination of the fairness or otherwise of admitting evidence under s 78 is distinct from the exercise of discretion in determining whether to stay criminal proceedings as an abuse of process. Depending on the circumstances, the latter may require consideration, not just of the potential fairness of a trial, but also of a balance of the possibly countervailing interests of prosecuting a criminal to conviction and discouraging abuse of power. However laudable the end, it may not justify any means to achieve it (see *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138 at 149–151, [1994] 1 AC 42 at 61–62 per Lord Griffiths and *R v Latif*, *R v Shahzad* [1996] 1 All ER 353 at 360–361, [1996] 1 WLR 104 at 112–113 per Lord Steyn).

At first sight, the words in s 78 'the circumstances in which the evidence was obtained' might suggest that the means by which evidence was secured, even if they did not affect the fairness of admitting it, could entitle the court to exclude it as a result of a balancing exercise analogous to that when considering a stay for abuse of process. On that approach, the court could, even if it considered that the intrinsic nature of the evidence was not unfair to the accused, exclude it as a mark of disapproval of the way in which it had been obtained. That was certainly not the law before the 1984 Act. And we consider that the inclusion in s 78 of the words 'the circumstances in which the evidence was obtained' was not intended to widen the common law rule in this respect as stated by Lord Diplock in *R v Sang*. That is that, save in the case of admissions and confessions and generally as

a to evidence obtained from the accused after the commission of the offence (eg *R v Payne* [1963] 1 All ER 848, [1963] 1 WLR 637, *Callis v Gunn* [1963] 3 All ER 677 at 680–681, [1964] 1 QB 495 at 502 per Lord Parker CJ—it is in that light that Woolf LJ's observations in *Matto v Wolverhampton Crown Court* [1987] RTR 337 at 346 should be read), there is no discretion to exclude evidence unless its quality was or might have been affected by the way in which it was obtained (see *R v Sang* [1979] 2 All ER 1222 at 1228–1231 esp at 1230–1231, [1980] AC 402 at 434–437 esp at 437 per Lord Diplock). As we have said, the House of Lords in *R v Khan (Sultan)* has applied the same test to s 78. All their Lordships were of the view that, regardless of a possible impropriety in the form of an apparent infringement of the right of privacy declared in art 8 of the European Convention of Human Rights, the critical test under s 78 and at common law is whether the impropriety affected the fairness of the proceedings. It was in that sense that Lord Nolan, with whom all their Lordships agreed on this point, acknowledged the trial judge's common law and s 78 jurisdiction to exclude evidence otherwise admissible. He said ([1996] 3 All ER 289 at 298, [1997] AC 558 at 577–578):

d '... your Lordships' House in *R v Sang* and the many decisions which have followed it make it plain that, as a matter of English law, evidence which is obtained improperly or even unlawfully remains admissible, subject to the power of the trial judge to exclude it in the exercise of his common law discretion or under ... s 78 ...'

e Mr Cassel sought to rely on this passage as an acknowledgement that s 78 entitles a trial judge to embark on the sort of exercise appropriate in applications for a stay for abuse of process even where he is of the view that there is no unfairness in the evidence itself. That Lord Nolan had no such intention is apparent from the following passage from his speech ([1996] 3 All ER 289 at 301, [1997] AC 558 at 582):

f '... if the behaviour of the police in the particular case amounts to an apparent or probable breach of some relevant law or convention, common sense dictates that this is a consideration which may be taken into account for what it is worth. Its significance, however, will normally be determined not so much by its apparent unlawfulness or irregularity, as upon its effect, taken as a whole, upon the fairness or unfairness of the proceedings.'

g See also the observations of Lord Slynn ([1996] 3 All ER 289 at 292, [1997] AC 558 at 572) and in particular Lord Nicholls, who said ([1996] 3 All ER 289 at 302–303, [1997] AC 558 at 583):

h '... the discretionary powers of the trial judge to exclude evidence march hand in hand with article 6.1 of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969). Both are concerned to ensure that those facing criminal charges receive a fair hearing. Accordingly, when considering the common law and statutory discretionary powers under English law, the jurisprudence on art 6 can have a valuable role to play. English law relating to the ingredients of a fair trial is highly developed. But every system of law stands to benefit by an awareness of the answers given by other courts and tribunals to similar problems. In the present case the decision of the European Court of Human Rights in *Schenk v Switzerland* (1988) 13 EHRR 242 confirms that the use at a criminal trial of

material obtained in breach of the rights of privacy enshrined in art 8 does not of itself mean that the trial is unfair. Thus, the European Court of Human Rights case law on this issue leads to the same conclusion as the English law.' a

The exercise for the judge under s 78 is not the marking of his disapproval of the prosecution's breach, if any, of the law in the conduct of the investigation or the proceedings, by a discretionary decision to stay them, but an examination of the question whether it would be unfair to the defendant to admit that evidence. b

Because of our unease about the possible effect on the reasoning of the judge of his adoption of the balancing appropriate to abuse of process cases, we consider that the proper course is to make our own decision about the fairness of admitting this evidence. We have no doubt whatever about the fairness of doing so. As we have said, there was no dispute as to its authenticity, content or effect; it was relevant, highly probative of the appellants' involvement in the conspiracy and otherwise admissible; it did not result from incitement, entrapment or inducement or any other conduct of that sort; and none of the unlawful conduct of the police or other of their conduct of which complaint is made affects the quality of the evidence. In the circumstances, we can see no basis for concluding that the admission of this evidence would, in the words of s 78, have had such an adverse effect on the fairness of the proceedings that the judge should not have admitted it. Accordingly, we would dismiss the appeals on that ground also. c  
d

*Appeals dismissed.* e

Kate O'Hanlon Barrister.



**Arbuthnot Latham Bank Ltd and others v  
Trafalgar Holdings Ltd and others  
Chishty Coveney & Co (a firm) v Raja**

COURT OF APPEAL, CIVIL DIVISION

LORD WOOLF MR, WALLER AND ROBERT WALKER LJJ

24, 25 NOVEMBER, 16 DECEMBER 1997

*Practice – Dismissal of action for want of prosecution – Inordinate delay without excuse – Action being statute-barred if struck out – Plaintiff having second possible cause of action subject to longer and unexpired limitation period – Plaintiff likely to commence second action if original action struck out – Whether appropriate to strike out original action.*

In two cases the issue arose as to the appropriateness of a court striking out an action for delay where the cause of action relied on by the plaintiff in the proceedings would be statute-barred if the action were struck out, but the plaintiff had another cause of action on which he could rely which was not statute-barred.

In the first case, the plaintiff bank issued a writ in August 1989 against T Ltd for the payment of moneys due, and against T Ltd's UK representative, A, and his wife, who had both signed a guarantee to meet T Ltd's liabilities to the bank on demand. Mr and Mrs A had also granted the bank a legal charge over their home, under which they covenanted to discharge on demand all their liabilities to the bank. T Ltd took no further part in the proceedings, but pleadings in relation to Mr and Mrs A closed in May 1990 and discovery was completed in June 1991. In May 1996 Mr and Mrs A issued a summons to strike out the plaintiff's claim on grounds of delay, the six-year limitation period applying to the claim on the guarantee having expired in August 1995. The bank explained the delay by stating that the debt had been assigned to a debt collection company, which had inherited a large portfolio of bad debts and which had given low priority to the claim against Mr and Mrs A because the debt was secured. The judge found that there had been inordinate and inexcusable delay, but dismissed the summons on the basis that the bank could commence a new action based on the mortgage. Mr and Mrs A appealed contending, inter alia, that they would have a defence to any claim based on the mortgage.

In the second case the plaintiff firm of accountants issued proceedings against the defendant in July 1986 for professional fees and interest. Those sums had been secured by a charge on the defendant's property. Two further actions for fees and interest were also commenced. In December 1992 the actions were struck out, but were reinstated on appeal in October 1993. In August 1996, however, on the defendant's application, the master again dismissed all three actions on the ground of inexcusable delay, and the judge dismissed the plaintiff's appeal. The plaintiff applied for leave to appeal.

**Held** – On an application to dismiss an action for want of prosecution on the ground of delay, a defendant was entitled to assume that normally the court would determine the issue on the basis of the claim which had been pleaded and which was before the court. Thus, if that cause of action was statute-barred, the action could be dismissed notwithstanding that the plaintiff could rely on another

cause of action which was not statute-barred and the court should not embark on an investigation of the merits of defences which would be raised to such a fresh claim unless they were obviously unfounded. Moreover, although an action would not normally be dismissed for delay if the limitation period had not expired, that consideration was not as important where the proceedings constituted an abuse of process. While delay alone did not amount to an abuse of process, a series of separate inordinate and inexcusable delays in complete disregard of the rules of the court and with full awareness of the consequences could do so; and if an action had already been struck out, the duty on a party to comply with the rules if the action was restored was heavier than it would be if the action had proceeded dilatorily without a previous intervention of the court. It followed that in the first case the judge had erred in his approach and the appeal would therefore be allowed. However, since in the second case there had been a total disregard of the rules and the overall conduct of the case amounted to an abuse of process, the judge had been correct to dismiss the actions. Accordingly, the application for leave to appeal would be dismissed (see p 187 f, p 188 a to g, p 189 e f, p 190 d e j to p 191 b and p 192 g, post).

*Birkett v James* [1977] 2 All ER 801, *Culbert v Stephen Westwell & Co Ltd* [1993] PIQR P54 and *Grovit v Doctor* [1997] 2 All ER 417 applied.

Per curiam. (1) The gradual change to a court controlled case management system which is taking place imposes additional burdens on the courts, and it is in the interests of litigants as a whole that the court's time is not unnecessarily absorbed in dealing with satellite litigation which non-compliance with the timetables laid down in the rules creates. Litigants and their legal advisors must therefore recognise that any delay which occurs from now on will be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it is, but also in relation to the effect it can have on other litigants who are wishing to have their cases heard and the prejudice which is caused to the due administration of justice (see p 191 e to g, post).

(2) The unofficial practice of banks and others, faced with a multitude of debtors, to initiate a great many actions and then select which of those proceedings to pursue at any particular time, should cease in so far as it is taking place with the consent of the court or other parties. Although it is arguable that to date such practices do not constitute an abuse of process, this will no longer be the case. This new approach will not be applied retrospectively to delays which have already occurred but will apply to future delays (see p 192 c to f, post).

## Notes

For dismissal of actions for want of prosecution, see 37 *Halsbury's Laws* (4th edn) paras 447–449, and for cases on the subject, see 37(3) *Digest* (Reissue) 67–79, 3293–3345.

For striking out for abuse of process, see 37 *Halsbury's Laws* (4th edn) paras 434, 435.

## Cases referred to in judgment

*Barclays Bank plc v Maling* [1997] CA Transcript 849.

*Barclays Bank plc v Miller (Frank, third party)* [1990] 1 All ER 1040, [1990] 1 WLR 343, CA.

*Birkett v James* [1977] 2 All ER 801, [1978] AC 297, [1977] 3 WLR 38, HL.

*Culbert v Stephen Westwell & Co Ltd* [1993] PIQR P54, CA.

- a** *Dept of Transport v Chris Smaller (Transport) Ltd* [1989] 1 All ER 897, [1989] AC 1197, [1989] 2 WLR 578, HL.  
*Grovit v Doctor* [1997] 2 All ER 417, [1997] 1 WLR 640, HL.  
*Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666, CA.  
*Janov v Morris* [1981] 3 All ER 780, [1981] 1 WLR 1389, CA.  
*Teale v McKay* [1994] PIQR P508, CA.
- b** **Cases also cited or referred to in skeleton arguments**  
*Ackbar v C F Green & Co Ltd* [1975] 2 All ER 65, [1975] QB 582.  
*Aiken v Stewart Wrightson Members' Agency Ltd* [1995] 3 All ER 449, [1995] 1 WLR 1281.  
*Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 1 All ER 543, [1968] 2 QB 229, CA.
- c** *Art Reproduction Co Ltd, Re* [1951] 2 All ER 984, [1952] Ch 89.  
*Barber v Staffordshire CC* [1996] 2 All ER 748, CA.  
*Barclays Bank Ltd v Beck* [1952] 1 All ER 549, [1952] 2 QB 47, CA.  
*Barnes v Glenton* [1899] 1 QB 885, CA.  
*Beoco Ltd v Alfa Laval Co Ltd* [1994] 4 All ER 464, [1995] QB 137, CA.
- d** *Brisbane City Council v A-G for Queensland* [1978] 3 All ER 30, [1979] AC 411, PC.  
*Central Electricity Generating Board v Halifax Corp* [1962] 3 All ER 915, [1963] AC 785, HL.  
*Christy (Thomas) Ltd (in liq), Re* [1994] 2 BCLC 527.  
*Cia de Electricidad de la Provincia de Buenos Aires Ltd, Re* [1978] 3 All ER 668, [1980] Ch 146.
- e** *Collin v Duke of Westminster* [1985] 1 All ER 463, [1985] QB 581, CA.  
*Dingle v Coppen* [1899] 1 Ch 726.  
*DSV Silo- und Verwaltungsgesellschaft mbH v Sennar (owners)* [1985] 2 All ER 104, [1985] 1 WLR 490, HL.  
*Ezekiel v Orakpo* [1997] 1 WLR 340, CA.
- f** *Government of India, Ministry of Finance (Revenue Division) v Taylor* [1955] 1 All ER 292, [1955] AC 491, HL.  
*Henderson v Henderson* (1843) 3 Hare 100, [1843–60] All ER Rep 378, 67 ER 313, V-C.  
*Hicks v Newman* [1990] CA Transcript 392.  
*Holmes v Cowcher* [1970] 1 All ER 1224, [1970] 1 WLR 834.
- g** *Hopkinson v Tupper* [1997] CA Transcript 468.  
*Lazenby (James) & Co v McNicholas Construction Co Ltd* [1995] 3 All ER 820, [1995] 1 WLR 615.  
*Lloyd, Re, Lloyd v Lloyd* [1903] 1 Ch 385, CA.  
*Lloyds Bank Ltd v Margolis* [1954] 1 All ER 734, [1954] 1 WLR 664.
- h** *Martin's Mortgage Trusts, Re, C & M Matthews Ltd v Marsden Building Society* [1951] 1 All ER 1053, [1951] Ch 758, CA.  
*National Westminster Bank plc v Kitch* [1996] 4 All ER 495, [1996] 1 WLR 1316, CA.  
*Poole v Poole* (1871) LR 7 Ch App 17.  
*Pople v Evans* [1968] 2 All ER 743, [1969] 2 Ch 255.  
*Roebuck v Mungovin* [1994] 1 All ER 568, [1994] 2 AC 224, HL.
- i** *Romain v Scuba TV Ltd* [1996] 2 All ER 377, [1997] QB 887, CA.  
*SCF Finance Co Ltd v Masri* [1985] 2 All ER 747, [1985] 1 WLR 876, CA.  
*Shtun v Zalejska* [1996] 3 All ER 411, [1996] 1 WLR 1270, CA.  
*Sutton v Sutton* (1882) 22 Ch D 511, CA.  
*Talbot v Berkshire CC* [1993] 4 All ER 9, [1994] QB 290, CA.  
*Trill v Sacher* [1993] 1 All ER 961, [1993] 1 WLR 1379, CA.  
*Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833, [1983] 1 AC 553, PC.



## Appeal and application

*Arbuthnot Latham Bank Ltd and ors v Trafalgar Holdings Ltd and ors*

The second and third defendants, Peter John Ashton and Pauline Hilda Ashton, appealed with leave granted by Potter LJ on 12 January 1997 from the order of Sir Ronald Waterhouse sitting as a judge of the High Court made on 31 July 1996 dismissing their summons for the dismissal of the action brought by the plaintiffs, Arbuthnot Latham Bank Ltd, Nordbanken London Branch and Securum Finance Ltd, for want of prosecution. The facts are set out in the judgment of the court.

*Chishty Coveney & Co (a firm) v Raja*

The plaintiff firm, Chishty Coveney & Co, applied for leave to appeal from the order of Judge Roger Cox, sitting as a deputy judge of the High Court, dismissing an appeal from the order of Master Hodgson made on 2 July 1997, dismissing three actions brought by the plaintiff against the defendant, Ibrahim Khan Raja, for professional fees. The facts are set out in the judgment of the court.

Mark Strachan QC and Peter Knox (instructed by Coldham Shield & Mace) for Mr and Mrs Ashton.

Terence Mowschenson QC and Anthony de Garr Robinson (instructed by Sheridans) for the plaintiffs.

Justin Althaus (instructed by Aslam & Co) for the plaintiff firm.

Mr Raja did not appear.

*Cur adv vult*

16 December 1997. The following judgment of the court was delivered.

**LORD WOOLF MR.** This judgment relates to an appeal and an application for leave to appeal. The appeal is in *Arbuthnot Latham Bank Ltd and others v Trafalgar Holdings Ltd and others*. The application for leave to appeal is in *Chishty Coveney & Co v Raja*. We are giving a joint judgment which relates to both cases, because although they were heard on different dates, they raise an identical issue. That issue is the appropriateness of a court striking an action out where there has been considerable delay if: (i) the cause of action relied upon by the plaintiff in the proceedings would be statute-barred if the action were to be struck out, but (ii) the plaintiff has another cause of action upon which he has not so far relied for recovering the money or property the subject matter of the existing action and the cause of action is subject to a longer limitation period which has not expired, and (iii) if the original action is struck out, the probabilities are that fresh proceedings will be commenced which will rely upon the cause of action which is not statute-barred.

The two cases also provide a convenient opportunity for this court to give some guidance for the assistance of the profession, as to the likely consequences in the future of excessive delay in the conduct of legal proceedings now that the courts are in the process of implementing changes requiring the parties to conduct their litigation with reasonable expedition.

### THE BACKGROUND TO THE TWO CASES

*The Arbuthnot Latham Bank case (the bank case)*

This is an appeal from a decision of Sir Ronald Waterhouse, sitting as a High Court Judge, on 31 July 1996, when he dismissed a summons by Mr and Mrs Ashton to strike out the action which had been brought against them.

a The claim against Mr and Mrs Ashton arose in this way. Mr Ashton was the first defendant's, Trafalgar Holdings Ltd (Trafalgar), representative in the United Kingdom. On 28 January 1987 Mr and Mrs Ashton signed a guarantee to meet on demand the liabilities of Trafalgar to Arbuthnot Latham Bank Ltd (the bank). Two years later on 2 March 1989 Mr and Mrs Ashton granted the bank a legal charge over their home (the mortgage). Under the mortgage Mr and Mrs Ashton

b covenanted to discharge on demand all their liabilities to the bank.  
By letter dated 8 June 1989, the bank demanded from Trafalgar payment of money then due amounting to over £720,000 plus interest. When that sum was not paid, on 31 July 1989, the bank demanded from the Ashtons the somewhat larger sum which by that time was allegedly due. Nothing was paid and on 23 August 1989 the bank issued a writ indorsed with a statement of claim against  
c Trafalgar and the Ashtons. Trafalgar did not serve a defence but the Ashtons did so. In the defence they contended that: (i) no debt was due from Trafalgar, (ii) the guarantee was subject to collateral warranties which made it unenforceable in the circumstances, and (iii) in the case of Mrs Ashton the guarantee was obtained by undue influence.

d Trafalgar took no further part in the proceedings but in relation to the Ashtons pleadings closed on 29 May 1990 and discovery was completed on 6 June 1991. On 7 June 1991 an order was made substituting Nordbanken London Branch as the plaintiff. Thereafter no step was taken until Securum Finance Ltd wrote to the Ashtons on 20 March 1996. This was followed by the Ashtons on 3 May 1996 issuing a summons to strike out the claim against them on the grounds of delay.

e Sir Ronald Waterhouse dismissed the summons to strike out, gave the plaintiffs leave to join Securum Finance Ltd as the third plaintiffs, gave the plaintiffs leave to issue a summons before the master seeking leave to amend the statement of claim, and refused the Ashtons leave to appeal.

f On 9 October 1996 Master Trench gave the plaintiffs leave to amend their statement of claim so as to include a claim based on the covenant in the mortgage.

It is common ground between the parties that the plaintiffs' original claim on the guarantee was a claim to which a six-year limitation period applied and that period had expired on 14 August 1995. It is also common ground that in relation to the claim under the mortgage, the limitation period is 12 years and that period  
g has not expired (see s 8 in relation to an action upon a speciality and s 20 of the Limitation Act 1980). In his judgment, Sir Ronald Waterhouse concluded that there had been inordinate and inexcusable delay. In their evidence, the plaintiffs explained the delay by stating that the debt was assigned to the company now known as Securum UK Ltd on 21 December 1992. After that assignment, that  
h company became 'in essence an asset recovery and debt collection company'. It had inherited a large portfolio of bad debts some of which ran into seven figures. It was therefore decided that the plaintiffs would deal with only those loans within their portfolio which required urgent action and, as in this case they had security, it was not regarded as an urgent situation and so it was not initially actively pursued. In addition Mr and Mrs Ashton were not only defending but  
j also counterclaiming against the plaintiffs and they appeared not anxious to pursue their counterclaim.

Mr and Mrs Ashton's defence turned substantially on oral evidence and the judge records that it is conceded by the plaintiff that the passage of time may have affected their recollection of events and this would impinge upon their oral evidence. But he drew attention to the fact that many important matters were recorded in correspondence and it is part of the Ashtons' case that the

proceedings against them should have been deferred until 1994 because of an undertaking they have been given. It was however, on the basis that a fresh action could be brought by the plaintiffs based on the mortgage which would not be statute-barred that the judge dismissed the defendant's application. By inference it appears that the judge would have come to a different decision, because of the anxiety to which the Ashtons had been subjected and their dimming recollection, if a fresh action could not have been brought.

*Chishty Coveney & Co v Raja (the accountants' case)*

In this action the plaintiffs are a firm of accountants. They issued proceedings on 7 July 1986, over 11 years ago, for professional fees amounting to almost £84,000 and interest. Mr Raja disputes that sum is a reasonable price for the services which he received. In addition he alleges that his signature was obtained by the plaintiff to a piece of paper by fraud and that this was used subsequently to represent that he had agreed to a charge. He also made a counterclaim suggesting that the plaintiff had been in breach of duty and removed certain property to which he was not entitled. A second action was commenced on 7 July 1986 for further fees and a third action was commenced naming a sum of over £157,000, including interest, based on an alleged compromise agreement. On 2 December 1992 the plaintiff's actions were struck out by the master but on an appeal on 22 October 1993 the three actions were reinstated. They were subsequently consolidated and various directions were given which the defendant suggests were not complied with in time. The defendant contends that he has suffered serious prejudice. First, because he suffered a heart attack in April 1994 and has ever since been less active, and secondly, because his recollection of events is now poor. He further suggests that he has been subject to additional tension and pressure because of the action not being resolved.

After the appeal against the striking out had been allowed, the plaintiff changed solicitors. While it is conceded that there has been inexcusable delay, it is submitted that the delay was neither intentional nor contumelious.

By an order made on 2 July 1997 Master Hodgson dismissed all three actions. The master also ordered that the plaintiff should pay the defendant's costs for the actions including the costs of the application. However, as both parties were legally aided he ordered that 'such costs are not to be enforced without leave of the Courts'. He also granted a legal aid taxation but indicated that the taxing master should consider the costs of photocopying up to a thousand documents and whether the costs of doing this should be allowed. On 28 July 1997 Judge Roger Cox, sitting as a deputy judge of the High Court, dismissed the appeal. He also ordered the defence and counterclaim to be struck out without any order as to costs, save for the costs of the appeal which should be paid by the plaintiff to the defendant, with the enforcement of the order adjourned generally. The judge also confined the order of the master about the non-enforcement of the order for costs to the period during which the plaintiff was legally aided.

On 7 October 1997 Schiemann LJ gave leave to appeal on the costs point and although he stated 'you may argue the other two [points]', it was thought necessary to renew the application for leave and it is that renewed application to which this judgment relates.

*The authorities on striking out*

Although there is a continuous stream of satellite litigation coming before the courts over the issue of delay, the main principles applicable are now clearly established. The starting point is invariably the House of Lords decision in *Birkett*



a *v James* [1977] 2 All ER 801, [1978] AC 297. In the very careful and helpful argument which was advanced by both sides in the bank case appeal we were taken through speeches in *Birkett v James* and in particular the speech of Lord Diplock. The position shortly is as follows. (1) An action should only be dismissed for want of prosecution where (a) the plaintiff's default has been intentional and contumelious, or (b) where there has been inordinate and

b inexcusable delay giving rise to a substantial risk that a fair trial would not be possible or to serious prejudice to the defendant. (2) Before the limitation period has expired an action will not normally be dismissed for inordinate and inexcusable delay if fresh proceedings for the same cause of action could be initiated.

c The House of Lords in *Birkett v James* were not, however, by setting out these principles, acquiescing in delay. They indicated that the court should exercise such powers as they have to ensure that an action is pursued with due diligence. Thus Lord Diplock said ([1977] 2 All ER 801 at 807, [1978] AC 297 at 321):

d 'The court may and ought to exercise such powers as it possesses under the rules to make the plaintiff pursue his action with all proper diligence, particularly where at the trial the case will turn upon the recollection of witnesses to past events. For this purpose the court may make peremptory orders providing for the dismissal of the action for non-compliance with its order as to the time by which a particular step in the proceedings is to be taken. Disobedience to such an order would qualify as "intentional and contumelious" ... But where no question of non-compliance with a

e peremptory order is involved the court is not in my view entitled to treat as "inordinate delay" justifying dismissal of the action in accordance with the second principle ... a total time elapsed since the accrual of the cause of action which is no greater than the limitation period within which the statute allows the plaintiffs to start that action.'

f In *Birkett v James* the House of Lords also explained why whether the limitation period has expired is so significant. The reason is that in the absence of some conduct which means that a second action could be stayed, it would not benefit the defendant to have the first action struck out since this would only result in further proceedings which would inevitably cause more expense and delay.

g If however the limitation period has expired, the same logic does not apply. It also does not apply where the defendant to the fresh action is able to show that it is 'open to doubt and serious argument whether the cause of action asserted ... would be time-barred if fresh proceedings were issued'. In such circumstances the interests of justice may be best served by dismissing the action and leaving the

h party whose action has been struck out to bring fresh proceedings if he chooses to do so. This was established by this court in *Barclays Bank plc v Miller (Frank, third party)* [1990] 1 All ER 1040, [1990] 1 WLR 343. In that case Staughton LJ explained the reason for this approach. He pointed out ([1990] 1 All ER 1040 at 1044, [1990] 1 WLR 343 at 348):

j 'The alternative is that masters, and judges on appeal and even this court, may become embroiled, on an application to dismiss for want of prosecution, in long and elaborate arguments as to whether some future action, if it were brought, would be time-barred. There is a good deal to be said for the view that masters should not have that task forced upon them when the problem may never arise and, if it does arise, could perhaps more conveniently be considered in another way.'

The fact that the limitation period has not expired, does not figure to the same degree in a case where there has been contumelious conduct on behalf of a plaintiff or where the proceedings which are being struck out constitute an abuse of process (see *Grovit v Doctor* [1997] 2 All ER 417, [1997] 1 WLR 640). In such circumstances, the plaintiff may well find that if he brings fresh proceedings after the original proceedings are struck out they are stayed because of his conduct.

For this purpose *delay alone* even delay of 11 years does not amount to an abuse of process. This was made clear in the recent case of *Barclays Bank plc v Maling* [1997] CA Transcript 849, a copy of which was placed before us. In that case there was delay of this order but for a substantial proportion of the period of delay the court had made an order that the action against the relevant defendant was to be adjourned generally with liberty to restore pending proceedings against his wife which in fact were never pursued. With that background Aldous LJ following *Teale v McKay* [1994] PIQR P508 said:

'That case is a clear indication that mere delay, whether or not caused by incompetence, cannot amount to an abuse of process which will enable an action to be struck out. What is needed is disregard of the court's orders. It may be that deliberate as opposed to negligent disregard may not be required (see *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666).'

The court distinguished *Culbert v Stephen Westwell & Co Ltd* [1993] PIQR P54. It did so because in *Culbert's* case the defendants 'had come to court to progress the action with the result that an unless order had to be made' on four occasions. In that situation Parker LJ said in *Culbert's* case [1993] PIQR P54 at P65-P66:

'There is however in my view another aspect of this matter. An action may also be struck out for contumelious conduct, or abuse of the process of the court or because a fair trial of the action is no longer possible. Conduct is in the ordinary way only regarded as contumelious where there is a deliberate failure to comply with a specific order of the court. In my view however a series of separate inordinate and inexcusable delays in complete disregard of the rules of the court and with full awareness of the consequences can also properly be regarded as contumelious conduct or, if not that, to an abuse of the process of the court. Both this and the question of fair trial are matters in which the court itself is concerned and do not depend on the defendant raising the question of prejudice. In my judgment the way in which the action has been conducted does amount to an abuse of the process of the court and it would be a further abuse of process if the action were allowed to proceed. In my judgment also, a fair trial is no longer possible. I am aware that liability is not seriously in doubt, indeed it may already have been decided in the plaintiff's favour but I can see no real possibility of a fair trial on *quantum* when even now the plaintiff's claim is still far from clear.'

These comments of Parker LJ are highly relevant in relation to the accountants' case.

In *Grovit v Doctor* [1997] 2 All ER 417 at 423, [1997] 1 WLR 640 at 646, in a speech with which the other members of the House agreed, I referred to the decision of the House in *Dept of Transport v Chris Smaller (Transport) Ltd* [1989] 1 All ER 897, [1989] AC 1197. In his speech in that case Lord Griffiths emphasised that 'a far more radical approach is required to tackle the problems of delay in the litigation process than driving an individual plaintiff away from the courts when his culpable delay has caused no injustice to his opponent' (see [1989] 1 All ER 897

a at 903, [1989] AC 1197 at 1207). He suggested that the remedy lay in the introduction of court controlled case management techniques. I pointed out in my speech, that the position had not improved since the decision in the *Chris Smaller* case. I went on to indicate that it was at least open to question whether it is not preferable to await the outcome of the implementation of the new rules (which at the present time are being drafted) before making a substantial inroad on the principles established in *Birkett v James*.

#### THE APPLICATION OF THE AUTHORITIES TO THE PRESENT CASES

##### *The bank case*

c The previous authority which is closest to the bank case is the decision of this court in *Barclays Bank plc v Miller* [1990] 1 All ER 1040, [1990] 1 WLR 343. Sir Ronald Waterhouse distinguished *Miller's* case because if fresh proceedings were commenced, he took the view that the bank would succeed. There was not the same uncertainty as to the outcome of the fresh proceedings as there was said to be in *Barclays Bank plc v Miller*.

d Was the judge right in adopting this approach? We do not think so, for reasons advanced by Mr Strachan QC on behalf of Mr and Mrs Ashton. Those reasons are as follows. (1) There is no dispute in this case that in relation to the only cause of action pleaded on behalf of the bank, any fresh proceedings would be statute-barred, both as to principal and interest. In *Birkett v James* no consideration was given to a situation where the only claim which had been e relied on would be statute-barred if the action was dismissed but there was another cause of action which would not be barred. When considering whether or not to strike out a claim for delay, a defendant is entitled to assume that, normally the court will determine the issue, as to whether to strike out on the basis of the cause of action which has been pleaded and is before the court. The defendant is entitled to say if the other requirements laid down in *Birkett v James* f are met the claim which had been made should be determined in my favour. There may be exceptional circumstances where this approach will not be adopted by the courts but that will be an exceptional situation.

(2) Mr Mowschenson QC on behalf of the plaintiffs accepts the plaintiffs may not recover as much interest in the second action as they would have recovered g in reliance upon the first cause of action, (see s 20(5) of the Limitation Act 1980), but he submits that the plaintiffs can recover the principal sum and all the interest by relying on their remedies as mortgagees. This will involve appointing a receiver to sell the property which constitutes the security, taking possession and exercising the statutory powers of sale under the Law of Property Act 1925, s 101 h or by bringing an action for foreclosure. He submits the plaintiffs would then recover all moneys owing from the Ashtons whether time-barred or not. However the plaintiffs in seeking to enforce their rights in this way, would be taking a wholly different course from that which they had chosen to take so far and it is inappropriate to take into account possibilities of this sort in determining what should be the outcome of the very different action which the plaintiffs have i relied on so far. In addition, if the plaintiffs sought to rely on the mortgage in this way, the Ashtons would still seek to rely upon the defences which they say they would have if the existing action was dismissed and the plaintiffs started further proceedings based upon the covenant contained in the mortgage.

(3) If the existing action is dismissed, in relation to an action based on the covenant contained in the mortgage, Mr Strachan submits on behalf of Mr and Mrs Ashton that they would have the following defences—(a) the fact that the



statute-barred claim would not be a liability. By their covenant the Ashtons only promised to discharge on demand all their 'liabilities' to the bank. Those 'liabilities' would be under the guarantee which they gave to the bank and would not include sums which were payable under the guarantee which were not recoverable. They would not be liabilities for the purpose of the mortgage; (b) the general principle is that a plaintiff should bring forward at the outset his whole case. Accordingly, it would be not open to the plaintiff to rely upon a cause of action which he could have relied on in the original action to provide a foundation for the second action relating to the same subject matter; (c) that in any event because of the provisions of s 20(5) of the Limitation Act 1980, the plaintiffs would not be able to recover in the second action any interest in relation to which six years had expired from the date upon which it became due prior to the commencement of the action. This point is not disputed by the plaintiffs; (d) finally it is said that the Ashtons would be entitled to their costs of the only action which has been brought against them and furthermore the plaintiffs would not be able to bring any further action until those costs had been paid. This would benefit the Ashtons.

Apart from the point which depends upon s 20(5) of the Limitation Act 1980 and the situation as to costs, the defences which the Ashtons propose to rely on in a second action are submitted by Mr Mowschenson to be wholly without foundation. This is to overstate the position. They cannot be dismissed out of hand. Mr Strachan is therefore on strong ground when he submits that on an application to strike out, the court should not embark upon an investigation of the merits of defences which would be raised if a claim, which has not yet been made, were to be brought unless they are obviously unfounded. As Mr Strachan rightly points out, the task of courts in considering applications to strike out is difficult enough without having to explore issues which are far from straight forward and would, as here, require careful examination.

It is submitted on behalf of the plaintiffs, that if the court were to dismiss the present proceedings this would bring the law into contempt in the eyes of the ordinary member of the public. The ordinary member of the public would regard it as a 'lawyers' game' to strike out a claim for a sum of money on the grounds of delay when an action could be brought for the very same sum of money the next day.

That this would be the reaction of the public is far from clear. Their reaction is equally likely to be that the striking out of the action was richly deserved the plaintiffs having allowed this action to go to sleep for just over four and a half years because they had actions against other parties to which they wished to give priority.

### *The accountants' case*

Much of what has already been said in the bank case is also relevant to this case. However, the position of the defendant in this case is even stronger. He is entitled to draw attention to the overall delay of nearly 11 years and the fact that the action had already been struck out on a previous occasion, although subsequently that order had been set aside. Although there had not been a peremptory or an unless order made in this case which had not been complied with there had been a total disregard of the rules by both parties and the overall conduct of this case amounted to an abuse of the court. This was not a situation where the normal timetable provided for in the rules had been placed on one side by the action being adjourned as in *Barclays Bank plc v Maling*. If an action has

a already been struck out, the duty on a party to comply with the rules if the action is restored is heavier than it would be if the action had proceeded dilatorily without a previous intervention of the court of this sort. The conduct of the defendant may also have been remiss. However, this is not a matter upon which the plaintiff can rely when there has been an abuse of process. The counterclaim has been correctly struck out as well.

b The plaintiff has however still leave to appeal in relation to the order of costs made by the judge. The order for costs is not the subject of this judgment. However, it is very much to be hoped that an appeal in regard to costs will not be pursued bearing in mind that the parties were in receipt of legal aid so the practical consequences of the orders for costs which were made must be limited.

c THE FUTURE

In his speech in the *Chris Smaller* case, Lord Griffiths identified the advantages which could accrue from a civil procedural process which was subject to 'court controlled case management techniques' (see [1989] 1 All ER 897 at 903, [1989] AC 1197 at 1207). This process is now being introduced. The new unified rules are intended to come into force in April 1999. However, many aspects of the process can be introduced while the existing Supreme Court and County Court Rules are in force. Most of the powers which the court requires for the purposes of case management are already contained in the existing rules.

The gradual change to a managed system which is taking place does impose additional burdens upon the courts, involving the need for training and the introduction of the necessary technological infrastructure. It is therefore in the interests of litigants as a whole, that the court's time is not unnecessarily absorbed in dealing with the satellite litigation which non-compliance with the timetables laid down in the rules creates. The substantial argument which was advanced before Sir Ronald Waterhouse and this court in relation to the bank case is just one instance of a phenomenon which is regularly taking up the time of the courts. In *Birkett v James* the consequence to other litigants and to the courts of inordinate delay was not a consideration which was in issue. From now on it is going to be a consideration of increasing significance. Litigants and their legal advisers, must therefore recognise that any delay which occurs from now on will be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it is, but also in relation to the effect it can have on other litigants who are wishing to have their cases heard and the prejudice which is caused to the due administration of civil justice. The existing rules do contain time limits which are designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed.

h It is already recognised by *Grovit v Doctor* [1997] 2 All ER 417, [1997] 1 WLR 640 that to continue litigation with no intention to bring it to a conclusion can amount to an abuse of process. We think that the change in culture which is already taking place will enable courts to recognise for the future, more readily than heretofore, that a wholesale disregard of the rules is an abuse of process as suggested by Parker LJ in *Culbert v Stephen Westwell & Co Ltd*. While an abuse of process can be within the first category identified in *Birkett v James* it is also a separate ground for striking out or staying an action (see *Grovit v Doctor* [1997] 2 All ER 417 at 419, [1997] 1 WLR 640 at 642–643) which does not depend on the need to show prejudice to the defendant or that a fair trial is no longer possible. The more ready recognition that wholesale failure, as such, to comply with the rules justifies an action being struck out, as long as it is just to do so, will avoid much time and expense being incurred in investigation questions of prejudice,

and allow the striking out of actions whether or not the limitation period has expired. The question whether a fresh action can be commenced will then be a matter for the discretion of the court when considering any application to strike out that action, and any excuse given for the misconduct of the previous action (see *Janov v Morris* [1981] 3 All ER 780, [1981] 1 WLR 1389). The position is the same as it is under the first limb of *Birkett v James*. In exercising its discretion as to whether to strike out the second action, that court should start with the assumption that if a party has had one action struck out for abuse of process some special reason has to be identified to justify a second action being allowed to proceed.

It has been the unofficial practice of banks and others who are faced with a multitude of debtors from whom they are seeking to recover moneys to initiate a great many actions and then select which of those proceedings to pursue at any particular time. This practice should cease in so far as it is taking place without the consent of the court or other parties. If there is good reason for doing so the court can make the appropriate directions. Whereas hitherto it may have been arguable that for a party on its own initiative to in effect 'warehouse' proceedings until it is convenient to pursue them does not constitute an abuse of process, when hereafter this happens this will no longer be the practice. It leads to stale proceedings which bring the litigation process into disrespect. As case flow management is introduced, it will involve the courts becoming involved in order to find out why the action is not being progressed. If the claimant has for the time being no intention to pursue the action this will be a wasted effort. Finding out the reasons for the lack of activity in proceedings will unnecessarily take up the time of the court. If, subject to any directions of the court, proceedings are not intended to be pursued in accordance with the rules they should not be brought. If they are brought and they are not to be advanced, consideration should be given to their discontinuance or authority of the court obtained for their being adjourned generally. The courts exist to assist parties to resolve disputes and they should be used by litigants for other purposes. This new approach will not be applied retrospectively to delays which have already occurred but it will apply to future delay.

The appeal of the Ashtons will therefore be allowed, the judge's order set aside and the plaintiffs' claim dismissed. The counterclaim will also be dismissed. In the accountants' case the application for leave to appeal will be refused.

*Appeal allowed. Application for leave to appeal refused.*

Kate O'Hanlon Barrister.



# **a R v Crown Court at Southwark, ex parte Bowles**

HOUSE OF LORDS

LORD GOFF OF CHIEVELEY, LORD SLYNN OF HADLEY, LORD STEYN, LORD CLYDE AND LORD HUTTON

**b** 9 FEBRUARY, 2 APRIL 1998

*Criminal evidence – Order for production of material – Power to make order – Statutory power to order production of material for purposes of investigation into whether person has benefited from criminal conduct – Whether statutory power exercisable where dominant purpose of application was to carry out investigation into whether criminal offence had been committed – Criminal Justice Act 1988, s 93H.*

*Criminal evidence – Special procedure material – Access to special procedure material – Application for production of special procedure material – Test to be applied in determining application – Dominant purpose of application – Police and Criminal Evidence Act 1984, s 9(1) – Criminal Justice Act 1988, s 93H.*

**d** The applicant, who was an accountant, had since 1991 prepared the accounts of ABM Ltd, a company run by Mr and Mrs P. Following allegations of dishonesty against Mr and Mrs P, the police applied to a circuit judge in the Crown Court for, and were granted, an order under s 93H<sup>a</sup> of the Criminal Justice Act 1988 requiring the applicant to produce certain documents relating to her dealing with ABM Ltd and Mr and Mrs P; s 93H provided that such an application could be made 'for the purposes of an investigation into whether any person has benefited from any criminal conduct'. The applicant accepted that the police were entitled to the material which she held relating to the affairs of ABM Ltd, but maintained that that entitlement arose under s 9(1)<sup>b</sup> of the Police and Criminal Evidence Act 1984, and applied to the Divisional Court for judicial review to quash the production order. The court granted the application, holding that the words 'an investigation into whether any person has benefited from any criminal conduct' in s 93H were not synonymous with 'an investigation into whether any conduct from which a person has benefited was criminal', and that since it was less than clear that the predominant reason why the police sought the documents was with a view to obtaining restraint and confiscation orders rather than further investigating Mr and Mrs P's alleged criminality, the production order should be quashed. The Director of Public Prosecutions appealed to the House of Lords.

**h** **Held** – On its true construction, having regard to its statutory context and to the different wording of s 9(1) of and Sch 1<sup>c</sup> to the 1984 Act, s 93H of the 1988 Act was concerned solely with an investigation as to what had happened to the proceeds of criminal conduct for the purpose of obtaining information relevant to the making of a restraint or a confiscation order. If the true and dominant purpose of an application under s 93H was to carry out an investigation into whether a criminal offence had been committed and to obtain evidence to bring a prosecution, the application should be refused. However, if the true and dominant purpose of the application was to enable an investigation to be made

**a** Section 93H is set out at p 196 *b* to *j*, post

**b** Section 9(1) is set out at p 197 *a*, post

**c** Schedule 1, so far as material, is set out at p 197 *d* to *j*, post

into the proceeds of criminal conduct, it should be granted, even if an incidental consequence might be that the police would obtain evidence relating to the commission of an offence. It followed, in the instant case, that the Divisional Court had correctly construed s 93H and had applied the correct test. Accordingly, the appeal would be dismissed (see p 194 *j* to p 195 *b*, p 198 *g*, p 199 *b*, p 200 *g* to *j* and p 202 *a* to *c* *f* to *j*, post).

Decision of the Divisional Court of the Queen's Bench Division [1996] 4 All ER 961 affirmed.

### Notes

For special procedure generally, see 11(1) *Halsbury's Laws* (4th edn reissue) paras 673–678.

For investigations into the proceeds of criminal conduct, see 11(1) *Halsbury's Laws* (4th edn reissue) para 541C.

For the Police and Evidence Act 1984, s 9, Sch 1, see 12 *Halsbury's Statutes* (4th edn) (1997 reissue) 813, 882.

For the Criminal Justice Act 1988, s 93H, see *ibid* 1066.

### Cases referred to in opinions

*R v Crown Court at Lewes, ex p Hill* (1990) 93 Cr App R 60, DC.

*R v Maidstone Crown Court, ex p Waitt* [1988] Crim LR 384, DC.

### Appeal

The Director of Public Prosecutions appealed with leave of the Appeal Committee of the House of Lords given on 9 July 1997 from the decision of the Queen's Bench Divisional Court (Simon Brown LJ and Gage J) ([1996] 4 All ER 961, [1998] QB 243) delivered on 17 October 1996 granting the application of Mrs Karen Bowles, a certified accountant, for an order of certiorari to quash the decision of Judge Peter Jackson in the Crown Court at Southwark on 29 March 1996 whereby he granted an order under s 93H of the Criminal Justice Act 1988 for the production of records held by her relating to the business operations of her clients, who were facing charges of dishonesty connected with the running of their company, Associate Business Management Ltd. In refusing leave to appeal, the Divisional Court certified that a point of law of general public importance (see p 202 *e*, post) was involved in the decision. Mrs Bowles took no part in the hearing of the appeal. The facts are set out in the opinion of Lord Clyde.

Victor Temple QC and Andrew Mitchell (instructed by the Crown Prosecution Service, Headquarters) for the DPP.

Clare Montgomery QC and David Perry (instructed by the Treasury Solicitor) as amici curiae.

Their Lordships took time for consideration.

2 April 1998. The following opinions were delivered.

**LORD GOFF OF CHIEVELEY.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Hutton. For the reasons he gives I would dismiss this appeal.

**LORD SLYNN OF HADLEY.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Hutton. For the reasons he gives I would dismiss this appeal.

a LORD STEYN. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Hutton. For the reasons he gives I would dismiss this appeal.

b LORD CLYDE. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Hutton. For the reasons he gives I, too, would dismiss this appeal.

c LORD HUTTON. My Lords, this appeal concerns the relationship between s 93H of the Criminal Justice Act 1988 and s 9 of and Sch 1 to the Police and Criminal Evidence Act 1984 (PACE) and the purpose for which the police may obtain an order under the former section.

*The background*

d Mrs Karen Bowles is an accountant. Amongst her clients were a Mr and Mrs Peaty, who ran a company, Associate Business Management Ltd (ABM). Mr and Mrs Peaty faced charges of dishonesty connected with the running of ABM. The essence of these charges was that ABM purported to be a management consultancy business which recruited redundant executives on payment of a joining fee of £7,500 in return for an assurance by ABM of an income from existing clients of the company of between £25,000 and £40,000 pa, but the executives who joined this scheme received no income. It was further alleged that ABM had received a sum in excess of £750,000 from the joining fees and that the bulk of this sum had been used for the personal and private benefit of Mr and Mrs Peaty. Since 1991 ABM's accounts had been prepared by Mrs Bowles. It was alleged that these accounts failed to account properly for either the income or the expenditure of the company and that information supplied by the company to Mrs Bowles had been either bogus or misleading.

f The police applied to the circuit judge sitting at the Crown Court at Southwark for a production order against Mrs Bowles under s 93H of the 1988 Act, and on 29 March 1996 Judge Peter Jackson made a production order against Mrs Bowles requiring that she—

g 'should give a constable access to and supply such originals and copies as may be necessary of the material to which the said application relates, namely all files, documents and accounts and other records used in the ordinary course of business [howsoever recorded] paid cheques, inter account transfers, telegraphic transfers, and correspondence ... in relation to [her] dealings with [ABM] and any other material relating to [Mr or Mrs Peaty] ...'

h Mrs Bowles has at all times behaved with the utmost propriety. She was anxious to co-operate with the authorities but she was advised by her lawyers that, although the police were entitled to the material which she held relating to the affairs of ABM, that entitlement arose under s 9 of PACE and not under s 93H of the 1988 Act. Accordingly Mrs Bowles brought an application for judicial review to quash the production order, and on 17 October 1996 the Divisional Court ([1996] 4 All ER 961, [1998] QB 243) made an order setting aside the order of the circuit judge.

*The relevant statutory provisions*

j Part VI of the Criminal Justice Act 1988 contains provisions which empower the courts to confiscate from convicted persons in certain criminal cases the



proceeds of offences committed by them and to make restraint orders prohibiting persons from dealing with property which may be the subject of a confiscation order. a

Section 93H was inserted in Pt VI of the Criminal Justice Act 1988 by s 11 of the Proceeds of Crime Act 1995. The material parts of s 93H are:

‘(1) A constable may, for the purposes of an investigation into whether any person has benefited from any criminal conduct or into the extent or whereabouts of the proceeds of any criminal conduct, apply to a Circuit judge for an order under subsection (2) below in relation to particular material or material of a particular description. b

(2) If, on such an application, the judge is satisfied that the conditions in subsection (4) below are fulfilled, he may make an order that the person who appears to him to be in possession of the material to which the application relates shall—(a) produce it to a constable for him to take away, or (b) give a constable access to it, within such period as the order may specify. This subsection has effect subject to section 93J(11) below. c

(3) The period to be specified in an order under subsection (2) above shall be seven days unless it appears to the judge that a longer or shorter period would be appropriate in the particular circumstances of the application. d

(4) The conditions referred to in subsection (2) above are—(a) that there are reasonable grounds for suspecting that a specified person has benefited from any criminal conduct; (b) that there are reasonable grounds for suspecting that the material to which the application relates—(i) is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purposes of which the application is made; and (ii) does not consist of or include items subject to legal privilege or excluded material; and (c) that there are reasonable grounds for believing that it is in the public interest, having regard—(i) to the benefit likely to accrue to the investigation if the material is obtained, and (ii) to the circumstances under which the person in possession of the material holds it, that the material should be produced or that access to it should be given. e  
f

(5) Where the judge makes an order under subsection (2)(b) above in relation to material on any premises he may, on the application of a constable, order any person who appears to him to be entitled to grant entry to the premises to allow a constable to enter the premises to obtain access to the material. g

(6) An application under subsection (1) or (5) above may be made *ex parte* to a judge in chambers.

(7) Provision may be made by Crown Court Rules as to—(a) the discharge and variation of orders under this section; and (b) proceedings relating to such orders ... h

(12) In this section—(a) “excluded material”, “items subject to legal privilege” and “premises” have the same meanings as in the Police and Criminal Evidence Act 1984; and (b) references to a person benefiting from any criminal conduct, in relation to conduct which is not an offence to which this Part of this Act applies but would be if it had occurred in England and Wales, shall be construed in accordance with section 71(4) and (5) above as if it had so occurred.’ j

Section 9(1) of PACE provides:

a 'A constable may obtain access to excluded material or special procedure material for the purposes of a criminal investigation by making an application under Schedule 1 below and in accordance with that Schedule.'

Section 14 of PACE provides:

b '(1) In this Act "special procedure material" means—(a) material to which subsection (2) below applies ...

(2) Subject to the following provisions of this section, this subsection applies to material, other than items subject to legal privilege and excluded material, in the possession of a person who—(a) acquired or created it in the course of any trade, business, profession or other occupation or for the purpose of any paid or unpaid office; and (b) holds it subject—(i) to an express or implied undertaking to hold it in confidence ...'

The material parts of Sch 1 to PACE are:

d '1. If on an application made by a constable a circuit judge is satisfied that one or other of the sets of access conditions is fulfilled, he may make an order under paragraph 4 below.

e 2. The first set of access conditions is fulfilled if—(a) there are reasonable grounds for believing—(i) that a serious arrestable offence has been committed; (ii) that there is material which consists of special procedure material or includes special procedure material and does not also include excluded material on premises specified in the application; (iii) that the material is likely to be of substantial value (whether by itself or together with other material) to the investigation in connection with which the application is made; and (iv) that the material is likely to be relevant evidence; (b) other methods of obtaining the material—(i) have been tried without success; or (ii) have not been tried because it appeared that they were bound to fail; and (c) it is in the public interest, having regard—(i) to the benefit likely to accrue to the investigation if the material is obtained; and (ii) to the circumstances under which the person in possession of the material holds it, that the material should be produced or that access to it should be given.

g 3. The second set of access conditions is fulfilled if—(a) there are reasonable grounds for believing that there is material which consists of or includes excluded material or special procedure material on premises specified in the application; (b) but for section 9(2) above a search of the premises for that material could have been authorised by the issue of a warrant to a constable under an enactment other than this Schedule; and (c) the issue of such a warrant would have been appropriate.

h 4. An order under this paragraph is an order that the person who appears to the circuit judge to be in possession of the material to which the application relates shall—(a) produce it to a constable for him to take away; or (b) give a constable access to it, not later than the end of the period of seven days from the date of the order or the end of such longer period as the order may specify ...'

### *The judgment of the Divisional Court*

j Before the Divisional Court the submission advanced on behalf of Mrs Bowles was that s 93H was directed solely towards assisting in the recovery of the proceeds of criminal conduct and that it had no application to the investigation of

crime as such. The submission advanced on behalf of the Director of Public Prosecutions was that under s 93H a production order could be made not only for the purpose of an investigation into the extent or whereabouts of the proceeds of any criminal conduct but also for the purpose of an investigation into whether a crime involving financial gain had been committed by a particular person. The Divisional Court rejected the latter submission and in his judgment (with which Gage J agreed) Simon Brown LJ stated ([1996] 4 All ER 961 at 966, [1998] QB 243 at 250):

'In my judgment, therefore, it would be wrong to construe the words in s 93H(1): "an investigation into whether any person has benefited from any criminal conduct", for all the world as if they were synonymous with "an investigation into whether any conduct from which a person has benefited was criminal"—effectively the construction for which [counsel for the Director of Public Prosecutions] contends.'

Simon Brown LJ then held that it was less than clear that the predominant reason why the police sought the documents held by Mrs Bowles was with a view to their obtaining restraint orders and confiscation orders rather than further investigating Mr and Mrs Peaty's alleged criminality, and that accordingly the production order should be quashed.

It appears that after the hearing before the Divisional Court criminal proceedings against Mr and Mrs Peaty were discontinued. Consequently Mrs Bowles decided that she no longer wished to be represented in these proceedings but, on this appeal, in addition to hearing submissions from Mr Temple QC on behalf of the Director of Public Prosecutions, the House also had the advantage of hearing submissions from Miss Montgomery QC as *amicus curiae*.

#### *The construction of s 93H*

My Lords, viewed in isolation and apart from their context, the words in s 93H 'an investigation into whether any person has benefited from any criminal conduct' are capable of being read to mean 'whether any person has committed a crime which has benefited him', and this is the construction which Mr Temple submitted should be given to them. However, I consider that Simon Brown LJ was right to hold that, in the context of Pt VI of the Criminal Justice Act 1988 and of the Proceeds of Crime Act 1995, which inserted s 93H in Pt VI, s 93H is concerned with an investigation into the proceeds of crime to assist the authorities to obtain information which may enable an application to be brought for a restraint order or a confiscation order. Thus the heading of Pt VI of the 1988 Act is 'Confiscation of the proceeds of an offence' and the long title of the Proceeds of Crime Act 1995 is:

'An Act to make further provision for and in relation to the recovery of the proceeds of criminal conduct; to make further provision for facilitating the enforcement of overseas forfeiture and restraint orders; and for connected purposes.'

The heading of s 93H itself is 'Investigations into the proceeds of criminal conduct'. It is also relevant to observe that the words in s 93H 'whether any person has benefited from any criminal conduct' echo the words in sub-s (1A) of s 71 of the 1988 Act (which was substituted by s 1(2) of the Proceeds of Crime Act 1995), which provide that before a confiscation order can be made against an



a offender: 'The court shall first determine whether the offender has benefited from any relevant criminal conduct.'

b I consider that the contrast between the wording of s 9(1) of and Sch 1 to PACE and the wording of s 93H gives further support to the view that s 93H does not relate to the investigation of a crime for the purpose of obtaining evidence to prosecute an offender, but relates to an investigation as to what has happened to the proceeds of criminal conduct for the purpose of obtaining information relevant to the making of a restraint order or a confiscation order. Section 9(1) refers to obtaining access to material 'for the purposes of a criminal investigation' and Sch 1, para 2(a)(iv) refers to reasonable grounds for believing that 'the material is likely to be relevant evidence', whereas the wording of s 93H does not refer to a 'criminal investigation' or to 'relevant evidence', and sub-ss (2) and c (4)(a) of s 93H require the judge to be satisfied that 'there are reasonable grounds for suspecting that a specified person has benefited from any criminal conduct'.

d I further consider that the Proceeds of Crime Act 1995 itself recognises the distinction between a criminal investigation into the commission of an offence and an investigation into the proceeds of criminal conduct. Sections 21 and 22 of PACE contain provisions relating to access to, and copying of, seized material by a third party, and to retention of seized property by a constable. Section 15(2) of the 1995 Act provides:

e 'For the purposes of sections 21 and 22 of the Police and Criminal Evidence Act 1984 (access to, and copying and retention of, seized material) an investigation into whether any person has benefited from any criminal conduct or into the extent or whereabouts of the proceeds of any criminal conduct shall be treated (so far as that would not otherwise be the case) as if it were an investigation of, or in connection with, an offence.'

f Therefore, although the words in brackets 'so far as that would not otherwise be the case' acknowledge that there may be a degree of overlapping, s 15(2) implicitly recognises that an investigation under s 93H differs from an investigation of, or in connection with, an offence.

g If the argument on behalf of the Director of Public Prosecutions were correct and s 93H should be given the wide construction for which Mr Temple contends, the effect would be that where the police wished to obtain access to material to investigate a criminal offence involving the obtaining of money or other property, they would have to make an application under s 93H and not under s 9(1) of PACE, because by virtue of para 2(b) of Sch 1 to PACE an application under s 9(1) cannot be granted if there are other methods available for obtaining the material. In *R v Crown Court at Lewes, ex p Hill* (1990) 93 Cr App R 60 at 65–66 h Bingham LJ referred to the careful balance in PACE between two public interests and the detailed and complex provisions of the Act designed to maintain that balance. He said:

j 'The Police and Criminal Evidence Act governs a field in which there are two very obvious public interests. There is, first of all, a public interest in the effective investigation and prosecution of crime. Secondly, there is a public interest in protecting the personal and property rights of citizens against infringement and invasion. There is an obvious tension between these two public interests because crime could be most effectively investigated and prosecuted if the personal and property rights of citizens could be freely overridden and total protection of the personal and property rights of

citizens would make investigation and prosecution of many crimes impossible or virtually so. The 1984 Act seeks to effect a carefully judged balance between these interests and that is why it is a detailed and complex Act. If the scheme intended by Parliament is to be implemented, it is important that the provisions laid down in the Act should be fully and fairly enforced. It would be quite wrong to approach the Act with any preconception as to how these provisions should be operated save in so far as such preconception is derived from the legislation itself. It is, in my judgment, clear that the courts must try to avoid any interpretation which would distort the parliamentary scheme and so upset the intended balance. In the present field, the primary duty to give effect to the parliamentary scheme rests on circuit judges. It seems plain that they are required to exercise those powers with great care and caution. I would refer to the observation of Lloyd L.J. in *Maidstone Crown Court, ex p. Waitt* ([1988] Crim LR 384) where he said: "The special procedure under section 9 and Schedule 1 is a serious inroad upon the liberty of the subject. The responsibility for ensuring that the procedure is not abused lies with circuit judges. It is of cardinal importance that circuit judges should be scrupulous in discharging that responsibility."

As Simon Brown LJ observed in his judgment in the Divisional Court ([1996] 4 All ER 961 at 964-965, [1998] QB 243 at 248), the safeguards protecting the rights of citizens are less stringent in s 93H than in s 9 of and Sch 1 to PACE: (i) applications under s 93H can be made *ex parte*; para 7 of Sch 1 requires that applications under s 9 must be made *inter partes*; (ii) s 9 applications must relate to a 'serious arrestable offence', no such requirement arises under s 93H; (iii) a s 9 order can only be made where there are 'reasonable grounds for believing' (para 2(a)(i) of Sch 1) that an offence has been committed; s 93H involves a lower threshold test, which is that there are 'reasonable grounds for suspecting' that a person has benefited from criminal conduct; (iv) applications under s 9 are limited by the requirement in para 2(b) of Sch 1 that other methods of obtaining the material have failed or have not been tried because they were bound to fail, but such a restriction does not apply to s 93H.

In my opinion it was not the intention of Parliament in enacting s 93H to take away, in respect of the investigation of criminal offences involving the obtaining of money or other property, the safeguards to the citizen given in the detailed provisions of Sch 1 to PACE. Accordingly I would reject the broader interpretation which Mr Temple submits should be given to s 93H.

Sections 29, 30 and 31 of the Criminal Justice Act 1993 inserted ss 93A, 93B and 93C in the Criminal Justice Act 1988 which create offences in respect of money laundering. Section 93A relates to assisting another to retain the benefit of criminal conduct; s 93B relates to the acquisition, possession or use of property representing proceeds of criminal conduct; and s 93C relates to concealing or transferring proceeds of criminal conduct. At first sight the words of s 93H might be read to authorise an investigation into whether some of the elements of an offence under s 93A or 93B or 93C existed in order to obtain evidence for a prosecution. But whilst an investigation can be ordered under s 93H into benefit from criminal conduct or into the extent or whereabouts of the proceeds of such conduct, I am of the opinion, for the reasons which I have stated, that an investigation cannot be ordered under s 93H for the purpose of investigating whether a crime has been committed under any of these three sections.

*Determining the purpose for which an application is made*

a A further point was considered by the Divisional Court, which was stated by Simon Brown LJ ([1996] 4 All ER 961 at 967, [1998] QB 243 at 250–251) in this way:

b 'What then is the touchstone by which to decide whether a s 93H application should be made by the prosecuting authority and, other conditions being satisfied, granted by the court? I can find no better way of expressing it than to say that the question to be asked is this: what is the dominant purpose of the application: is it for criminal investigation purposes, to determine whether an offence has been committed and, if so, to provide evidence of that offence, or is it to determine, in respect of criminal offending—although not necessarily a specific offence which the prosecution already has reasonable grounds for believing (rather than merely suspecting) has been committed—whether (and, if so, to what extent) someone has benefited from it, or the whereabouts of the proceeds.'

c Mr Temple submitted that, if the only purpose for which an order could be made under s 93H was for an investigation into the proceeds of criminal conduct, there was nevertheless no need to introduce the test of dominant purpose into the matters to be considered by a circuit judge in determining whether to make an order, and that the only matters as to which the judge need be satisfied (in addition to the matters set out in s 93H(4)) were that the police officer applying for the order had the genuine purpose of investigating the proceeds of criminal conduct and that the application for the order was not a mere device in order to investigate the commission of an offence and to obtain evidence to support a prosecution. Mr Temple submitted that if the judge were satisfied on these matters, the order should not be refused, even if the granting of it would also enable the police to investigate the commission of a crime.

d My Lords, I would make two observations in respect of these submissions. The first is that if the true construction of s 93H be the one which I have suggested, then I consider that in the great majority of cases the circuit judge will not be faced with a situation where it appears that the police are actuated both by the purpose of investigating the proceeds of criminal conduct and by the purpose of investigating the commission of an offence, and that the judge will only have to consider whether he is satisfied (in addition to the matter specified in s 93H(4)) that the purpose of the application is to investigate the proceeds of criminal conduct. Secondly, in my opinion the nature of the dominant purpose test is well stated in *Wade and Forsyth on Administrative Law* (7th edn, 1994) p 436:

e 'Sometimes an act may serve two or more purposes, some authorised and some not, and it may be a question whether the public authority may kill two birds with one stone. The general rule is that its action will be lawful provided that the permitted purpose is the true and dominant purpose behind the act, even though some secondary or incidental advantage may be gained for some purpose which is outside the authority's powers. There is a clear distinction between this situation and its opposite, where the permitted purpose is a mere pretext and a dominant purpose is ultra vires.'

f In those cases where consideration may have to be given to the distinction between the two purposes, or where it may appear that the two purposes may co-exist (an example being where the police wish to investigate a case of living on the earnings of a prostitute), I think that there will be little practical difference between applying the test adopted by Simon Brown LJ and applying the test



propounded by Mr Temple, but if a difference were to result, I consider it to be clear that the dominant purpose test is the appropriate one to apply. a

Accordingly, I consider that if the true and dominant purpose of an application under s 93H is to enable an investigation to be made into the proceeds of criminal conduct, the application should be granted even if an incidental consequence may be that the police will obtain evidence relating to the commission of an offence. But if the true and dominant purpose of the application is to carry out an investigation whether a criminal offence has been committed and to obtain evidence to bring a prosecution, the application should be refused. b

I further consider that if the police discover evidence of the commission of an offence in the course of an investigation consequent upon an order properly made under s 93H, the fact that the evidence was discovered in this way would not be a reason for the exclusion of the evidence under s 78 of PACE on the ground of unfairness at a trial where the prosecution sought to adduce such evidence. c

#### *The certified point of law*

The point of law of general public importance certified by the Divisional Court is as follows: d

‘Should there be imported into section 93H of the Criminal Justice Act 1988 a requirement for the applicant for a production order to show that the dominant purpose of the application is the investigation of benefit from criminal conduct and/or the extent and whereabouts of such benefit?’ e

In my opinion it is not appropriate to answer this question as it is formulated, because it fails to distinguish between the two separate points which arise for consideration on this appeal. The first point is whether an order should be made under s 93H if the purpose of the police in applying for the order is not to carry out an investigation into whether someone has benefited from criminal conduct or into the extent or whereabouts of the proceeds of criminal conduct, but to carry out an investigation into whether someone has committed an offence and to obtain evidence to bring a prosecution. For the reasons which I have stated, I would hold that an order should not be made for the latter purpose. The second point is how should a circuit judge decide for what purpose the application is brought if that issue arises before him. In my opinion, as I have stated, the answer is that a circuit judge should decide by applying the dominant purpose test as it is described by the authors of *Wade and Forsyth on Administrative Law*. But when a circuit judge applies that test he will do so, not because a requirement for the dominant purpose test has to be imported or read into the words of s 93H, but because it is the test which the law applies where an issue arises as to the purpose or purposes for which a statutory power is exercised or sought to be exercised. f  
g  
h

For the reasons I have given I would dismiss this appeal.

*Appeal dismissed.*

L I Zysman Esq   Barrister. j

# Boddington v British Transport Police

HOUSE OF LORDS

LORD IRVINE OF LAIRG LC, LORD BROWNE-WILKINSON, LORD SLYNN OF HADLEY, LORD STEYN AND LORD HOFFMANN

10, 11 NOVEMBER 1997, 15 JANUARY, 2 APRIL 1998

*Byelaw – Validity – Challenge to validity – Offence of smoking within a railway carriage in breach of byelaw – Whether appropriate to challenge byelaws in criminal proceedings – Whether distinction to be drawn between substantive and procedural invalidity of byelaw – Whether appropriate to raise legality of byelaw as a defence in criminal proceedings – British Railways Board’s Byelaws 1965 – Transport Act 1962, s 67(1).*

On 28 July 1995 B was convicted by a stipendiary magistrate of the offence of smoking a cigarette in a railway carriage where smoking was prohibited, contrary to byelaw 20<sup>a</sup> of the British Railways Board’s Byelaws 1965. The byelaw was made under s 67(1)<sup>b</sup> of the Transport Act 1962 as amended, which conferred a power to make byelaws to regulate ‘the use and working of, and travel on, [the] railways’ and referred to the making of byelaws on particular matters, including ‘(c) with respect to the smoking of tobacco in railway carriages and elsewhere and the prevention of nuisances’. The magistrate fined B £10. B appealed by way of case stated to the Divisional Court, which dismissed his appeal. Thereafter B appealed to the House of Lords against his conviction. The issues arose: whether a defendant could raise as a defence to a criminal charge a contention that a byelaw, or an administrative decision made pursuant to powers conferred by it, was ultra vires; and if he could, whether he could succeed only if he could show the byelaw or administrative decision to be unlawful.

**Held** – (1) A defendant in criminal proceedings was entitled to challenge the lawfulness of subordinate legislation, or an administrative decision made thereunder, where his prosecution was premised on its validity, unless there was a clear parliamentary intention to the contrary. Moreover, for the purposes of such a challenge, there was no distinction to be drawn between substantive and procedural invalidity and consequently no ground for holding that a magistrates’ court had jurisdiction to rule on the patent or substantive invalidity of subordinate legislation or an administrative act under it, but had no jurisdiction to rule on its latent or procedural invalidity, unless a statutory provision had that effect (see p 212 f to j, p 213 g h, p 214 d to p 215 c, p 217 g, p 218 g, p 219 a b e, p 224 d, p 226 j to p 227 a e, p 228 j and p 229 j, post); *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208 followed; *Bugg v DPP* [1993] 2 All ER 815 overruled.

(2) There was nothing in the language of s 67 of the 1962 Act or in the byelaws to indicate that Parliament had intended to deprive the smoker of an opportunity to defend himself in criminal proceedings by asserting the alleged unlawfulness of the decision to post no smoking notices throughout the train. Accordingly, B was entitled to raise the legality of that decision as a possible defence to the charge against him. However, a ban on smoking in all railway carriages was one way in

<sup>a</sup> Byelaw 20 is set out at p 207 b c, post

<sup>b</sup> Section 67(1) is set out at p 206 j to p 207 b, post

which a railway company might decide to regulate the use of its railways so far as concerned smoking on carriages; that was what the railway company did in the instant case, in bringing byelaw 20 into operation, and there was nothing unlawful in so doing. It followed that B's appeal would be dismissed (see p 216 h to p 217 b, p 218 d to g, p 220 b and p 229 b to d h j, post).

### Notes

For validity of byelaws generally, see 9 *Halsbury's Laws* (4th edn) paras 1283–1288, and for cases on the subject, see 13 *Digest* (Reissue) 453–458, 2979–3019.

For byelaws regulating the railways, see 38 *Halsbury's Laws* (4th edn) paras 710–715.

For the Transport Act 1962, s 67, see 36 *Halsbury's Statutes* (4th edn) (1994 reissue) 254.

### Cases referred to in opinions

*Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208, [1969] 2 AC 147, [1969] 2 WLR 163, HL.

*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223, CA.

*Bugg v DPP* [1993] 2 All ER 815, [1993] QB 473, [1993] 2 WLR 628, DC.

*Calvin v Carr* [1979] 2 All ER 440, [1980] AC 574, [1979] 2 WLR 755, PC.

*Chief Adjudication Officer v Foster* [1993] 1 All ER 705, [1993] AC 754, [1993] 2 WLR 292, HL.

*City of Toronto Municipal Corp v Virgo* [1896] AC 88, PC.

*Coombs (T C) & Co (a firm) v IRC* [1991] 3 All ER 623, sub nom *R v IRC, ex p T C Coombs & Co* [1991] 2 AC 283, [1991] 2 WLR 682, HL.

*Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935, [1985] AC 374, [1984] 3 WLR 1174, HL.

*DPP v Head* [1958] 1 All ER 679, [1959] AC 83, [1958] 2 WLR 617, HL.

*DPP v Hutchinson* [1990] 2 All ER 836, [1990] 2 AC 783, [1990] 3 WLR 196, HL.

*Eshugbayi Eleko v Officer Administering the Government of Nigeria* [1931] AC 662, PC.

*Hoffmann-La Roche (F) & Co AG v Secretary of State for Trade and Industry* [1974] 2 All ER 1128, [1975] AC 295, [1974] 3 WLR 104, HL.

*Kirklees Metropolitan BC v Wickes Building Supplies Ltd* [1992] 3 All ER 717, [1993] AC 227, [1992] 3 WLR 170, HL.

*Kruse v Johnson* [1898] 2 QB 91, [1895–9] All ER Rep 105, DC.

*London and Clydeside Estates Ltd v Aberdeen DC* [1979] 3 All ER 876, [1980] 1 WLR 182, HL.

*Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 All ER 575, [1996] 1 WLR 48, HL.

*O'Reilly v Mackman* [1982] 3 All ER 1124, [1983] 2 AC 237, [1982] 3 WLR 1096, HL.

*Page v Hull University Visitor* [1993] 1 All ER 97, sub nom *R v Hull University Visitor, ex p Page* [1993] AC 682, [1992] 3 WLR 1112, HL.

*Percy v Hall* [1996] 4 All ER 523, [1997] QB 924, [1997] 3 WLR 573, CA.

*Plymouth City Council v Quietlynn Ltd* [1987] 2 All ER 1040, sub nom *Quietlynn Ltd v Plymouth City Council* [1988] QB 114, [1987] 3 WLR 189, DC.

*Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1959] 3 All ER 1, [1960] AC 260, [1959] 3 WLR 346, HL.

*R v Chief Constable of the Thames Valley Police, ex p Cotton* [1990] IRLR 344, CA.

*R v Crown Court at Reading, ex p Hutchinson, R v Devizes Justices, ex p Lee* [1988] 1 All ER 333, [1988] QB 384, [1987] 3 WLR 1602, DC.

*R v Wicks* [1997] 2 All ER 801, [1998] AC 92, [1997] 2 WLR 876, HL.



*Ridge v Baldwin* [1963] 2 All ER 66, [1964] AC 40, [1963] 2 WLR 935, HL.

a *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 All ER 705, [1992] 1 AC 624, [1992] 2 WLR 239, HL.

*Smith v East Elloe RDC* [1956] 1 All ER 855, [1956] AC 736, [1956] 2 WLR 888, HL.

*Tarr v Tarr* [1972] 2 All ER 295, [1973] AC 254, [1972] 2 WLR 1068, HL.

*Wandsworth London BC v Winder* [1984] 3 All ER 976, [1985] AC 461, [1984] 3 WLR

b 1254, HL; *affg* [1984] 3 All ER 83, [1985] AC 461, [1984] 3 WLR 563, CA.

### Appeal

The defendant, Peter James Boddington, appealed with leave of the Appeal Committee of the House of Lords given on 19 May 1997 against the decision of the Queen's Bench Divisional Court (Auld LJ and Ebsworth J) ([1996] Times, 23

c July) made on 5 July 1996 dismissing his appeal by way of case stated against his conviction by a stipendiary magistrate sitting at Brighton on 28 July 1995 of

smoking a cigarette in a railway carriage where smoking was prohibited, contrary to byelaw 20 of the British Railways Board's Byelaws 1965 made under s 67 of the Transport Act 1962. The Divisional Court had refused leave to appeal but had

d certified that the decision to dismiss the appeal involved the following points of law of general public importance, namely: (1) may a defendant raise as a defence

to a criminal charge a contention that a byelaw, or an administrative decision made pursuant to powers conferred by it, is *ultra vires*; (2) if so, (i) does the

e answer to the question depend on whether the byelaw or administrative decision is bad on its fact; and (ii) may the criminal court consider whether the byelaw or administrative decision is reasonable, and if, so by reference to what

criteria, those stated in *Kruse v Johnson*, or those stated in *Wednesbury*, or some other criteria? The facts are set out in the judgment of Lord Irvine of Lairg LC.

*Francis Jones* (instructed by *Kaori & Co*) for the appellant.

*Anthony Scrivener QC* and *Nicholas Ainsley* (instructed by the *Crown Prosecution*

f *Service Headquarters*) for the respondents.

*Jonathan Caplan QC* and *Ian Burnett* (instructed by the *Treasury Solicitor*) as *amici curiae*.

Their Lordships took time for consideration.

g 2 April 1998. The following opinions were delivered.

**LORD IRVINE OF LAIRG LC.** My Lords, on 28 July 1995 Peter James Boddington was convicted by the stipendiary magistrate for East Sussex of the offence of smoking a cigarette in a railway carriage where smoking was prohibited, contrary to byelaw 20 of the British Railways Board's Byelaws 1965.

h The byelaw was made under s 67 of the Transport Act 1962, as amended. The magistrate fined Mr Boddington £10 and ordered him to pay costs. He appealed by way of case stated to the Divisional Court, which dismissed his appeal.

However, the Divisional Court certified two points of law of general public importance arising in the case but refused leave to Mr Boddington to appeal to

j this House against his conviction.

The points of law of general public importance certified by the Divisional Court were essentially whether a defendant could raise as a defence to a criminal charge a contention that a byelaw, or an administrative decision made pursuant to powers conferred by it, is *ultra vires*; and if he could, whether he could succeed only if he could show the byelaw or administrative decision to be 'bad on its face'.

The stipendiary magistrate found the following facts:

(a) On 5 November 1994 at 2020 hours the appellant was a passenger on a train between Falmer and Brighton. a

(b) The appellant was smoking during the course of the journey in a part of the train where a conspicuous notice was visible prohibiting smoking.

(c) The appellant was in an area of the train which was designated non smoking and had visible signs in the form of window stickers indicating a penalty of £50 for smoking in that area of the train. b

(d) The appellant was approached by a uniformed revenue protection officer and asked to put out his cigarette, which he did not do. Initially he made no response to the officer until the officer cautioned him that in the event of continuing smoking he would report him for an offence contrary to the byelaw. The appellant invited the officer to do as he liked. The appellant declined a request to give the officer his name and address and was advised that the police would be called. c

(e) Upon arrival at Brighton, a uniformed police officer, P.C. Ansell, was advised of the position in the presence and hearing of the appellant and the appellant provided his name and address.

(f) Network South Central is a wholly owned subsidiary company of the British Railways Board whose duty is to provide railway services to the South Coast. There has been a great reduction in the amount of smoking on trains and since 1 January 1993 a complete smoking ban was applied by Network South Central to all their trains. Although this complete prohibition applies to other subsidiaries of the British Railways Board such as Thameslink, it does not apply to Inter City trains making the journey between London and Brighton. d

(g) Network South Central instituted the ban for purely commercial reasons. e

(h) The decision to implement the total prohibition was made after research was undertaken and notice was given to the travelling public via customer announcements and stickers on train windows. f

(i) Despite the total prohibition, smoking on the trains continued primarily but not exclusively in the buffet and the appellant was aware of the total ban from about early 1993. He continued to smoke on the trains until that date. There was little sign of the prohibition being actively pursued beyond the use of the stickers. g

(j) There was no consultation with the Rail Users Consultative Committee in relation to the prohibition, there being no legal requirement for such consultation. h

Mr Boddington's appeal raises this important question: to what extent may a defendant to a criminal charge laid under subordinate legislation argue by way of defence that the subordinate legislation, or an administrative act bringing that legislation into operation (such as, in this case, the posting of no smoking notices throughout all railway carriages), was itself ultra vires and unlawful? i

#### *The statutory framework*

Section 67(1) of the Transport Act 1962 provides:

'The Railways Board may make bylaws regulating the use and working of, and travel on, their railways, the maintenance of order on their railways and railway premises, including stations and the approaches to stations, and the conduct of all persons, including their officers and servants, while on those premises, and in particular bylaws—(a) with respect to tickets issued for

a entry on their railway premises or travel on their railways and the evasion of payment of fares and other charges, (b) with respect to interference or obstruction of the working of the railways, (c) with respect to the smoking of tobacco in railway carriages and elsewhere and the prevention of nuisances, (d) with respect to the receipt and delivery of goods, and (e) for regulating the passage of bicycles and other vehicles on footways and other premises controlled by the Board and intended for the use of those on foot.'

Byelaw 20 of the British Railways Board's Byelaws was made under that provision, and provides:

c 'No person shall smoke or carry a lighted pipe, cigar or cigarette in any lift or vehicle or elsewhere upon the railway, where smoking is expressly prohibited by the Board by a notice exhibited in a conspicuous position in such lift or vehicle or upon or near such other part of the railway or if requested by an authorised person not to do so in or upon any part of the railway where smoking or carrying a lighted pipe, cigar or cigarette may be dangerous.'

d Thus, the byelaw does not by itself prohibit any activity: a further, administrative act is required (in the form of the posting of a notice or the making of a request) before a person becomes at risk of committing an offence. It is not suggested that byelaw 20 was itself ultra vires the powers which the primary legislation conferred upon the British Railways Board. Objection is, however, made to the administrative decision by which no smoking notices came to be displayed on the trains.

#### *Mr Boddington's defence*

f Mr Boddington attempted to put forward as a defence an argument that the decision of the rail company, Network South Central, to post notices in all of the carriages of its trains prohibiting smoking and so to activate the operation of byelaw 20, was ultra vires its powers to bring byelaw 20 into operation. He argued before the magistrate and before the Divisional Court that the power conferred by s 67(1) of the Transport Act 1962 was only a power to regulate the use of the railway, in respect of smoking on carriages; and that complete prohibition of smoking on all carriages by the posting of no smoking notices in all carriages went beyond permissible regulation. He argued that the unlawfulness of the decision to post these notices had the effect of nullifying their validity, so that byelaw 20 was not properly brought into operation. This, he said, gave him a defence to the offence with which he was charged.

h He also sought to raise a related, but distinct, defence: that the notices were posted by Network South Central rather than the British Railways Board as such. He argued that neither the primary legislation nor byelaw 20 authorised Network South Central to post the notices, and that the British Railways Board could not delegate the decision to post notices. Mr Boddington did not pursue this argument before your Lordships.

j Mr Boddington's primary defence, therefore, raises the question of the extent to which a defendant to a criminal charge may defend himself by pointing to the unlawfulness of subordinate legislation, or an administrative act made under that legislation, the breach of which is alleged to constitute his offence. The Divisional Court held that Mr Boddington was not entitled to put forward his public law defence in the criminal proceedings against him.



*Raising public law defences to criminal charges*

These arguments are regularly raised in the courts in cases in the public law field concerned with applications for judicial review. The issue is whether the same arguments may be deployed in a criminal court as a defence to a criminal charge.

Challenge to the lawfulness of subordinate legislation or administrative decisions and acts may take many forms, compendiously grouped by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935, [1985] AC 374 under the headings of illegality, procedural impropriety and irrationality. Categorisation of types of challenge assists in an orderly exposition of the principles underlying our developing public law. But these are not watertight compartments because the various grounds for judicial review run together. The exercise of a power for an improper purpose may involve taking irrelevant considerations into account, or ignoring relevant considerations; and either may lead to an irrational result. The failure to grant a person affected by a decision a hearing, in breach of principles of procedural fairness, may result in a failure to take into account relevant considerations.

The question of the extent to which public law defences may be deployed in criminal proceedings requires consideration of fundamental principle concerning the promotion of the rule of law and fairness to defendants to criminal charges in having a reasonable opportunity to defend themselves. However, sometimes the public interest in orderly administration means that the scope for challenging unlawful conduct by public bodies may have to be circumscribed.

Where there is a tension between these competing interests and principles, the balance between them is ordinarily to be struck by Parliament. Thus whether a public law defence may be mounted to a criminal charge requires scrutiny of the particular statutory context in which the criminal offence is defined and of any other relevant statutory provisions. That approach is supported by authority of this House.

In *DPP v Head* [1958] 1 All ER 679, [1959] AC 83 a defendant was convicted of an offence under s 56(1)(a) of the Mental Deficiency Act 1913, of carnal knowledge of 'a woman ... under care or treatment in an institution or certified house or approved home, or whilst placed out on licence therefrom'. She had been sent to an institution for defectives as a 'moral defective', under an order made by the Secretary of State in purported exercise of his powers under the Act and subsequent orders had been made to transfer her to other institutions. At the time of the alleged offences, she was out on licence from one of these institutions. At the trial, the prosecution conceded that the original order had been made without proper evidence that the woman was a 'moral defective' and that it could be successfully challenged on an application for certiorari or a writ of habeas corpus. The Court of Criminal Appeal quashed the conviction, on the ground that the woman was not lawfully detained in the institution. This House, by a majority, upheld that decision.

The majority and Viscount Simonds treated the issue as turning on the proper construction of s 56 of the 1913 Act. As a matter of construction did it require the prosecution to prove that the woman was lawfully detained in the institution? The majority (Lord Reid, Lord Tucker and Lord Somervell of Harrow) held that, whilst proof of detention in an institution established a prima facie case that a woman was a defective lawfully under care, that presumption could be rebutted if the defendant showed that the detention was in fact unlawful (see [1958] 1 All ER 679 esp at 686, [1959] AC 83 esp at 103 per Lord Tucker). The defendant in

a the case was assisted by the fact that the prosecution had itself adduced the evidence from which the invalidity of the order appeared. But the language of Lord Tucker, delivering the leading speech for the majority, is consistent with an entitlement in the defendant to adduce such evidence himself. If the defendant had adduced other evidence, for instance to show that the Secretary of State had made his order for some improper purpose, so that it could be quashed, I think  
b the majority's view would have entailed the criminal court reviewing this evidence to determine whether the defendant had made out a defence on the basis of it.

Lord Denning, who was in the minority, was of the view that the order was valid as at the date of the alleged offence, so that the alleged offence was made out (see [1958] 1 All ER 679 at 693, [1959] AC 83 at 113), even although the order  
c was voidable and therefore liable to be quashed on certiorari. The majority, however, did not accept that the order was voidable rather than void, but in any event doubted that, even if it was to be characterised as voidable rather than void, a defendant could not raise the matter by way of defence. As Lord Somervell of Harrow put it ([1958] 1 All ER 679 at 687, [1959] AC 83 at 104):

d 'Is a man to be sent to prison on the basis that an order is a good order when the court knows it would be set aside if proper proceedings were taken? I doubt it.'

Viscount Simonds, Lord Reid and Lord Tucker agreed with these views (see  
e [1958] 1 All ER 679 at 682, 683 and 686–687, [1959] AC 83 at 98 and 103–104). In my judgment the answer to Lord Somervell's question must be No. It would be a fundamental departure from the rule of law if an individual were liable to conviction for contravention of some rule which is itself liable to be set aside by a court as unlawful. Suppose an individual is charged before one court with  
f breach of a byelaw and the next day another court quashes that byelaw—for example because it was promulgated by a public body which did not take account of a relevant consideration. Any system of law under which the individual was convicted and made subject to a criminal penalty for breach of an unlawful byelaw would be inconsistent with the rule of law.

In my judgment the views of the majority in *DPP v Head* have acquired still  
g greater force in the light of the development of the basic principles of public law since that case was decided. Lord Denning had dissented on the basis of the historic distinction between acts which were ultra vires ('outside the jurisdiction of the Secretary of State'), which he accepted were nullities and void, and errors of law on the face of the relevant record, which rendered the relevant instrument  
h voidable rather than void. He felt able to assign the order in question to the latter category. But in 1969, the decision of your Lordships House in *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208, [1969] 2 AC 147 made obsolete the historic distinction between errors of law on the face of the record and other errors of law. It did so by extending the doctrine of ultra vires, so that any misdirection in law would render the relevant decision ultra vires and a  
j nullity: see *Page v Hull University Visitor* [1993] 1 All ER 97 at 107–108, [1993] AC 682 at 701–702 per Lord Browne-Wilkinson (with whom Lord Keith of Kinkel and Lord Griffiths agreed (see [1993] 1 All ER 97 at 99, [1993] AC 682 at 692), citing the speech of Lord Diplock in *O'Reilly v Mackman* [1982] 3 All ER 1124 at 1129, [1983] 2 AC 237 at 278. Thus, today, the old distinction between void and voidable acts on which Lord Denning relied in *DPP v Head* no longer applies. This much is clear from the *Anisminic* case and these later authorities.

What was in issue in the *Anisminic* case was a decision of the Foreign Compensation Commission. The plaintiffs brought an action for a declaration that the decision was a nullity. The commission replied that the courts were precluded from considering the question by s 4(4) of the Foreign Compensation Act 1950. It provided: 'The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law.' Lord Reid summarised the case for the commission in this way ([1969] 1 All ER 208 at 212, [1969] 2 AC 147 at 169):

'The commission maintain that these are plain words only capable of having one meaning. Here is a determination which is apparently valid; there is nothing on the face of the document to cast any doubt on its validity. If it is a nullity, that could only be established by raising some kind of proceedings in court. But that would be calling the determination in question, and that is expressly prohibited by the statute.'

This submission was rejected in Lord Reid's speech. He made it clear that all forms of public law challenge to a decision have the same effect, to render it a nullity (see [1969] 1 All ER 208 esp at 213–214, [1969] 2 AC 147 esp at 171; see also [1969] 1 All ER 208 at 233–234 and 243, [1969] 2 AC 147 at 195–196 and 207 per Lord Pearce and Lord Wilberforce). The decision of the commission was wrong in law, and therefore a nullity, rather than a 'determination' within the protection of the ouster clause (see [1969] 1 All ER 208 at 213, [1969] 2 AC 147 at 170–171).

Thus the reservation of Lord Somervell in *DPP v Head* [1958] 1 All ER 679 at 687, [1959] AC 83 at 104 (with which the majority allied themselves) whether the order of the Secretary of State could be described as voidable has been vindicated by subsequent developments. It is clear, in the light of the *Anisminic* case and the later authorities, that the Secretary of State's order in *DPP v Head* would now certainly be regarded as a nullity (ie as void ab initio), even if it were to be analysed as an error of law on the face of the record. Equally, the order would be regarded as void ab initio if it had been made in bad faith, or as a result of the Secretary of State taking into account an irrelevant, or ignoring a relevant, consideration—that is matters not appearing on the face of the record, but having to be established by evidence.

Subordinate legislation, or an administrative act, is sometimes said to be presumed lawful until it has been pronounced to be unlawful. This does not, however, entail that such legislation or act is valid until quashed prospectively. That would be a conclusion inconsistent with the authorities to which I have referred. In my judgment, the true effect of the presumption is that the legislation or act which is impugned is presumed to be good until pronounced to be unlawful, but is then recognised as never having had any legal effect at all. The burden in such a case is on the defendant to establish on a balance of probabilities that the subordinate legislation or the administrative act is invalid: see also *T C Coombs & Co (a firm) v IRC* [1991] 3 All ER 623, [1991] 2 AC 283.

This is the principle to which Lord Diplock referred in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1974] 2 All ER 1128, [1975] AC 295. There the Secretary of State sought an interlocutory injunction under s 11(2) of the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948, to restrain the appellant from charging prices in excess of those fixed by a statutory instrument the Secretary of State had made. The appellant argued that the statutory instrument was ultra vires, because it had been based upon a report by the Monopolies Commission, which the appellant maintained had been



a produced without due regard to principles of natural justice. The Secretary of State objected to giving a cross undertaking in damages and this House ruled that he was not required to give such an undertaking. The ratio of the decision, as subsequently explained in *Kirklees Metropolitan BC v Wickes Building Supplies Ltd* [1992] 3 All ER 717 at 725–727, 728, [1993] AC 227 at 271–273, 274 per Lord Goff of Chieveley, was that a public authority is not required as a rule to give such an undertaking in a law enforcement action. However, in his speech, Lord Diplock expressed views about the legal status of the statutory instrument in question. He made it clear that the courts could ‘declare it to be invalid’ if satisfied that the minister acted outwith his powers conferred by the primary legislation, whether the order was ‘ultra vires by reason of its contents (patent defects) or by reason of defects in the procedure followed prior to its being made (latent defects)’. He then said ([1974] 2 All ER 1128 at 1153–1154, [1975] AC 295 at 365):

d ‘Under our legal system, however, the courts as the judicial arm of government do not act on their own initiative. Their jurisdiction to determine that a statutory instrument is ultra vires does not arise until its validity is challenged in proceedings inter partes, either brought by one party to enforce the law declared by the instrument against another party, or brought by a party whose interests are affected by the law so declared sufficiently directly to give him locus standi to initiate proceedings to challenge the validity of the instrument. Unless there is such challenge and, if there is, until it has been upheld by a judgment of the court, the validity of the statutory instrument and the legality of acts done pursuant to the law declared by it, are presumed. It would, however, be inconsistent with the doctrine of ultra vires as it has been developed in English law as a means of controlling abuse of power by the executive arm of government if the judgment of a court in proceedings properly constituted that a statutory instrument was ultra vires were to have any lesser consequence in law than to render the instrument incapable of ever having had any legal effect upon the rights or duties of the parties to the proceedings (cf *Ridge v Baldwin* [1963] 2 All ER 66, [1964] AC 40). Although such a decision is directly binding only as between the parties to the proceedings in which it was made, the application of the doctrine of precedent has the consequence of enabling the benefit of it to accrue to all other persons whose legal rights have been interfered with in reliance on the law which the statutory instrument purported to declare.’

h Thus, Lord Diplock confirmed that once it was established that a statutory instrument was ultra vires, it would be treated as never having had any legal effect. That consequence follows from application of the ultra vires principle, as a control on abuse of power; or, equally acceptably in my judgment, it may be held that maintenance of the rule of law compels this conclusion.

j This view of the law is supported by the decision of this House in *Wandsworth London BC v Winder* [1984] 3 All ER 976, [1985] AC 461. That case concerned rent demands made by a local authority landlord on one of its tenants. The local authority, pursuant to its powers under the Housing Act 1957, resolved to increase rents generally. The tenant refused to pay the increased element of the rent. When sued by the local authority for that element, he sought to defend himself by pleading that the resolutions and notices of increase were ultra vires and void, on the grounds that they were unreasonable in the *Wednesbury* sense (ie irrational: see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All

ER 680, [1948] 1 KB 223), and counterclaiming for a declaration to that effect. It seems clear from the particulars given in the defence (set out at [1984] 3 All ER 83 at 85–86, [1985] AC 461 at 466–467) that the tenant proposed adducing some evidence to support his case of unreasonableness. The local authority sought to strike out the defence and counterclaim as an abuse of process, on the grounds that the tenant should be debarred from challenging the conduct of the local authority other than by application for judicial review under RSC Ord 53. This House ruled that Mr Winder was entitled as of right to challenge the local authority's decision by way of defence in the proceedings which it had brought against him. The decision was based squarely on 'the ordinary rights of private citizens to defend themselves against unfounded claims' (see [1984] 3 All ER 976 at 981, [1985] AC 461 at 509 per Lord Fraser of Tullybelton, delivering the leading speech). As a matter of construction of the relevant legislation, those rights had not been swept away by the procedural reforms introducing the new RSC Ord 53 (see [1984] 3 All ER 976 at 981, [1985] AC 461 at 509–510).

In my judgment, precisely similar reasoning applies, a fortiori, where a private citizen is taxed not with private law claims which are unfounded because based upon some ultra vires decision, but with a criminal charge which is unfounded, because based upon an ultra vires byelaw or administrative decision. The decision of the Divisional Court in *R v Crown Court at Reading, ex p Hutchinson, R v Devizes Justices, ex p Lee* [1988] 1 All ER 333, [1988] QB 384 (and the principal authorities referred to in it, including the classic decision in *Kruse v Johnson* [1898] 2 QB 91, [1895–9] All ER Rep 105) is in accord with this view. There it was held that a defendant to a charge brought under a byelaw is entitled to raise the question of the validity of that byelaw in criminal proceedings before magistrates or the Crown Court, by way of defence. There was nothing in the statutory basis of the jurisdiction of the justices which precluded their considering a challenge to the validity of a byelaw (see [1988] 1 All ER 333 at 336–338, [1988] QB 384 at 391–393 per Lloyd J).

In *Bugg v DPP* [1993] 2 All ER 815 at 821, [1993] QB 473 at 493 the Divisional Court departed from this trend of authority. They expressed the view that 'except in the "flagrant" and "outrageous" case a statutory order, such as a byelaw, remains effective until it is quashed'. Three authorities were cited which were said to support this approach: *London and Clydeside Estates Ltd v Aberdeen DC* [1979] 3 All ER 876 at 883, [1980] 1 WLR 182 at 189–190 in the speech of Lord Hailsham of St Marylebone LC, *Smith v East Elloe RDC* [1956] 1 All ER 855 at 871, [1956] AC 736 at 769–770, in the speech of Lord Radcliffe and the *Hoffmann-La Roche* case [1974] 2 All ER 1128 at 1154, [1975] AC 295 at 366, in the speech of Lord Diplock. This approach was then elevated by the Divisional Court into a rule that byelaws which are on their face invalid or are patently unreasonable (termed 'substantive' invalidity) may be called in question by way of defence in criminal proceedings, whereas byelaws which are invalid because of some defect in the procedure by which they came to be made (termed 'procedural' invalidity) may not be called in question in such proceedings, so that a person might be convicted of an offence under them even if the byelaws were later quashed in other proceedings.

Strong reservations about the decision of the Divisional Court in *Bugg v DPP* [1993] 2 All ER 815, [1993] QB 473 have recently been expressed by this House in *R v Wicks* [1997] 2 All ER 801, [1998] AC 92. I have reached the conclusion that the time has come to hold that it was wrongly decided.

*a* I am bound to say that I do not think that the three authorities to which I have referred support the position as stated in *Bugg's* case. In my judgment Lord Diplock's speech in the *Hoffmann-La Roche* case [1974] 2 All ER 1128, [1975] AC 295, when read as a whole, makes it clear that subordinate legislation which is quashed is deprived of any legal effect at all, and that is so whether the invalidity arises from defects appearing on its face or in the procedure adopted in its promulgation. Lord Diplock ([1974] 2 All ER 1128 at 1154–1155, [1975] AC 295 at 366) himself cited the speech of Lord Radcliffe in *Smith v East Elloe RDC* [1956] 1 All ER 855 at 871, [1956] AC 736 at 769–770 and regarded him as saying no more about the presumption of validity than he (Lord Diplock) was saying. I agree with that view.

*b* In my judgment, Lord Hailsham LC, in the passage of his speech relied upon by the Divisional Court in *Bugg's* case, was simply making the observation that in a flagrant case of invalidity a private citizen might feel sure enough of his ground to proceed and rely on his rights to assert the 'defect in procedure' (as Lord Hailsham LC describes it) as a defence in proceedings brought against him; that, on the other hand, where a defect in procedure is trivial (ie one which would not render the public body's act ultra vires), the public body may feel safe to proceed without taking further steps to shore up the validity in law of what it had done by reconsideration of the matter; and that in cases in the grey area between these clear examples, it might be necessary for the private citizen to safeguard his position by taking the prudent course of seeking a declaration of his rights, or for the public body to reconsider the matter. But that would be for the citizen or the public body, as the case might be to decide. Subject to any statutory qualifications upon his right to do so, the citizen could, in my judgment, choose to accept the risk of uncertainty, take no action at all, wait to be sued or prosecuted by the public body and then put forward his arguments on validity and have them determined by the court hearing the case against him. That is a matter of right in a case of ultra vires action by the public authority, and would not be subject to the discretion of the court: see *Wandsworth London BC v Winder*. In my judgment any other interpretation of Lord Hailsham's speech could not be reconciled with the decision of this House in the *Anisminic* case.

*c* In my judgment the reasoning of the Divisional Court in *Bugg's* case, suggesting two classes of legal invalidity of subordinate legislation, is contrary both to the *Anisminic* case and the subsequent decisions of this House to which I have referred. The *Anisminic* decision established, contrary to previous thinking that there might be error of law within jurisdiction, that there was a single category of errors of law, all of which rendered a decision ultra vires. No distinction is to be drawn between a patent (or substantive) error of law or a latent (or procedural) error of law. An ultra vires act or subordinate legislation is unlawful simpliciter and, if the presumption in favour of its legality is overcome by a litigant before a court of competent jurisdiction, is of no legal effect whatsoever.

*d* The Divisional Court in *Bugg's* case themselves drew attention to Lord Denning's dissenting speech in *DPP v Head* and, whilst avowing that the 'distinction between orders which are void and voidable is now clearly not part of our law' identified his approach as interesting, because Lord Denning 'was drawing a distinction, as we are seeking to do, between different types of invalidity' (see [1993] 2 All ER 815 at 824, [1993] QB 473 at 496). However, the distinction which Lord Denning drew is one which was made redundant by the decision in the *Anisminic* case, in which all categories of unlawfulness were treated as equivalent and as having the same effect.



Further, the Divisional Court thought that there was no authority where it had been held that it is proper for a criminal court to inquire into questions of procedural irregularity. With respect to the court, I think it overlooked that that was one basis for the decision of the majority of this House in *DPP v Head*. Lord Tucker ([1958] 1 All ER 679 at 686, [1959] AC 83 at 103) envisaged that documents upon which the administrative order were based might be adduced in evidence to rebut the presumption of invalidity. Lord Reid and Lord Somervell agreed with his speech. Lord Somervell ([1958] 1 All ER 679 at 687, [1959] AC 83 at 104) thought that the facts of the case itself could also be analysed not as a case of patent error, but as a case where it was shown by evidence that the minister had made his order without having any evidence available to him to justify it, that is, a case of latent procedural, rather than patent, error. Viscount Simonds, Lord Reid and Lord Tucker all agreed. Indeed, on the facts of the case, and this, in my view, was Lord Somervell's point, it was simply fortuitous that the minister's order had made reference on its face to the medical certificates. The result of the case could not have been any different if it had not done so, but appeared on its face to be normal and valid.

Also, in my judgment the distinction between orders which are 'substantively' invalid and orders which are 'procedurally' invalid is not a practical distinction which is capable of being maintained in a principled way across the broad range of administrative action. This emerges from the discussion of *Wandsworth London BC v Winder* by the Divisional Court in *Bugg v DPP* [1993] 2 All ER 815 at 823–824, [1993] QB 473 at 495–496. The court regarded it as a case of 'substantive invalidity,' ie in which either the decision to increase rents or the rent demands themselves were on their face invalid. I disagree. The rent demands appeared perfectly valid on their face. The decision was said by the tenant to be *Wednesbury* unreasonable, because irrelevant matters had, or relevant matters had not, been taken into account, as set out in his pleading. At trial, he would have had to adduce evidence to make out that case. It was not an error on the face of the decision. In *R v Wicks* [1997] 2 All ER 801 at 812–813, [1998] AC 92 at 113–114 Lord Hoffmann made the same point and referred to another problem of the application of the categories proposed by the Divisional Court. Many different types of challenge, which shade into each other, may be made to the legality of byelaws or administrative acts. The decision in the *Anisminic* case freed the law from a dependency on technical distinctions between different types of illegality. The law should not now be developed to create a new, and unstable, technical distinction between 'substantive' and 'procedural' invalidity.

In this case, the judgment of Auld LJ in the Divisional Court ([1996] Times, 23 July) justifies such distinctions on pragmatic grounds: the difficulties for magistrates in having to deal with complicated points of administrative law and the dangers of inconsistent decisions, both between different benches of magistrates and between magistrates and the Divisional Court. There is certainly weight in these arguments, although I do not think that magistrates should be underestimated and the practical risks of inconsistency are probably exaggerated. But the remedy proposed, which is in effect to have two systems of challenge to subordinate legislation or administrative action: one in magistrates' courts which is frozen in the pre-*Anisminic* mould and a modern version operated in the Divisional Court, is in my view both illogical and unfair.

Finally, in relation to *Bugg's* case the consequences of the proposed distinction is that, in a case of 'procedural' invalidity, a court (whether in civil or criminal proceedings) is to regard byelaws and other subordinate legislation as valid until

a set aside in judicial review proceedings; and that an individual who contravenes a byelaw commits an offence and can be punished, even if the byelaw is later set aside as unlawful (see [1993] 2 All ER 815 at 827, [1993] QB 473 at 493 at 500). I can think of no rational ground for holding that a magistrates' court has jurisdiction to rule on the patent or substantive invalidity of subordinate legislation or an administrative act under it, but has no jurisdiction to rule on its latent or procedural invalidity, unless a statutory provision has that effect. In my judgment, this conclusion in substance revives the distinction between voidable and void administrative acts and is contrary to the decisions of this House to which I have already referred. If subordinate legislation is ultra vires on any basis, it is unlawful and of no effect in law. It follows that no citizen should be convicted and punished on the basis of it. For these reasons I would overrule *Bugg v DPP*.

c However, in every case it will necessary to examine the particular statutory context to determine whether a court hearing a criminal or civil case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or an administrative act under it. There are situations in which Parliament may legislate to preclude such challenges being made, in the d interest, for example, of promoting certainty about the legitimacy of administrative acts on which the public may have to rely.

The recent decision of this House in *R v Wicks* is an example of a particular context in which an administrative act triggering consequences for the purposes of the criminal law was held not to be capable of challenge in criminal e proceedings, but only by other proceedings. The case concerned an enforcement notice issued by a local planning authority and served on the defendant under the then current version of s 87 of the Town and Country Planning Act 1971. The notice alleged a breach of planning control by the erection of a building and required its removal above a certain height. One month was allowed for compliance. The appellant appealed against the notice to the Secretary of State, f under s 174 of the Town and Country Planning Act 1990, but the appeal was dismissed. The appellant still failed to comply with the notice and the local authority issued a summons alleging a breach of s 179(1) of the 1990 Act. In the criminal proceedings which ensued, the appellant sought to defend himself on the ground that the enforcement notice had been issued ultra vires, maintaining g that the local planning authority had acted in bad faith and had been motivated by irrelevant considerations. The judge ruled that these contentions should have been made in proceedings for judicial review and that they could not be gone into in the criminal proceedings. The appellant then pleaded guilty and was convicted. This House upheld his conviction. Lord Hoffmann, in the leading speech, emphasised that the ability of a defendant to criminal proceedings to h challenge the validity of an act done under statutory authority depended on the construction of the statute in question. This House held that the Town and Country Planning Act 1990 contained an elaborate code including provision for appeals against notices, and that on the proper construction of s 179(1) of the Act all that was required to be proved in the criminal proceedings was that the notice j issued by the local planning authority was formally valid.

The decision of the Divisional Court in *Plymouth City Council v Quietlynn Ltd* [1987] 2 All ER 1040, [1988] QB 114 is justified on similar grounds: see *R v Wicks* [1997] 2 All ER 801 at 815–816, [1998] AC 92 at 117–118 per Lord Hoffmann. There, a company was operating sex shops in Plymouth under transitional provisions which allowed them to do so until their application for a licence under the scheme introduced by the Local Government (Miscellaneous Provisions) Act

1982 had been 'determined'. The local authority refused the application. The company was then prosecuted for trading without a licence. It sought to allege that the local authority had failed to comply with certain procedural provisions and that its application had therefore not yet been determined within the meaning of the Act. The Divisional Court held as a matter of construction that the local authority's decision was a determination, whether or not it could be challenged by judicial review. In the particular statutory context, therefore, an act which might turn out for a different purpose to be a nullity (eg so as to require the local authority to hear the application again) was nevertheless a determination for the purpose of bringing the transitional period to an end. a  
b

However, in approaching the issue of statutory construction the courts proceed from a strong appreciation that ours is a country subject to the rule of law. This means that it is well recognised to be important for the maintenance of the rule of law and the preservation of liberty that individuals affected by legal measures promulgated by executive public bodies should have a fair opportunity to challenge these measures and to vindicate their rights in court proceedings. There is a strong presumption that Parliament will not legislate to prevent individuals from doing so: 'It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words:' *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1959] 3 All ER 1 at 6, [1960] AC 260 at 286 per Viscount Simonds; cited by Lord Fraser of Tullybelton in *Wandsworth London BC v Winder* [1984] 3 All ER 976 at 981, [1985] AC 461 at 510. c  
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As Lord Diplock put it in the *Hoffmann-La Roche* case [1974] 2 All ER 1128 at 1154, [1975] AC 295 at 366: e

'... the courts lean very heavily against a construction of the Act which would have this effect (cf *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208, [1969] 2 AC 147).'

f

The particular statutory schemes in question in *R v Wicks* and in the *Quietlynn* case did justify a construction which limited the rights of the defendant to call the legality of an administrative act into question. But in my judgment it was an important feature of both cases that they were concerned with administrative acts specifically directed at the defendants, where there had been clear and ample opportunity provided by the scheme of the relevant legislation for those defendants to challenge the legality of those acts, before being charged with an offence. g

By contrast, where subordinate legislation (eg statutory instruments or byelaws) is promulgated which is of a general character in the sense that it is directed to the world at large, the first time an individual may be affected by that legislation is when he is charged with an offence under it: so also where a general provision is brought into effect by an administrative act, as in this case. A smoker might have made his first journey on the line on the same train as Mr Boddington; have found that there was no carriage free of no smoking signs and have chosen to exercise what he believed to be his right to smoke on the train. Such an individual would have had no sensible opportunity to challenge the validity of the posting of the no smoking signs throughout the train until he was charged, as Mr Boddington was, under byelaw 20. In my judgment in such a case the strong presumption must be that Parliament did not intend to deprive the smoker of an opportunity to defend himself in the criminal proceedings by asserting the alleged unlawfulness of the decision to post no smoking notices throughout the train. I h  
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a can see nothing in s 67 of the Transport Act 1962 or the byelaws which could displace that presumption. It is clear from *Wandsworth London BC v Winder* and *R v Wicks* [1997] 2 All ER 801 at 815, [1998] AC 92 at 116 per Lord Hoffmann that the development of a statutorily based procedure for judicial review proceedings does not of itself displace the presumption.

b Accordingly, I consider that the Divisional Court was wrong in the present case in ruling that Mr Boddington was not entitled to raise the legality of the decision to post no smoking notices throughout the train, as a possible defence to the charge against him.

c Lord Nicholls of Birkenhead noted in *R v Wicks* [1997] 2 All ER 801 at 806, [1998] AC 92 at 106–107 that there may be cases where proceedings in the Divisional Court are more suitable and convenient for challenging a byelaw or administrative decision made under it than by way of defence in criminal proceedings in the magistrates' court or the Crown Court. None the less Lord Nicholls ([1997] 2 All ER 801 at 805, [1998] AC 92 at 106) held that 'the proper starting point' must be a presumption that 'an accused should be able to challenge, on any ground, the lawfulness of an order the breach of which

d constitutes his alleged criminal offence'. No doubt the factors listed by Lord Nicholls may, where the statutory context permits, be taken into account when construing any particular statute to determine Parliament's intention, but they will not usually be sufficient in themselves to support a construction of a statute which would preclude the right of a defendant to raise the legality of a byelaw or administrative action taken under it as a defence in other proceedings. This is

e because of the strength of the presumption against a construction which would prevent an individual being able to vindicate his rights in court proceedings in which he is involved. Nor do I think it right to belittle magistrates' courts: they sometimes have to decide very difficult legal questions and generally have the assistance of a legally qualified clerk to give them guidance on the law. For

f example when the Human Rights Bill now before Parliament passes into law the magistrates' courts will have to determine difficult questions of law arising from the European Convention on Human Rights. In my judgment only the clear language of a statute could take away the right of a defendant in criminal proceedings to challenge the lawfulness of a byelaw or administrative decision where his prosecution is premised on its validity.

g *Is Mr Boddington's defence made out?*

The burden was on Mr Boddington to establish, on a balance of probabilities, that the decision of Network South Central to post no smoking notices in all the

h carriages of its trains was unlawful. His argument turned on the construction of the statute. He maintained that the primary legislation—s 67(1) of the Transport Act 1962—in its relevant part, empowered the British Railways Board to make byelaws 'regulating ... the conduct of all persons ... with respect to ... smoking ... in railway carriages', and that 'regulating' could not include prohibition. Whilst Mr Boddington did not contend that the byelaw itself was unlawful, he did

j argue that, in the context of the primary legislation, the decision to post notices to prohibit, rather than regulate, smoking, was unlawful. He relied upon authorities to the effect that normally a power to regulate does not include a power to prohibit: *City of Toronto Municipal Corp v Virgo* [1896] AC 88 at 93 and *Tarr v Tarr* [1972] 2 All ER 295, [1973] AC 254 at 265–268 per Lord Pearson.

In my judgment, whilst ordinarily the word 'regulate' may be used to indicate something less than total prohibition, the meaning to be attributed to it in any

statute must depend on the particular statutory context. Authorities relating to other statutes are of limited assistance.

The opening part of s 67(1) of the Transport Act 1962 is expressed in very general terms. There are two limbs of the provision which are relevant. First, it confers a power to make byelaws to regulate 'the use and working of, and travel on, [the] railways'. Second, it confers a power to make byelaws 'regulating ... the conduct of all persons ... while on [railway] premises'. The reference in the section to the making of byelaws on particular matters, including '(c) with respect to the smoking of tobacco in railway carriages and elsewhere and the prevention of nuisances', is governed by both limbs of the opening of the provision. Control of smoking on railway carriages is, however, in my view, governed by the first limb of the opening part of sub-s (1). This is because the second limb relates to conduct of persons 'on ... [railway] premises' a term used in the subsection in distinction from 'on [the] railways'. The term 'railway premises' includes 'stations and the approaches to stations', and in context means the land on which the railway company carries on its business. The power to regulate what may take place on board the railway carriages is, therefore, derived from the first limb of the subsection.

The word 'regulating' applies to the general activities of 'the use and working of, and travel on' the railway, and not directly to the specific activity of smoking. No doubt a byelaw could not be made to prohibit the use of the railway, or travel on the railway, since that would not be justified by the use of the term 'regulating' in relation to those activities. But in my opinion a ban on smoking on all railway carriages is a form of regulating the use of the railway, or travel on the railway. Paragraph (c) makes it plain that regulation of the use of the railway may extend to dealing with the subject of smoking of tobacco in railway carriages. One way in which a railway company may, perfectly reasonably, decide to regulate the use of its railway so far as concerns smoking on carriages, is to ban smoking. That was what Network South Central did in the present case, in bringing byelaw 20 into operation, and there was nothing unlawful in their doing so.

I would therefore dismiss the appeal.

**LORD BROWNE-WILKINSON.** My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn, with which I agree. For the reasons which he gives I would dismiss this appeal.

I have also read the speech of my noble and learned friend Lord Irvine of Lairg LC with which, but for one point, I also agree. Lord Irvine LC attaches importance to the consideration that an invalid bye-law is and always has been a nullity. The byelaw will necessarily have been found to be ultra vires; therefore it is said it is a nullity having no legal effect. I adhere to my view that the juristic basis of judicial review is the doctrine of ultra vires. But I am far from satisfied that an ultra vires act is incapable of having any legal consequence during the period between the doing of that act and the recognition of its invalidity by the court. During that period people will have regulated their lives on the basis that the act is valid. The subsequent recognition of its invalidity cannot rewrite history as to all the other matters done in the meantime in reliance on its validity. The status of an unlawful act during the period before it is quashed is a matter of great contention and of great difficulty: see *Percy v Hall* [1996] 4 All ER 523 at 544–545, [1997] QB 924 at 950–952 per Schiemann LJ and the authorities there referred to; de Smith, Woolf and Jowell *Judicial Review of Administrative Action* (5th edn, 1995) paras 5.044–5.048 and *Calvin v Carr* [1979] 2 All ER 440 at 445–446, [1980] AC 574 at 589–590.

a I prefer to express no view at this stage on those difficult points. It is sufficient for the decision of the present case to agree with both my Lords in holding that a man commits no crime if he infringes an invalid byelaw and has the right to challenge the validity of the byelaw before any court in which he is being tried.

b **LORD SLYNN OF HADLEY.** My Lords, I have had the advantage of reading in draft the speeches prepared by noble and learned friends Lord Irvine of Lairg LC and Lord Steyn. Like them I hold that it is open to a defendant to raise in a criminal prosecution the contention that a byelaw or an administrative act undertaken pursuant to it is ultra vires and unlawful and that if he establishes that he has committed no crime. For magistrates to be required to convict when they are satisfied that an administrative act is unlawful is unacceptable. It is not a realistic or satisfactory riposte that defendants can always go by way of a judicial review. In any event although the procedural advantages of raising such [questions] by way of judicial review have long been recognised, an application for judicial review is not a strait-jacket which must be put on before rights can be asserted. The decisions in cases in your Lordships' House cited by Lord Steyn make this clear.

d The risk of divergent decisions by magistrates is of course present but if a decision by a court of criminal jurisdiction that a byelaw or administrative act pursuant to it is ultra vires is of importance to a prosecuting authority the latter can always challenge it. It is indeed a matter for consideration whether some simple form of reference by magistrates' courts to the Divisional Court of questions of invalidity could not be set up.

e I further agree, for the reasons given by my noble and learned friends, that for this purpose the distinction between substantive and procedural error should not be upheld. Like Lord Steyn I am in agreement with the passage quoted by him of the opinion of Lord Nicholls of Birkenhead in *R v Wicks* [1997] 2 All ER 801 at 807, [1998] AC 92 at 108.

f I consider that the result of allowing a collateral challenge in proceedings before courts of criminal jurisdiction can be reached without it being necessary in this case to say that if an act or byelaw is invalid it must be held to have been invalid from the outset for all purposes and that no lawful consequences can flow from it. This may be the logical result and will no doubt sometimes be the position but courts have had to grapple with the problem of reconciling the logical result with the reality that much may have been done on the basis that an administrative act or a byelaw was valid. The unscrambling may produce more serious difficulties than the invalidity. The European Court of Justice has dealt with the problem by ruling that its declaration of invalidity should only operate for the benefit of the parties to the actual case or of those who had begun proceedings for a declaration of invalidity before the court's judgment. In our jurisdiction the effect of invalidity may not be relied on if limitation periods have expired or if the court in its discretion refuses relief, albeit considering that the act is invalid. These situations are of course different from those where a court has pronounced subordinate legislation or an administrative act to be unlawful or where the presumption in favour of their legality has been overruled by a court of competent jurisdiction. But even in these cases I consider that the question whether the acts or byelaws are to be treated as having at no time had any effect in law is not one which has been fully explored and is not one on which it is necessary to rule in this appeal and I prefer to express no view upon it. The cases referred to in *Wade and Forsyth on Administrative Law* (7th edn, 1994) pp 323–324, 342–344 lead the authors to the view that nullity is relative rather than an



absolute concept (p 343) and that 'void' is meaningless in any absolute sense. Its meaning is relative. This may all be rather imprecise but the law in this area has developed in a pragmatic way on a case by case basis. The result, however, in the present case is clear that the validity of the administrative act may be challenged by way of defence.

Although the appellant has served a useful function in bringing this appeal and establishing the right to raise in the magistrates court the invalidity of the administrative act of putting up no smoking notices in the railway carriages, his appeal must still fail. For the reasons given by Lord Irvine of Lairg LC it seems to me plain that on the wording of s 67(1) of the Transport Act 1962 Network South Central acted within their powers.

I would accordingly dismiss the appeal.

**LORD STEYN.** My Lords,

*I. The general problem*

It is a truth generally acknowledged among lawyers that the complexity of a civil or criminal case does not depend on the level of the hierarchy of courts where it is heard. On a given day a bench of magistrates may have to decide a more difficult case than an appeal being heard by the Appellate Committee of the House of Lords. Magistrates are the bedrock of the English criminal justice system: they decide more than 95% of all criminal cases tried in England and Wales. Frequently they are called upon to decide complex questions of fact and, with the aid of the justices' clerk, difficult questions of law. For example, in criminal cases justices may have to exercise control over proceedings through the abuse of process jurisdiction; they may have to decide issues of fact on which they heard conflicting scientific evidence; they may have to deal with intractable problems of similar fact evidence or sensitive questions under the Police and Criminal Evidence Act 1984; they may have to decide whether as a matter of law undisputed or disputed conduct by a defendant is or may be a criminal offence; and so forth. The working assumption has been that every court of criminal jurisdiction including magistrates courts must decide all issues of fact or law which need to be determined in order to establish the guilt or innocence of a defendant. But in the last ten years, in the wake of the expansion of judicial review and the resultant increase in the power of the Divisional Court, the idea has gained ascendancy that it is not part of the jurisdiction of a criminal court to determine issues regarding the validity of byelaws or administrative decisions even if the resolution of such issues could be determinative of the guilt or innocence of a defendant. Such a view was put forward by the Divisional Court in *Plymouth City Council v Quietlynn Ltd* [1987] 2 All ER 1040, [1988] QB 114 but that decision is explicable on the basis of the policy of the statute in question. In *R v Crown Court at Reading, ex p Hutchinson*, *R v Devizes Justices, ex p Lee* [1988] 1 All ER 333, [1988] QB 384 a differently constituted Divisional Court doubted the correctness of some of the general observations in the *Quietlynn* case. The leading decision suggestive of such a restriction on the jurisdiction of magistrates, and indeed of all criminal courts, is *Bugg v DPP* [1993] 2 All ER 815, [1993] QB 473. In that case Woolf LJ, giving the judgment of the Divisional Court, distinguished in the context of byelaws between substantive and procedural validity and he held that while a criminal court may decide an issue as to substantive validity a question as to procedural validity is beyond its power. The decision of the Divisional Court ([1996] Times, 23 July) in the present case went significantly further. Auld LJ, sitting with Ebsworth J and giving the reserved judgment of the

a Divisional Court, held that any issue of the validity of a byelaw or administrative action is beyond the jurisdiction of criminal courts. The present appeal affords an opportunity to examine the correctness of these important decisions.

## II. *Mr Boddington's case*

b It is necessary to describe how it comes about that Mr Boddington's appeal enables your Lordships' House to examine the general jurisdictional issues. Mr Boddington regularly travelled by train between London and Brighton. He is a smoker. Until 1 January 1993 he was able to smoke on his journeys since there was always one carriage in which smoking was permitted. On that date Network South Central (NSC), a part of the British Railways Board, which provided the relevant services, put into effect a decision to ban smoking on all carriages of its trains. The statutory basis of the action taken by NSC was as follows. Section c 67(1)(c) of the Transport Act 1962 provides:

d "The Railways Board may make bylaws regulating the use and working of, and travel on, their railways ... and the conduct of all persons ... while on [their] premises, and in particular bylaws ... (c) with respect to the smoking of tobacco in railway carriages and elsewhere and the prevention of nuisances ..."

On 22 June 1965, purportedly acting under s 67(1)(c) the British Railways Board made 'Railway Byelaws'. Byelaw 20 provides:

e "No person shall smoke or carry a lighted ... cigarette ... in any vehicle ... where smoking is expressly prohibited by the Board by a notice exhibited in a conspicuous position in such ... vehicle ..."

Byelaw 1(1) defines 'vehicle' as follows:

f "... "vehicle" means any railway vehicle on the railway and includes any compartment of any such vehicle."

Relying on byelaw 20 NSC exhibited notices prohibiting smoking in all carriages on their trains.

g In early 1993 Mr Boddington became aware of the ban. He did not accept the legality of the ban. He continued to smoke on his journeys. On 5 November 1994 he smoked as usual during his journey to Brighton. An officer asked him to put out his cigarette. He refused to do so. In due course he was charged with an offence under the relevant byelaw read with s 67 of the Transport Act as amended. He was tried by a stipendiary magistrate sitting at Brighton. Mr Boddington's defence was twofold. First, he apparently contended that byelaw h was unreasonably wide and therefore ultra vires. Secondly, he contended that the administrative decision to implement the ban was unreasonable and invalid. The stipendiary magistrate convicted Mr Boddington. He was asked to state a case and he did so. From the stated case it appears that the stipendiary magistrate, having had the decision in *Bugg's* case cited to him, concluded that subordinate legislation can only be challenged 'in a court with locus standi to challenge the validity of subordinate legislation'. Nevertheless the stipendiary magistrate j rejected the challenges to the validity of the byelaw and the administrative decision to implement the ban.

That is how the appeal by way of case stated came before the Divisional Court. Counsel for the appellant concentrated his argument on the validity of the administrative decision. But after extensive citation of authority and full argument Auld LJ, sitting with Ebsworth J, ruled 'that Mr Boddington was not

entitled to challenge by way of defence in the criminal proceedings before the magistrate the substantive validity of the prohibition, either as a matter of construction of s 67 and the byelaw or as to whether it was irrational'. From the context it is clear (1) that Auld LJ had in mind that all issues of procedural and substantive invalidity of byelaws were beyond the jurisdiction of a criminal court and (2) that any challenge to the validity of an administrative decision was also beyond the jurisdiction of a criminal court. In the result Auld LJ declined to rule on the merits of Mr Boddington's argument: he held that such matters could only be considered in judicial review proceedings. This is the context in which the Divisional Court certified that points of law of general importance are involved.

In the agreed statement of facts and issues on the present appeal the questions have been refined as follows:

'Was the Appellant entitled before the Magistrate to raise as a Defence:— (a) a contention that the byelaw was ultra vires the powers granted by s. 67(1) of the Transport Act 1962; (b) a contention that the byelaw was unreasonable; (c) a contention that the administrative act that led to the byelaw being used to implement a total ban on smoking in NSC trains was of so unreasonable a nature that it rendered the byelaw invalid? or ... Are these matters which can be raised only by way of proceedings for Judicial Review in the Divisional Court?'

It will be convenient to consider the general jurisdictional questions before examining the merits of Mr Boddington's particular arguments. For that purpose I will concentrate on the issues raised by *Bugg's* case and the judgment of the Divisional Court in Mr Boddington's case.

### III. *The decision in Bugg's case*

In *Bugg's* case the Divisional Court considered whether it is appropriate for magistrates courts hearing criminal proceedings to decide issues regarding the validity of byelaws. The defendants in two cases had entered military protected areas. They were charged with offences under byelaws. They argued that the byelaws were invalid because the areas to which the byelaws applied were insufficiently identified. The Divisional Court allowed a defendant's appeal in one case and dismissed a prosecutor's appeal in the other case. Woolf LJ concluded that a criminal court may decide issues concerning substantive validity but not issues of procedural validity. He stated ([1993] 2 All ER 815 at 827, [1993] QB 473 at 500):

'So far as procedural invalidity is concerned, the proper approach is to regard byelaws and other subordinate legislation as valid until they are set aside by the appropriate court with the jurisdiction to do so. A member of the public is required to comply with byelaws even if he believes they have a procedural defect unless and until the law is held to be invalid by a court of competent jurisdiction. If before this happens he contravenes the byelaw, he commits an offence and can be punished. Where the law is substantively invalid, the position is different. No citizen is required to comply with a law which is bad on its face. If the citizen is satisfied that that is the situation, he is entitled to ignore the law.'

Since the issue before the Divisional Court was undoubtedly one of substantive validity the observations of Woolf LJ were strictly obiter. But any observations of Woolf LJ, are entitled to great weight and Woolf LJ is of course a great



a expositor of public law. And he had the advantage of sitting with Pill J, a judge with extensive Divisional Court experience.

b The reasons of Woolf LJ can be grouped under two headings. First, there are his pragmatic reasons for thinking that a criminal court is not equipped to deal with the relevant issues. Woolf LJ said that in cases of substantive invalidity of byelaws no evidence is required whereas in cases of procedural invalidity  
c evidence is required. The fact that evidence is required he said, may lead to different outcomes in different courts. He said that in cases of procedural invalidity the party interested in upholding a byelaw may well not be a party to the proceedings. Secondly, Woolf LJ relied on the developments which have taken place in judicial review over the last 25 years. The principal ground of his reasoning was that, except in 'flagrant' and 'outrageous' cases, a byelaw remains effective until quashed.

#### IV. *The correctness of Bugg's case*

d Recently in *R v Wicks* [1997] 2 All ER 801, [1998] AC 92 Lord Nicholls of Birkenhead and Lord Hoffmann expressed views which called into question the correctness of *Bugg's case*. *R v Wicks* was a planning case. The defendant was charged with non-compliance with an enforcement notice. He attempted to challenge the validity of the enforcement notice at a criminal trial. In the leading judgment Lord Hoffmann held that as a matter of statutory interpretation 'enforcement notice' in s 179(1) of the Town and Country Planning Act 1990  
e means a notice issued by the authority which is formally valid and has not been set aside. Accordingly, there was no defence to the criminal charge. That was the unanimous view of the House. In these circumstances the issues raised by *Bugg's case* did not arise and the House expressed no final view on them. In the present case those issues do arise directly and ought to be decided. Initially there was a difficulty. Counsel for the appellant and the respondent were in agreement that  
f the observations in *Bugg's case*, as well as the more far reaching observations by the Divisional Court in the present case, were wrong. It would have been undesirable for the House of Lords to decide such important issues without the benefit of full argument. Fortunately, as a result of the careful and thorough written and oral submissions of Mr Caplan QC and Mr Burnett, acting as amici curiae appointed by the Attorney General, the House has had the benefit of  
g argument for and against the reasoning in both cases. Moreover, there has been valuable academic discussion of the issues raised by *Bugg's case*: see David Feldman 'Collateral challenge and judicial review: the boundary dispute continues' [1993] PL 37, Carl Emery 'Public law or private law: the limits of procedural reform' [1995] PL 450 at 455–461, Dr Christopher Forsyth '*The metaphysic of nullity*' invalidity, conceptual reasoning and the rule of law, Forsyth and Hare *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (1998) pp 152–153, *Wade and Forsyth on Administrative Law* (7th edn, 1994) pp 321–324 and Craig *Administrative Law* (3rd edn, 1994) pp 447–466. Sir Harry Woolf's Hamlyn lecture, 'Protection of the public—a new challenge' (1987), had foreshadowed the reasoning in *Bugg's case*. That reasoning was  
h criticised: J Beatson '"Public" and "private" in English administrative law' (1987) 103 LQR 34 at 59–61. I have found the discussion of the problems by academic lawyers of great assistance.

i The pragmatic reasons given by Woolf LJ need to be put in context. As Lord Hoffmann observed in *R v Wicks* [1997] 2 All ER 801 at 815, [1998] AC 92 at 116: '... the distinction between substantive and procedural invalidity appears to cut across the distinction between grounds of invalidity which require no extrinsic

evidence and those which do.' An issue of substantive invalidity may involve daunting issues of fact, eg an issue as to unequal treatment of citizens in a pluralistic society or other forms of unreasonableness. In such a case the issues of law may also be complex. In contrast an issue of procedural invalidity of a byelaw may involve minimal evidence, eg simply the negative fact that an express duty to consult was breached. And the question of law may be straightforward. This aspect of the pragmatic case is not persuasive. It is true, as Woolf LJ said, that on the evidence presented to them different magistrates courts may come to different conclusions. But this factor proves too much: it applies equally to substantive validity. In any event, although a criminal court can not quash byelaws the Divisional Court can on appeal on a case stated from a decision of magistrates give a ruling which will in practice be followed by other magistrates courts. Woolf LJ added that the party with an interest in upholding the byelaws may not be before the court. But that is also true of cases of substantive invalidity. Moreover, in a criminal case the prosecution, backed by the resources of the state, will usually put forward the case for upholding the byelaws. I therefore regard the pragmatic case in favour of a rule that magistrates may not decide issues of procedural validity, even if the distinction can be satisfactorily drawn, as questionable.

There is also a formidable difficulty of categorisation created by *Bugg's* case. A distinction between substantive and procedural invalidity will often be impossible or difficult to draw. Woolf LJ recognised that there may be cases in a grey area, eg cases of bad faith (see [1993] 2 All ER 815 at 827, [1993] QB 473 at 500). I fear that in reality the grey area covers a far greater terrain. In *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680 at 682, [1948] 1 KB 223 at 229 Lord Greene MR pointed out that different grounds of review 'run into one another'. A modern commentator has demonstrated the correctness of the proposition that grounds of judicial review have blurred edges and tend to overlap with comprehensive reference to leading cases: see Fordham *Judicial Review Handbook* (2nd edn, 1997) pp 514–521. Thus the taking into account by a decision maker of extraneous considerations is variously treated as substantive or procedural. Moreover, even Woolf LJ categorisation of procedural invalidity is controversial. Wade and Forsyth rightly point out that contrary to normal terminology Woolf LJ treated procedural invalidity as being not a matter of excess or abuse of power: *Wade and Forsyth on Administrative Law* (7th edn, 1994) p 323. Categorisation is an indispensable tool in the search for rationality and coherence in law. But the process of categorisation in accordance with *Bugg's* case which serves to carve out of the jurisdiction of criminal courts the power to decide on some issues pertinent to the guilt of a defendant, leads to a labyrinth of paths. It is nevertheless an inevitable consequence of *Bugg's* case that magistrates may have to rule on the satellite issue whether a particular challenge is substantive or procedural. That may involve hearing wide-ranging arguments. Even then there may be no clear cut answer. This is a factor militating against the pragmatic case on which Woolf LJ relied in *Bugg's* case.

The problems of categorisation pose not only practical difficulties. As Lord Nicholls of Birkenhead explained in *R v Wicks* they expose a fundamental problem. About the concluding passage in *Bugg's* case [1993] 2 All ER 815 at 827, [1993] QB 473 at 500 which I have quoted, he said:

'On this reasoning there is not only a boundary between the two different types of invalidity. There is also an imperative need for the boundary line to be fixed and crystal clear. There can be no room for an ambiguous grey area.

a On this reasoning the boundary is not merely concerned with identifying the proceedings in which, as a matter of procedure, the unlawfulness issue can best be raised. Rather, the boundary can represent the difference between committing a criminal offence and not committing a criminal offence. According to this reasoning, a decision on invalidity has sharply different consequences, so far as criminality is concerned, in the two types of case.

b Setting aside an impugned order for procedural invalidity, as distinct from substantive invalidity, has no effect on the criminality of earlier conduct. Despite a court decision that the order was not lawfully made, the defendant is still guilty of an offence, by reason of his prior conduct. Further, it would seem to follow that in the case of procedural invalidity, the accused could be convicted even after the order is set aside as having been made unlawfully,

c so long as the non-compliance occurred before the order was set aside. In cases of substantive invalidity the citizen can take the risk and disobey the order. If he does so, and the order is later held to be invalid, he will be innocent of any offence. In case of procedural invalidity, the citizen is not permitted to take this risk, however clear the irregularity may be.' (See [1997] 2 All ER 801 at 807, [1998] AC 92 at 108.)

d

I regard this reasoning as unanswerable. The rule of law requires a clear distinction to be made between what is lawful and what is unlawful. The distinction put forward in *Bugg's* case undermines this axiom of constitutional principle.

e Now I turn to modern developments in judicial review which were the principled grounds upon which Woolf LJ relied. The first and major factor for Woolf LJ was the proposition that except in 'flagrant' and 'outrageous' cases a statutory order, such as a byelaw, remains effective until it is quashed. This is a large topic on which there are confusing and contradictory dicta. It is not possible to review the subject in detail in the context of the present case. But I cannot

f accept the absolute proposition in *Bugg's* case without substantial qualification. Leaving to one side the separate topic of judicial review of non-legal powers exercised by non-statutory bodies, I see no reason to depart from the orthodox view that ultra vires is 'the central principle of administrative law' as *Wade and Forsyth* p 41 described it. Lord Browne-Wilkinson observed in *Page v Hull University Visitor* [1993] 1 All ER 97 at 107, [1993] AC 682 at 701:

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'The fundamental principle [of judicial review] is that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. In all cases ... this intervention ... is based on the proposition that such powers have been conferred on the decision maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a *Wednesbury* sense ... reasonably. If the decision maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is *Wednesbury* unreasonable, he is acting ultra vires his powers and therefore unlawfully ...'

h

j This is the essential constitutional underpinning of the statute based part of our administrative law. Nevertheless, I accept the reality that an unlawful byelaw is a fact and that it may in certain circumstances have legal consequences. The best explanation that I have seen is by Dr Forsyth, who summarised the position as follows in '*The metaphysic of nullity*' *invalidity, conceptual reasoning and the rule of law* p 159:



'... it has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. *The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act.* And it is determined by a analysis of the law against the background of the familiar proposition that an unlawful act is void.' (My emphasis.)

That seems to me a more accurate summary of the law as it has developed than the sweeping proposition in *Bugg's* case. And Dr Forsyth's explanation is entirely in keeping with the analysis of the formal validity of the enforcement notice in *R v Wicks* which was sufficient to determine the guilt of the defendant.

That brings me to a matter of principle and precedent. In my view the holding in *Bugg's* case is contrary to established judicial review principles established by decisions of high authority. The general rule of procedural exclusivity judicially created in *O'Reilly v Mackman* [1982] 3 All ER 1124, [1983] 2 AC 237 was at its birth recognised to be subject to exceptions, notably (but not restricted to the case) where the invalidity of the decision arises as a collateral matter in a claim for infringement of private rights. The purpose of the rule was stated to be prevention of an abuse of the process of the court, and that purpose is of prime importance in determining the reach of the general rule: compare *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 All ER 575 at 581, [1996] 1 WLR 48 at 57 per Lord Slynn of Hadley. Since *O'Reilly v Mackman* decisions of the House of Lords have made clear that the primary focus of the rule of procedural exclusivity is situations in which an individual's sole aim was to challenge a public law act or decision. It does not apply in a civil case when an individual seeks to establish private law rights which cannot be determined without an examination of the validity of a public law decision. Nor does it apply where a defendant in a civil case simply seeks to defend himself by questioning the validity of a public law decision. These propositions are established in the context of civil cases by four decisions of the House of Lords: *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 All ER 705, [1992] 1 AC 624, *Chief Adjudication Officer v Foster* [1993] 1 All ER 705, [1993] AC 754, *Wandsworth London BC v Winder* [1984] 3 All ER 976 esp at 981, [1985] AC 461 esp at 509–510 per Lord Fraser of Tullybelton and *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 All ER 575 esp at 581, [1996] 1 WLR 48 esp at 57 per Lord Slynn of Hadley. One would expect a defendant in a criminal case, where the liberty of the subject is at stake, to have no lesser rights. Provided that the invalidity of the byelaw is or maybe a defence to the charge a criminal case must be the paradigm of collateral or defensive challenge. And in *DPP v Hutchinson* [1990] 2 All ER 836, [1990] 2 AC 783, a criminal case, the House of Lords allowed a collateral challenge to delegated legislation. The judgment in *Bugg's* case in effect denies the right of defensive challenge in a criminal case. In my view the observations in *Bugg's* case are contrary to authority and principle.

There is, above all, another matter which strikes at the root of the decision in *Bugg's* case. That decision contemplates that, despite the invalidity of a byelaw and the fact that consistently with *R v Wicks* such invalidity may in a given case afford a defence to a charge, a magistrate court may not rule on the defence. Instead the magistrates may convict a defendant under the byelaw and punish him. That is an unacceptable consequence in a democracy based on the rule of

a law. It is true that *Bugg's* case allows the defendant to challenge the byelaw in judicial review proceedings. The defendant may, however, be out of time before he becomes aware of the existence of the byelaw. He may lack the resources to defend his interests in two courts. He may not be able to obtain legal aid for an application for leave to apply for judicial review. Leave to apply for judicial review may be refused. At a substantive hearing his scope for demanding examination of witnesses in the Divisional Court may be restricted. He may be denied a remedy on a discretionary basis. The possibility of judicial review will, therefore, in no way compensate him for the loss of *the right* to defend himself by a defensive challenge to the byelaw in cases where the invalidity of the byelaw might afford him with a defence to the charge. My Lords, with the utmost deference to eminent judges sitting in the Divisional Court I have to say the consequences of *Bugg's* case are too austere and indeed too authoritarian to be compatible with the traditions of the common law. In *Eshugbayi Eleko v Officer Administering the Government of Nigeria* [1931] AC 662 at 670, a habeas corpus case, Lord Atkin observed that 'no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice'. There is no reason why a defendant in a criminal trial should be in a worse position. And that seems to me to reflect the true spirit of the common law.

There is no good reason why a defendant in a criminal case should be precluded from arguing that a byelaw is invalid where that could afford him with a defence. Sometimes his challenge may be defeated by special statutory provisions on analogy with the decision in *R v Wicks*. The defence may fail because the relevant statutory provisions are held to be directory rather than mandatory. It may be held that substantial compliance is sufficient. But, if an issue as to the procedural validity of a byelaw is raised, the trial court must rule on it.

#### V. *Subsidiary points arising from Bugg's case*

For the sake of completeness I need to direct attention briefly to three subsidiary matters mentioned in *Bugg's* case. First, Woolf LJ quoted a passage from Lord Diplock's speech in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1974] 2 All ER 1128 at 1154, [1975] AC 295 at 366 about the presumption that subordinate legislation is valid: see Woolf LJ [1993] 2 All ER 815 at 821, [1993] QB 473 at 493. As Lord Hoffmann explained in *R v Wicks* [1997] 2 All ER 801 at 814, [1998] AC 92 at 116 the context of the *Hoffmann-La Roche* case shows that the presumption of validity is not more than an evidential matter at the interlocutory stage. There is no *rule* that lends validity to invalid acts. In a practical world, however, a court will usually assume that subordinate legislation, and administrative acts, are valid unless it is persuaded otherwise. Secondly, Woolf LJ ([1993] 2 All ER 815 at 822, [1993] QB 473 at 494) said that 'in the case of the substantive invalidity an applicant need only show the invalidity whereas in the case of procedural invalidity there is also the need for the applicant to show that he has suffered substantial prejudice'. As formulated I am unable to accept this proposition. Let me pose two cases: one a breach of a duty to consult before the making of a byelaw and the other a breach of a duty to give a hearing before making an administrative decision. In both cases that establishes the ground of review. It is true that cases could occur where it might be right in regard to an established ground of judicial review to refuse a discretionary remedy and in that respect absence of prejudice may be a relevant factor: see e.g. *Ridge v Baldwin* [1963] 2 All ER 66, [1964] AC 40 and compare Bingham LJ's

reasons in *R v Chief Constable of the Thames Valley Police, ex p Cotton* [1990] IRLR 344, as to why denial of a remedy as a matter of discretion in such a case should be a rarity. But that is altogether different from saying that prejudice is an element that an applicant must prove to establish a ground of review. Thirdly, Woolf LJ ([1993] 2 All ER 815 at 821–822, [1993] QB 473 at 493) commented on the expansion of the circumstances in which courts will intervene to quash decisions. This cannot, however, be a principled ground for carving away by judicial decision part of the jurisdiction of magistrates' courts. Nor can the powers of magistrates to rule on the lawfulness of byelaws be deemed to have been frozen at some date in the past.

#### VI. *The Divisional Court decision in the present case*

It is perhaps the recognition of the difficulties inherent in the distinction drawn between substantive and procedural invalidity in *Bugg's* case that led Auld LJ to extend the scope of the ruling in *Bugg's* case by holding that all questions of invalidity of subordinate legislation and administrative decisions should be determined only in judicial review proceedings. Auld LJ based his decision entirely on the pragmatic grounds of the inconvenience of magistrates deciding such issues. Auld LJ said that it 'would be to beckon chaos' to permit such challenges in criminal courts. While I accept that there is force in the point that it would be convenient if all public law issues could be decided in the Divisional Court, it seems to me that Auld LJ came to an unduly pessimistic conclusion. Moreover, he failed to take into account counter arguments. Like Lloyd LJ in *R v Crown Court at Reading, ex p Hutchinson* [1988] 1 All ER 333, [1988] QB 384 and Lord Hoffmann in *R v Wicks* [1997] 2 All ER 801 at 814, [1998] AC 92 at 116, I am impressed with the following policy considerations put forward by a Greenham Common defendant in *Ex p Hutchinson* [1988] 1 All ER 333 at 337, [1988] QB 384 at 392:

'Coming to London to the High Court is inconvenient and expensive. Byelaws are generally local laws which have been made for local people to do with local concerns. Magistrates' courts are local courts and there is one in every town of any size in England. The cost of proceedings in a magistrates' court are far less than in the High Court. I believe this egalitarian aspect of seeking recourse to the law in a magistrates' court to be an important sign of the availability of justice for all.'

Moreover, allowing a collateral or defensive challenge 'avoids a cumbrous duplicity of proceedings which could only add to the already overburdened list of applications for judicial review awaiting determination in the Divisional Court' as Lord Bridge of Harwich put it in *Chief Adjudication Officer v Foster* [1993] 1 All ER 705 at 712–713, [1993] AC 754 at 766–767. In any event, expediency is not a sufficient and proper basis for taking away by judicial decision part of the jurisdiction of magistrates' courts to rule on issues pertinent to the guilt or innocence of defendants. Moreover, the ruling of the Divisional Court is contrary to principle and precedent which permits in civil and criminal cases a collateral or defensive challenge to subordinate legislation and administrative decisions. The result of the decision of the Divisional Court is that magistrates' courts will sometimes be obliged to convict defendants and to punish them despite the fact that the invalidity of the byelaw or order on which the prosecution is based affords the defendant an answer to the charge. Subject to the qualification enunciated in *R v Wicks* such a view of the law involves an injustice which cannot be tolerated in our criminal justice system.



a It follows that the stipendiary magistrate erred in ruling that the issues raised by Mr Boddington were beyond his jurisdiction. It further follows that the Divisional Court erred in ruling that the issues raised by Mr Boddington could only be determined in judicial review proceedings. Mr Boddington was entitled at the criminal trial to challenge the relevant byelaw and the administrative decision implementing the ban on smoking. In these circumstances Mr b Boddington is now entitled to a ruling on his submissions.

#### VII. *Mr Boddington's arguments*

The issues raised by the underlying dispute are not difficult to determine. They do not justify elaborate exposition. Byelaw 20 can quite naturally as a matter of ordinary language be accommodated within the wide words 'with c respect to the smoking of tobacco in railway carriages' in s 67. In my view the byelaw is valid. That leads to the attack on the administrative decision. It is true that the administrative decision interferes with the liberty of Mr Boddington and other smokers. On the other hand, there is a conflicting interest: NSC were entitled to take the view that many passengers do not wish to be exposed to tobacco fumes even in one carriage on overcrowded trains. If NSC had d maintained its previous policy, which permitted some smoking on its trains, that decision would not have been vulnerable to judicial review. The decision to impose the general ban is also within the range of reasonable decisions open to a decision-maker. It follows that there is no sustainable ground on which the validity of the administrative decision can be challenged.

#### e VIII. *Legislative reform*

Subject to suitable and effective safeguards to protect the individual, there is a case for legislation providing for a discretionary transfer by a criminal court of public law issues to the Divisional Court. But any such reform must confront the problem created by the fact that leave to apply for judicial review is required, and f that the remedies are discretionary. Those features of judicial review procedure cannot readily be reconciled with the need to ensure justice in accordance with law to a defendant in a criminal trial. Moreover, it will be necessary to take into consideration the countervailing arguments of the type put forward by the Greenham Common defendant in *Ex p Hutchinson* and to those mentioned by Lord Bridge of Harwich in *Chief Adjudication Officer v Foster*. But, above all, it g must be borne in mind that there 'are grave objections to giving courts discretion to decide whether governmental action is lawful or unlawful' see *Wade on Administrative Law* (6th edn, 1988) p 354. In my view any reform must take account of such concerns.

#### h IX. *The disposal of the appeal*

Mr Boddington has vindicated his right to challenge the byelaw and the administrative decision of which he complained. But his defence has been rejected. I would therefore dismiss the appeal.

j **LORD HOFFMANN.** My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Irvine of Lairg LC and Lord Steyn. For the reasons they have given I, too, would dismiss the appeal.

*Appeal dismissed.*

# United Mizrahi Bank Ltd v Doherty and others

CHANCERY DIVISION

MICHAEL BURTON QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

28 NOVEMBER 1997

*Practice – Pre-trial relief – Mareva injunction – Third party interests – Plaintiff bank bringing proceedings against defendants for breach of trust and obtaining worldwide Mareva injunction – Proviso to injunction allowing for defendants' reasonable legal expenses – Whether expenditure of moneys under proviso could amount to further breach of trust – Whether recipient of moneys would be in breach of constructive trust as a result of knowing receipt or dishonest assistance.*

The first defendant, D, who worked for the plaintiff bank, was dismissed for breach of his duty towards them. The bank alleged that D had procured customers who entered into transactions with the bank to make payments to third party entities for his benefit. It also maintained that the funds which D had wrongfully obtained from the customers had been siphoned off to offshore entities and had ended up in the hands of his wife (the fifth defendant) and certain companies. The funds were then used for the purchase of properties which became the subject matter of the bank's application to the court for breach of trust against D and in constructive trust and tracing against the other defendants. The court subsequently granted the bank a worldwide Mareva injunction, freezing the assets held by Mr and Mrs D, subject to certain financial limits and including an allowance for reasonable living expenses and legal costs. Thereafter, Mr and Mrs D sought a declaration from the court that they would not be in breach of the Mareva order by utilising certain assets to fund their legal expenses of defending the action. They were concerned that, if they expended moneys, as permitted under the proviso to the Mareva injunction, it could nevertheless be suggested that they were expending funds which might turn out to be the bank's property, such that the expenditure of those moneys could amount to a further breach of trust and that the recipients of the moneys, such as their solicitors, might be alleged to be in breach of constructive trust as a result of knowing receipt or dishonest assistance. The judge ordered that the defendants would not be in breach of the Mareva order by utilising certain assets held by them to fund their reasonable legal costs, but added a proviso that nothing in his order should deprive the bank of any proprietary claim it had to those assets. The defendants issued a fresh notice of motion seeking the court's sanction that the disposal of certain assets for the purpose of funding their reasonable legal costs could not thereafter be a continuation or perpetuation of a breach of trust or constructive trust as against the bank.

**Held** – Where a plaintiff brought a proprietary claim against a defendant, who had been permitted by the court to incur reasonable legal expenses, that permission was no guarantee for the recipients of the moneys that they would be protected from a possible future claim in constructive trust for knowing receipt should the plaintiff establish his claim. Such permission merely allowed the defendant so to use the moneys without being in contempt of court for breach of an order otherwise prohibiting the disposal of his assets. Accordingly, the proviso to the Mareva order entitling the defendants to cover their reasonable legal costs

a only ensured that they would not be in breach of the order freezing their assets. It did not provide the defendants' solicitors with any guarantee, should the bank be successful in establishing a proprietary claim against the defendants, that a claim in constructive trust would not be made against them for the moneys paid for their services in defending the action. It followed that the order sought by the defendants would be refused (see p 236 *d e*, p 239 *g* and p 240 *f to j*, post).

## b Notes

For Mareva injunctions, see 37 *Halsbury's Laws* (4th edn) para 362, and for cases on the subject, see 28(4) *Digest* (2nd reissue) 197–214, 5326–5392.

## Cases referred to in judgment

- c *Cala Cristal SA v Emran Al-Borno* (Mubarak Abdulaziz al Hassawi, third party) (1994) Times, 6 May.
- Carl-Zeiss-Stiftung v Herbert Smith & Co (a firm)* (No 2) [1969] 2 All ER 367, [1969] 2 Ch 276, [1969] 2 WLR 427, CA.
- Chandler v Church* (21 December 1987, unreported), Ch D.
- Finers (a firm) v Miro* [1991] 1 All ER 182, [1991] 1 WLR 35, CA.
- d *Gamlen Chemical Co (UK) Ltd v Rochem Ltd* [1979] CA Transcript 777.
- PCW (Underwriting Agencies) Ltd v Dixon* [1983] 2 All ER 158; varied [1983] 2 All ER 697n, CA.
- Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3 All ER 97, [1995] 2 AC 378, [1995] 3 WLR 64, PC.
- e *Sundt Wrigley & Co Ltd v Wrigley* [1993] CA Transcript 685.
- Westdock Realisations Ltd, Re* [1988] BCLC 354.
- Xylas v Khanna* [1992] CA Transcript 1036.

## Cases also cited or referred to in skeleton arguments

- A v C* [1980] 2 All ER 347, [1981] QB 956.
- f *A v C* (No 2) [1981] 2 All ER 126, [1981] QB 961.
- Alsop Wilkinson (a firm) v Neary* [1995] 1 All ER 431, [1996] 1 WLR 1220.
- Atlas Maritime Co SA v Avalon Maritime Ltd, The Coral Rose* (No 3) [1991] 4 All ER 783, [1981] 1 WLR 917, CA.
- Biddencare Ltd, Re* [1994] 2 BCLC 160.
- g *National Anti-Vivisection Society Ltd v Duddington* (1989) Times, 23 November.

## Motion

- By a notice of motion dated 24 November 1997, the first defendant, John Doherty, and his wife, the fifth defendant, Carmel Jacqueline Doherty, sought an order that notwithstanding the alleged proprietary claim of the plaintiff, United Mizrahi Bank Ltd, to various properties held by the defendants, Mrs Doherty was at liberty to sell one property registered in her name and apply the proceeds of sale in discharge of the legal costs of their solicitors. The facts are set out in the judgment.

- j *Jonathan Crow* (instructed by *Lewis Silkin*) for the defendants.
- David Richards QC* and *Matthew Collings* (instructed by *Nabarro Nathanson*) for the plaintiff.

**MICHAEL BURTON QC.** This is an application on motion brought by the first and fifth defendants, Mr and Mrs Doherty, against the plaintiff, United Mizrahi Bank Ltd. Their notice of motion is in somewhat unusual form, and their



application is an important one which has deserved and obtained very careful development from counsel instructed on both sides. a

The motion sought an order that, notwithstanding the plaintiff's alleged proprietary claim to the whole or a part of the property situate at and known as 21 Kingsbridge Road, Bishop's Stortford, currently registered in the name of Mrs Doherty, and to the net proceeds of sale of certain other properties formerly registered in the name of a company called Jarod Partnership Ltd, currently held by Messrs Lewis Silkin (who are the solicitors to the first and fifth defendants), the fifth defendant, Mrs Doherty, be at liberty to sell the property to Jarod Partnership Ltd at a specified price, and to apply the proceeds of sale in the due discharge of the past and future legal costs of the first and fifth defendants, Mr and Mrs Doherty, incurred by them to their solicitors, Lewis Silkin. b

The claim by the plaintiff bank against Mr Doherty arises from his employment by the bank which led to his eventual dismissal on 12 November 1995 and its allegation against him that he acted in breach of his duty towards the bank, in particular by procuring customers who entered into transactions with the bank to make payments to third party entities for, as the plaintiff asserts, the benefit of Mr Doherty. The money which the plaintiff alleges he thus wrongfully obtained from the customers has been, as the plaintiff asserts, siphoned off to offshore entities, and has ended up in the hands of his wife and certain companies, and has been used for the purchase of properties, including properties the subject matter of this application. The plaintiff bank has thus a claim for breach of trust against the first defendant and in constructive trust and tracing against the other defendants. c

There was a notice of motion brought on 20 November 1997 before Rattee J also by Mr and Mrs Doherty which sought a declaration that the defendants would not be in breach of the order of Robert Walker J dated 8 November 1996 by utilising certain assets held by them to fund their legal expenses of the action. This order of Robert Walker J was a Mareva injunction freezing the entirety of their assets in this country and abroad, subject to certain financial limits, and incorporating the usual provisos, including the fact that they were entitled to spend £800 per week on living expenses plus their reasonable legal expenses. The Mareva order included certain specific proprietary injunctions relating to particular funds, but was not in terms aimed at any of the properties the subject matter of this application, or indeed the application to Rattee J. d

The concern that the defendants had before Rattee J, and still have today, is that if they expend moneys, which they are permitted to do under the proviso to the order of Robert Walker J, it will nevertheless be suggested that they are expending moneys which may turn out to be the property of the plaintiff bank, such that there may hereafter be a suggestion that the expenditure of those moneys would be a further breach of trust and that the recipients of those moneys, such as for example Lewis Silkin, might be alleged to be in breach of constructive trust as a result of knowing receipt or, although this does appear wholly unlikely, dishonest assistance. e

The hearing before Rattee J ended very abruptly because the plaintiff pointed out that it had no objection to the use of the assets in question for the purpose of legal costs so far as there could be any suggestion that there was a breach of the Mareva order because it asserted that, as there was a specific proviso allowing the expenditure of legal costs, there could not be a breach of the order in the defendants so doing. Consequently, Rattee J was persuaded to make an order that Mr and Mrs Doherty should not be in breach of the order of Robert Walker J f

a dated 8 November 1996, by utilising certain assets held by them to fund their reasonable legal expenses of defending the action. But he added the proviso that nothing in that order should deprive the plaintiff of any proprietary claim it might have to those assets. That, of course, did not satisfy the needs and concerns of Mr and Mrs Doherty and Lewis Silkin, but it was all they could obtain on the basis of the notice of motion before Rattee J. Consequently, they have issued this fresh notice of motion which has come on before me today, effectively seeking the court's determination that the expenditure of such costs thus allowed by the order should deprive the plaintiff of such claim.

b It is of course wholly familiar territory for a court to be faced with a situation in which a defendant is subject to a Mareva injunction which either covers the entirety, or at any rate a very substantial part, of his or her assets, and then needs to spend money on legal costs, which is usually provided for in a proviso to the order. There are, however, occasions when a plaintiff has resisted the incorporation of such a proviso, or at any rate has insisted on some limitation to the proviso, and then the court has had to decide whether the defendant should be permitted to spend money on legal costs notwithstanding the terms of the order. There has been a number of cases in which the court's jurisprudence has been developed on the subject of when it is appropriate to allow legal costs to be incurred even if they came to such a substantial amount that what was known of the defendant's assets appeared likely to be depleted such that the plaintiff would be left with little or nothing to execute against when it came to execution if he were successful at trial.

e It also came to be recognised that there might be a distinction between cases where there was an injunction based on a remedy in damages and cases where the injunction was based in whole or in part on some proprietary claim. In the latter case not only could it be said that the expenditure, pending trial, on living expenses and legal costs might deplete the only available pot for execution by the plaintiff (the purpose of the Mareva being to preserve so much as possible pending trial), but, further, if the plaintiff succeeded in establishing in whole or in part a proprietary remedy at trial not only might there be nothing left, but the money that would have been being expended in the meanwhile would have been the plaintiff's own money; thus to add insult to injury, if the defendant on that basis were unsuccessful, he would not only have committed originally some conversion or breach of trust against the plaintiff, but then even that part of the plaintiff's property which was still left at the outset of proceedings would have been dissipated by the time it came to the trial; and the legal costs expended by the defendant in making it more difficult for the plaintiff to obtain his eventual successful judgment would have been paid for by the plaintiff, out of the plaintiff's own moneys.

h It was thus recognised that there was, perhaps, a more difficult task for the court to perform in deciding whether the defendant should be given an unfettered right to reasonable legal expenses in a claim where the injunction was in whole or in part a proprietary one, and the first authority in which that was considered was *PCW (Underwriting Agencies) Ltd v Dixon* [1983] 2 All ER 158, a decision of Lloyd J. In words which are well familiar now to the courts he said (at 165):

j 'In my view justice and convenience require in the present case that the first defendant should be allowed the means of defending himself, even if it could be said that the plaintiffs had laid claim to the whole of his assets as a

trust fund ... So whether the case is put on the basis of the Mareva jurisdiction or the so-called wider jurisdiction to trace in equity I reach the same conclusion.' a

There have, however, been more difficult cases for the courts to decide subsequently, some of which have been considered before me today. The decision of Harman J in *Chandler v Church* (21 December 1987, unreported) was one of the important first instance decisions in this regard. Harman J pointed out the balancing act that had to be carried out: b

'The litigant is entitled to be heard and have his day in court. The question for me is at whose expense should he have that day? I have to balance the fact that this is likely to be a long, heavy and complicated case involving vital matters for Mr Church, against the fact that if I grant this application and Mr Church is found to be a defaulting trustee he will have spent the whole trust fund in defending himself.' c

In *Xylas v Khanna* [1992] CA Transcript 1036 Neill LJ said:

'It is said by Mr Brodie that *Chandler v Church* can be distinguished because if the application there had been successful the whole of the fund that was claimed by the plaintiff would have been swallowed up by the defendant's costs. In this case, said Mr Brodie, it is quite a different situation because the application has now been limited and quantified in a way it was not before the judge. In my judgment, however, the principle is the same. If these are funds properly belonging to the plaintiffs, then the balancing exercise has to be undertaken to see whether it is right in the circumstances for the plaintiffs to be required in effect to finance the defendants' defence out of their own moneys.' d e

In that case the Court of Appeal upheld the judge and concluded that the moneys should not be spent, because in that case Mr Khanna was considered to be well able to defend himself. f

There have been two further decisions which I should mention. First, there is the important decision of *Sundt Wrigley & Co Ltd v Wrigley* [1993] CA Transcript 685, in which Bingham MR gave a detailed judgment, with which Mann and Peter Gibson LJ agreed, considering a first instance decision in which very careful consideration had been given to a number of questions, including the question of whether a litigant should be driven from the judgment seat by not having legal representation on the one hand, or whether the fund should be expended on the other. He concluded that it was only in an exceptional case, where the merits could be gone into for the purpose of satisfying a court that the proprietary claim was so strong that it could be demonstrated that such proprietary claim was well founded at an interlocutory stage, that a defendant should not be free to draw on enjoined funds to finance his defence. Absent the intervention of such considerations, the ordinary balancing act would apply, albeit that the question was formulated by Bingham MR in this way: g h

'Is there so great a risk of injustice for the defendant if he is not represented as to justify recourse to enjoin funds which may be shown to be the plaintiff's funds held by the defendant as trustee or constructed trustee?' j

He further said:



a 'A careful and anxious judgment has to be made in a case where a proprietary claim is advanced by the plaintiff as to whether the injustice of permitting the use of the funds by the defendant is outweighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may turn out to be a successful defence.'

b Following the *Sundt Wrigley* case Ferris J in *Cala Cristal SA v Emran Al-Borno* (*Mubarak Abdulaziz al Hassawi*, third party) (1994) Times, 6 May developed and expanded the jurisdiction in ways which appear to me to be helpful. He considered the same general principles as in the *Sundt Wrigley* case but he then considered the order which he eventually made, whereby albeit that it appeared that all, or almost all, the assets available to the defendant were arguably the plaintiffs' or traceable by the plaintiffs, he was prepared to allow legal costs in that case of a very substantial amount to be incurred, but he would only do so subject to certain safeguards. The safeguards there imposed ought to be mentioned. He said:

d 'The first safeguard is that the defendants' offer to undertake to make good, out of funds to which the plaintiffs have no proprietary claims, any sums which are spent on costs which are found at the end of the day to have come out of property in which the plaintiffs have a good proprietary claim.'

e The second safeguard was that, having identified one particular property which looked as though it was clear of any allegation that the plaintiffs had a claim to it, he concluded that there ought to be security in respect of that property, by the grant of a charge in favour of the plaintiffs, securing the payment of what he called the 'replacement moneys' which would result in appropriate circumstances from the operation of the first safeguard.

f The last relevant safeguard which I would mention would be that he concluded that it was appropriate that, in the event of its being found at trial that the plaintiffs were entitled on a proprietary basis to any of the assets which would by then have been resorted to, or would be likely to be resorted to, for the payment of the solicitors' costs which were being allowed to be paid by the order, the plaintiffs, who would thus have become retrospectively the paying party, should be permitted to take part in a taxation; and thus he took such steps as would ensure that, if so required, the defendant's solicitor's costs would be taxed at the option of the plaintiffs on a solicitor and client basis, and that the plaintiffs should be enabled to attend upon such taxation and to make representations.

h Plainly in relation to a case in which it would appear on the evidence at the time of an interlocutory application in respect of the expenditure of legal costs that all, or almost all, the available assets of the defendant were, or were arguably if the plaintiff's claim succeeded, the assets of the plaintiff, if legal costs were to be expended those safeguards would appear to be sensible ones, certainly if sought by the plaintiff.

j The question, however, is what is the effect of such an order on the moneys that are thus expended on costs pursuant to a proviso permitting such expenditure, and that is really the main issue, if not the only issue, that has been canvassed before me today, and that question has not been expressly addressed in any of those decisions, and now falls for determination in terms.

Mr Richards QC for the plaintiff has sought to urge upon me that the notice of motion today is of a different procedural nature to that which was being considered in the applications to which I have referred. He pointed out that all

the applications and decisions to which I have referred occurred upon applications by the defendant for permission to incur legal costs, and that permission to incur legal costs was only given on the basis of certain provisos and after considerable legal argument. In this case, he says, this is not such an application because there is already a proviso in place. The plaintiff has agreed that there would be no contempt of court nor breach of any order if moneys were incurred on legal costs, and consequently there is no call for this kind of consideration at all.

I am unpersuaded by that. It seems to me that it is a pure matter of chance that there is in this case an unopposed proviso for the expenditure of legal costs at the choice of the plaintiff. But the argument that is occurring before me could just as well have occurred on the setting or formulation of a proviso, and indeed would in any event have occurred if the parties had thought about it or wanted to raise it on any of the applications in any of the previous decisions.

Similarly, for reasons which I will indicate, it seems to me that the question that Mr Crow is here raising is not one which is even limited to cases where there are injunctions either with or without provisos, but could and would apply in any case in which there is a claim by a plaintiff against the defendant, based on constructive trust or equivalent, that the defendant is holding its property.

The issue is, as indeed Rattee J made clear, not whether the defendants are permitted to use moneys to spend on legal costs, for they are so permitted so far as the order is concerned, but whether in so doing they are to have the court's sanction that such an act of disposal of the costs cannot hereafter be complained of either against them or against the recipient as being a continuation or perpetuation of a breach of trust or constructive trust as against the plaintiff.

The question that is being asked before me, it seems to me, could as well have been asked on any of the occasions when the matter has come before the court, for example in the *Sundt Wrigley* case, if the parties had asked themselves, or the court: 'By allowing the defendant to incur legal costs notwithstanding the injunction, are you, the court, also saying that the expenditure of those moneys cannot hereafter be complained about on the basis that it is an expenditure of the plaintiff's money?'

It may well be that the parties who left the court after those cases—and I am thinking particularly of the *Cala Cristal* case, in which I happen to have been involved as counsel, and particularly of the two sets of solicitors in that case who must have been extremely relieved to receive sanction to be paid what in that case were very substantial sums indeed—may well have left court thinking that they had not only had the sanction of the court to receive the moneys so far as the court order was concerned, but that there could be no complaint thereafter that they had received or expended them, on any other ground. But that is an implication or an inference which, if it was rightly or wrongly held by those parties, was never set out in any of the judgments, and Mr Richards now challenges it before me, and it is that which falls for my decision.

As I have indicated, it seems to me that, put baldly, such a question has nothing, or at any rate nothing necessarily, to do with the fact that there happen to be injunctions claimed in these proceedings. The situation would be exactly the same if a plaintiff brought an action against a defendant without seeking an injunction, based upon the assertion that funds which the defendants were in possession of were the plaintiff's property; and the solicitors of the defendants were concerned that the moneys that they were being paid by the defendants

a might be moneys which would turn out at the end of the day to be the plaintiff's moneys.

b That would arise in a case without an injunction, and it will have similarly arisen in all those cases to which I have referred where there has been an injunction. I am satisfied that in none of the cases to which reference has been made to me has there been any express consideration of the latter question, that is the question as to whether there was to be an exemption from the provisions of the law of constructive trust, as opposed to a sanctioning of what would otherwise have been contempt for breach of the order.

c Now, if there has been no express sanction, has there been an implied sanction for such exemption from breach of trust? Mr Crow points out the following. First of all, the language that is used in the cases, namely that the defendants should be allowed to expend moneys on legal costs and should not lose their legal representation etc, is certainly consistent with a suggestion that there should be no inhibition upon the expenditure of those legal costs, as there might otherwise be if there was the lingering concern on the part of the solicitors that they might be suggested thereafter to be constructed trustees.

d Secondly, the fundamental purpose behind the balancing act, if it came down on the side of permitting the expenditure of legal costs (rather than as in *Xylas v Khanna* [1992] CA Transcript 1036 concluding that justice would be done if no legal representation were permitted), was that the purpose was to *allow* such legal representation, and if the consequence were that all that was sanctioned was what would otherwise have been a breach of the order, leaving all other potential risks still in existence, then the order would not of itself have achieved the required aim of enabling the solicitors to continue. Indeed, Mr Crow tells me that his present instructions are that unless Lewis Silkin obtain from the court today the sanction that is sought in the notice of motion they would, or at any rate may, feel obliged to come off the record, thus leaving the defendants without legal representation when, on the face of the order, they are permitted to incur legal costs out of moneys which are otherwise covered by the order and which may otherwise turn out to be the plaintiff's.

g Thirdly, Mr Crow takes me to the decision in which he appeared as counsel in *Finers (a firm) v Miro* [1991] 1 All ER 182, [1991] 1 WLR 35 in the Court of Appeal. That was a case in which a solicitor concluded that his clients might be in breach of trust as against third parties and was himself in possession of substantial funds, and the solicitor went to the court for directions as to what to do with the funds, and after a contested application at first instance, and then on appeal, the Court of Appeal allowed moneys to be paid out of that fund for the purposes of the bringing or defending of legal proceedings. That, Mr Crow says, is an example of the court exercising its jurisdiction in a trust case to encourage legal representation, to achieve justice just as is, on the face of it, carried out in the balancing act in the *Mareva* or proprietary injunction cases to which I have referred.

j Mr Richards' submissions have been that there is no warrant for the court to grant a sanction in advance of this kind of nature, where the only sanction that is required is that there should be no breach of the order by expenditure of the legal costs. He refers to the very limited ambit of the court's jurisdiction to allow, pre-trial, and without any judgment as to the eventual merits, the expenditure of a trust fund, or an alleged trust fund, on the costs of one or other of the parties, and the most recent decision to which he refers is the decision of



Browne-Wilkinson V-C in *Re Westdock Realisations Ltd* [1988] BCLC 354. In that case Browne-Wilkinson V-C (at 359) concluded that—

‘the proper approach [is that in] general, claims arising for determination ... are ... hostile claims in which one or more parties are in dispute as to the ownership of property. It is litigation between rival claimants. In those circumstances one would expect that the costs would normally follow the event, the unsuccessful claimant paying not only his own costs but also the other side’s.’

In that class of case he concluded that it would not be appropriate to make an order that the costs of all parties, or in fact either side, should come out of the fund because, he said: ‘Unless satisfied that after trial a judge would be likely to make an order that the costs of all parties are to come out of the fund it cannot in general be right to make such an order at [the interlocutory] stage.’

He then turned to a different category of case and said (at 359–360):

‘However, there are many cases in which it is essential for the due administration of the liquidator’s or receiver’s duties to obtain a decision from the court. In such cases there are often large classes of creditors, contributors or other claimants, the exact membership of which class is often not easily established or even known, who be affected by such decision. In such a case the liquidator or receiver joins a representative respondent to argue the point on behalf of the class. Frequently the sum at stake for the individual respondent joined does not justify him incurring the costs involved in litigating the matter. As a result, in order to ensure that the matter is properly determined the costs of the representative respondents are frequently paid out of the fund.’

But in his judgment those were special cases in which it was necessary for the proper execution of the duties of the receiver or liquidator to have the matter determined, and a pre-emptive order as to costs is a necessary prerequisite to that determination being obtained.

Now, Browne-Wilkinson V-C made clear that that is not, as indeed Mr Richards conceded, a jurisdictional question. There are exceptional cases in which pre-emptive costs orders can be made which do not fall within that latter category and *Re Westdock Realisations Ltd* was concluded to be one of them. But it is quite plain that it is a very limited jurisdiction.

If Mr Crow be right, then this would not be a limited jurisdiction, and indeed what I referred to perhaps frivolously in the course of the hearing as a United Mizrahi Bank order would become common practice. It would be the case that in many cases where claims were brought by a plaintiff against a defendant in constructive trust, or conversion or if some proprietary claim were made, and the defendant were concerned, or more likely his solicitors were concerned, that the moneys with which he was paying his solicitor could turn out to be the plaintiff’s moneys, a pre-emptive United Mizrahi Bank order could be applied for.

That has never happened yet; certainly the nearest indicative case that has been shown to me is *Finers (a firm) v Miro* [1991] 1 All ER 182, [1991] 1 WLR 35. As I have indicated, I do not see any stopping point between on the one hand cases of injunctions or particular kinds of injunctions, applications for provisos, or applications for permissions to extend provisos, or clarify provisos, and on the other hand every case where a solicitor and/or a defendant is concerned that he may be putting the solicitor at risk of a claim in constructive trust.

a Such a far-reaching effect would not necessarily be something that should concern the court, although it would be, as I have indicated, the first such case, given that I do not believe that the matter has been considered in any of the authorities to which I have referred when, although they have considered such important questions as the need for defendants, particularly in injunction cases, to have solicitors, this aspect has never been considered.

b So not only would it be new, but it would also be potentially wide-ranging. There seem to me to be two important final factors which I must mention. The first is looked at from the point of view of Mr Crow and his submissions. Mr Crow points out that the possible result of my refusal of this order, indeed if he is right the probable result, will be that Mr and Mrs Doherty will lose the services of Lewis Silkin because they will or may be unprepared to continue to act. That, of course, would be extremely regrettable in relation to a case two months away from trial, but analysed by me as it has been I do not consider the situation to be different in this case, as I have indicated, from that in any other case. I hope that solicitors do not have to worry about a claim in constructive trust in any case, or certainly only in a rare one. Mr Richards himself has conceded that the ambit of a claim in constructive trust against solicitors in the light of such authorities as there were, at any rate before such changes in the law as there have been recently as a result of *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3 All ER 97, [1995] 2 AC 378, if that is going to affect matters at all (I am thinking of *Carl-Zeiss-Stiftung v Herbert Smith & Co (a firm) (No 2)* [1969] 2 All ER 367, [1969] 2 Ch 276 and of *Gamlen Chemical Co (UK) Ltd v Rochem Ltd* [1979] CA Transcript 777), is such that the risk of liability for solicitors is not overly great. I hope that is right. It certainly will be a matter for consideration hereafter, because it cannot be right in the interests of litigants that solicitors should be looking over their shoulder just because they are not able to be completely confident in their chances of success for their client, or just because the opposing litigant is busy writing or asserting that he or she has an unanswerable case. That should not, and I hope will not, prevent solicitors from acting for litigants in difficult cases.

f But, if that is a worry that solicitors have, it is a worry that they will have in all such cases, and not simply in cases where there are injunctions. In this case, as I have indicated, the defendants are permitted to expend money on legal costs even if it should turn out that the assets belong to the plaintiff so far as being in contempt is concerned, and therefore the question of whether there might be some claim in constructive trust will be no different in this case from that in any other similar case where there is no injunction.

g The second factor I approach from the point of view of Mr Richards' submissions. There may well be room for, if not a United Mizrahi Bank order, at any rate something similar to a Westdock Realisations order, in this kind of case. h It may be that Mr Crow and his clients have hit upon an area which is ripe for consideration. But it seems to me that such consideration cannot be given in the context of the kind of Sundt Wrigley application which here comes before the court, because those are applications inter partes between the plaintiff and the defendant in which the court, if I may say so with respect entirely rightly, has emphasised that the merits should not be gone into in great detail, or indeed in any detail, unless it is for the purpose of showing that, for example, the defence is virtually non-existent; and that the balance of justice should be considered rather than the merits, as in any injunctive situation.

i In that context it would be very difficult, if not impossible, to consider something along the lines of an application as occurred in *Finers (a firm) v Miro* [1991] 1 All ER 182, [1991] 1 WLR 35 and as might, perhaps, be appropriate in the

kind of situation I am here considering. It may be that in any kind of case, that is either an injunction case or a non-injunction case, a solicitor, who is concerned that he may be at risk of constructive trust liability, might wish to make application as a trustee or potential trustee for directions from the court as to whether he can go on acting. Now, if that were to happen then plainly the court would have to make specific provision for it, perhaps in circumstances in which the opposing litigant is not present, rather as in applications to go off the record, although that in itself would obviously raise its own difficulties; and, in any event, in circumstances of in camera or in chambers such as, it seems, was canvassed in *Finers (a firm) v Miro*. But if the court is to be asked in advance to sanction an act which would otherwise be a breach of trust, so that a potential third party would not be a constructive trustee who otherwise might have been, the court must be given the full picture.

I suggested in argument to Mr Crow that there may well be a difference between a solicitor who is simply finding it difficult to be confident that his client will succeed, perhaps even beginning to think that his client is going to lose on the one hand (situation A) and a solicitor who has information in his possession, which perhaps he is under no obligation to disclose, but which nevertheless leads him to conclude that his client is certain to lose (situation B). It seems to me wrong that the court should sanction blind in advance the conduct of the solicitor in situation B in the same way as the solicitor in situation A. But all that, of course, would come out in the wash afterwards, if the plaintiff were unsuccessful in recovering money in execution and wanted to seek to pursue a solicitor as a third party, as an extra defendant after judgment; and indeed there may well be in situation B grounds in addition for some kind of wasted costs order. So that is something that may well occur afterwards.

If there be jurisdiction for a solicitor to have that cleared up pre-emptively then it may well be there can be such cases. But in my view this is not such a case, namely a case in which the court has no idea whether there is any conceivable risk for the solicitors for the defendant. I could have no idea whether there is any danger such that it would be positively wrong to exempt that liability. In those circumstances I come to the conclusion that, sympathetic though I am in the particular facts of this case both to the solicitors and to the defendants (and, knowing, as I do, the solicitors in question, such as to believe that there is no possible risk of situation B in this case), and keen as I am that this action should go ahead in two months' time with legal representation on the part of the defendants, I am satisfied that it is not a case where I can or should say, in advance, that there would be no breach of trust by the expenditure of these moneys, and I content myself with saying, as Rattee J did, that so far as the existence of the injunction is concerned, it can be disregarded. The defendants can act as they would have done if there had been no injunction against expending legal costs on their defence to this action which will come to trial very shortly.

Therefore, I am not prepared to make the order that Mr Crow has sought.

*Motion dismissed.*

Celia Fox Barrister.



## Bacchiocchi v Academic Agency Ltd

COURT OF APPEAL, CIVIL DIVISION

SIMON BROWN, WARD LJ AND MOORE-BICK J

9, 20 FEBRUARY 1998

*Landlord and tenant – Business premises – Compensation for disturbance – Agreement by landlord and tenant excluding tenant's statutory right to compensation for disturbance – Restriction on such agreements – Agreement void if tenant occupying premises 'for the whole of the five years immediately preceding' expiry of lease – Tenant leaving premises 12 days before expiry of lease – Whether tenant occupying premises for five years immediately preceding expiry of lease – Whether agreement void – Whether compensation payable – Landlord and Tenant Act 1954, ss 37, 38(2).*

The tenant ran a restaurant from premises held by him under a 20-year lease dated 14 January 1974 to which Pt II of the Landlord and Tenant Act 1954 applied.

On 4 October 1993 the landlords served a notice under s 25 of the 1954 Act seeking to determine the tenancy on 8 April 1994 and stating that any application for a new tenancy would be opposed on the statutory grounds contained in paras (f) and (g) of s 30(1) of the Act. On 3 November 1993 the tenant served a counter-notice, stating that he was not willing to give up possession of the premises, and applied to court for an order for the grant of a new tenancy. He subsequently changed his mind and withdrew the application, having decided to retire from the restaurant business. By operation of s 64 of the Act, the tenancy was continued until 11 August 1994 and terminated on that date. The tenant, however, was mistakenly advised by his solicitors that the lease terminated on 29 July and made arrangements accordingly. He closed down his restaurant business on 23 July and on 29 July vacated the premises, which stood empty for 12 days until 11 August. The landlord held the tenant to that later date and he remained liable under the terms of the lease and for rent until then. By cl 4(7) of the lease the parties had contracted out of the obligation under s 37 of the Act to pay compensation for disturbance, but by s 38(2) that clause would be void if the tenant had occupied the premises for 'the whole of the five years immediately preceding the date on which [he was] to quit the holding'. The judge dismissed the tenant's application for compensation under s 37 on the ground that he had not been in occupation for the last 12 days of the tenancy. The tenant appealed.

**Held** – When determining whether a business tenant had occupied the premises for the whole of the five-year period immediately preceding the date on which he quit the holding for the purposes of s 38(2) of the 1954 Act, the court would be unlikely to find that business occupancy had ceased (or not started) where the business premises were empty for only a short period, whether mid term or before or after trading at either end of the lease, provided always that during that period there existed no rival for the role of business occupant and that the premises were not being used for some other non-business purpose. However, if the premises were left vacant for a matter of months, the court would be readier to conclude that the reason for that period of closure was not an incident in the ordinary course or conduct of business life and that the thread of continuity had been broken. In the instant case, the tenant, having planned to vacate the premises in late July through a misunderstanding of when the lease was to end,

found it commercially sensible to adhere to that plan: that was an incident of normal business life. Accordingly, the requirement in s 38(2) was satisfied, and that section operated to render void the clause in the lease excluding the tenant from compensation under s 37 of the Act. The appeal would therefore be allowed (see p 249 *h* to p 250 *d*, p 253 *g* to p 254 *a e* and p 256 *c* to *h*, post).

*Dept of the Environment v Royal Insurance plc* [1987] 1 EGLR 83 overruled.

## Notes

For compensation for disturbance, see 27(1) *Halsbury's Laws* (4th edn reissue) paras 607–610.

For agreements purporting to exclude the right to compensation, see *ibid* para 561.

For the Landlord and Tenant Act 1954, ss 25, 30, 37, 38, 64, see 23 *Halsbury's Statutes* (4th edn) (1989 reissue) 147, 152, 164, 168, 192.

## Cases referred to in judgments

*Aspinall Finance Ltd v Viscount Chelsea* [1989] 1 EGLR 103.

*Caplan Ltd (I & H) v Caplan (No 2)* [1963] 2 All ER 930, [1963] 1 WLR 1247.

*Cardshops Ltd v John Lewis Properties Ltd* [1982] 3 All ER 746, [1983] QB 161, [1982] 3 WLR 806, CA.

*Dept of the Environment v Royal Insurance plc* [1987] 1 EGLR 83.

*Graysim Holdings Ltd v P & O Property Holdings Ltd* [1995] 4 All ER 831, [1996] AC 329, [1995] 3 WLR 854, HL.

*Hancock & Willis (a firm) v GMS Syndicate Ltd* [1983] 1 EGLR 70, CA.

*Morrison Holdings Ltd v Manders Property (Wolverhampton) Ltd* [1976] 2 All ER 205, [1976] 1 WLR 533, CA.

*Teasdale v Walker* [1958] 3 All ER 307, [1958] 1 WLR 1076, CA.

*Wandsworth London BC v Singh* (1991) 89 LGR 737, CA.

## Case also cited or referred to in skeleton arguments

*Findlay v Railway Executive* [1950] 2 All ER 969, CA.

## Appeal

The tenant, Glauco Bacchiocchi, appealed from the decision of Judge Bursell QC sitting as a judge of the High Court in Bristol on 21 February 1997, whereby he held that the tenant was not entitled to statutory compensation for disturbance under s 37 of the Landlord and Tenant Act 1954 from the landlords, Academic Agency Ltd, following the termination of his business tenancy on 11 August 1994. The facts are set out in the judgment of Simon Brown LJ.

*Edward Denehan* (instructed by *Withy King & Lee*, Bath) for the appellant.

*Richard Stead* (instructed by *McCloy & Co*, Bradford on Avon) for the respondents.

*Cur adv vult*

20 February 1998. The following judgments were delivered.

**SIMON BROWN LJ.** This is an appeal from that part of the order of Judge Bursell QC sitting as a judge of the High Court in Bristol on 21 February 1997 which held the appellant not entitled to statutory compensation for disturbance following the termination of his business tenancy. It raises an interesting question under s 38(2) of the Landlord and Tenant Act 1954.

a The basic facts are these. From 1974 to 1994 the appellant, Glauco Bacchiocchi, ran a restaurant, 'La Pentola', in the basement and cellars at 14 North Parade, Bath. He was the tenant of those premises under a 20-year lease dated 14 January 1974 until 23 April 1983 with a partner and thereafter alone. The respondents, Academic Agency Ltd, became his landlords on 11 July 1980. The annual rent, reviewable at five-yearly intervals, started at £900 and rose finally to £2,875. The tenancy was one to which Pt II of the Landlord and Tenant Act 1954 applied. All statutory references hereafter are to that Act.

b On 4 October 1993 the respondents served a s 25 notice seeking to determine the tenancy on 8 April 1994, and stating that any application by the appellant for a new tenancy would be opposed on the statutory grounds contained in paras (f) and (g) of s 30(1). On 3 November 1993 the appellant served a counter-notice c stating that he was not willing to give up possession of the premises, and on 8 December 1993 he applied to the Bath County Court for an order for the grant of a new tenancy. On 5 January 1994 the respondents filed an answer stating that they would not oppose the appellant's application for a new tenancy but objecting to the terms proposed. The appellant too then changed his mind and d on 29 April 1994 applied to the court for leave to withdraw his application. On 11 May 1994 the appellant formally discontinued his application by notice under CCR Ord 18, r 1. In the result, by operation of s 64, the tenancy was continued until 11 August 1994 and terminated on that date.

e Generally speaking, a tenant in those circumstances would be entitled to compensation under s 37—indeed, having occupied the premises for (more than) 14 years, to compensation calculated at twice the basic rate. It is common ground here that such compensation, if due, would amount to £15,030. The respondents, however, contend, and the judge below held, that no such compensation is payable: the right to it was excluded under the lease. True, s 38(2) provides that in certain circumstances such an exclusion is void. That, however, depends upon f the premises having been occupied for the purposes of the business 'during the whole of the five years immediately preceding the date on which the tenant ... is to quit the holding' (here 11 August 1994). Critically for present purposes, the appellant had vacated the premises and handed over the keys to his solicitors on Friday, 29 July 1994. During the 12 days between then and 11 August 1994, so the judge held, the appellant was not in occupation of the premises. Those were the g days 'immediately preceding' 11 August 1994. It accordingly followed that the appellant had not been in occupation during the whole of the required five-year period. Was the judge right to take that view? This is the critical issue raised upon this appeal.

h With that brief introduction let me at once set out the relevant clause in the lease and the material parts of ss 37 and 38. Clause 4(7) of the lease provided:

j 'If the tenancy hereby granted is within Part II of the Landlord and Tenant Act 1954 then subject to the provisions of sub-section (2) of Section 38 of the Act neither the Tenant nor any assignee or underlessee of the term hereby granted or of the demised premises shall be entitled on quitting the demised premises to any compensation under Section 37 of this same Act ...'

Section 37, so far as material, provides:

'(1) ... where no other ground is specified in the landlord's notice under section 25 ... than those specified in the said paragraphs (e), (f) and (g) [of s 30(1)] and either no application under ... section 24 is made or such an



application is withdrawn, then ... the tenant shall be entitled on quitting the holding to recover from the landlord by way of compensation an amount determined in accordance with the following provisions of this section. a

(2) ... the said amount shall be as follows, that is to say,—(a) where the conditions specified in the next following subsection are satisfied it shall be the product of the appropriate multiplier and twice the rateable value of the holding. b

(3) The said conditions are—(a) that, during the whole of the fourteen years immediately preceding the termination of the current tenancy, premises being or comprised in the holding have been occupied for the purposes of a business carried on by the occupier or for those and other purposes ... c

Section 38, so far as material, provides:

‘... (2) Where—(a) during the whole of the five years immediately preceding the date on which the tenant under a tenancy to which this Part of this Act applies is to quit the holding, premises being or comprised in the holding have been occupied for the purposes of a business carried on by the occupier or for those and other purposes, and ... any agreement (whether contained in the instrument creating the tenancy or not and whether made before or after the termination of that tenancy) which purports to exclude or reduce compensation under the last foregoing section shall to that extent be void ... d

(3) In a case not falling within the last foregoing subsection the right to compensation conferred by the last foregoing section may be excluded or modified by agreement.’ e

We were referred to a number of cases decided under Pt II of the 1954 Act which consider the question of what constitutes the occupation of business premises. All but one of these, one should note, were concerned with the basic question arising under s 23, the question whether, when the contractual term ends, the tenant is occupying the premises for business purposes and thus entitled under the Act to continue his tenancy. The question of occupation in the present case arises in a rather different context; here by definition there is to be no continuation of the tenancy. It is nevertheless important to discover the central principles emerging from the s 23 authorities. f

I start with the most authoritative of the cases, the recent decision of the House of Lords in *Graysim Holdings Ltd v P & O Property Holdings Ltd* [1995] 4 All ER 831, [1996] AC 329 far removed though that case was from the present. The question there was not whether anyone was in business occupation of the premises but rather which amongst competing candidates for that role was properly to be regarded as occupier. Was it the respondent, the tenant of the enclosed market hall, or was it the individual stallholders who had exclusive possession of their stalls? In holding the latter, Lord Nicholls ([1995] 4 All ER 831 at 835, [1996] AC 329 at 334–335) in the single reasoned speech made, under the heading ‘Occupied’, these important general observations: g

‘As has been said on many occasions, the concept of occupation is not a legal term of art, with one single and precise legal meaning applicable in all circumstances. Its meaning varies according to the subject matter. Like most ordinary English words, “occupied”, and corresponding expressions such as occupier and occupation, have different shades of meaning according h

a to the context in which they are being used ... In many factual situations questions of occupation will attract the same answer, whatever the context. A tenant living alone in a detached house under a residential lease would be regarded as the sole occupier of the house. It would need an unusual context to point to any other answer. But the answer in situations which are not so clear cut is affected by the purpose for which the concept of occupation is being used. In such situations the purpose for which the distinction between occupation and non-occupation is being drawn, and the consequences flowing from the presence or absence of occupation, will throw light on what sort of activities are or are not to be regarded as occupation in the particular context. In Pt II of the 1954 Act "occupied" and "occupied for the purposes of a business carried on by him" are expressions employed as the means of identifying whether a tenancy is a business tenancy and whether the property is part of the holding and qualifies for inclusion in the grant of a new tenancy. In this context "occupied" points to some business activity by the tenant on the property in question. The Act seeks to protect the tenant in his continuing use of the property for the purposes of that activity. Thus the word carries a connotation of some physical use of the property by the tenant for the purposes of his business. This is a good starting point but it is not a test which will provide an answer in all cases. Occasionally the question will be whether the property is occupied or unoccupied. *Wandsworth London BC v Singh* (1991) 89 LGR 737, concerning a small public open space at St John's Hill in Wandsworth, is an example of this. More usually, however, when disputes arise about business tenancies there is no question of the property being unoccupied. Rather, there is competition for the role of occupier.'

The present, of course, is one of those 'occasional' cases where the question is 'whether property is occupied or unoccupied'. Amongst other such cases referred to us were *I & H Caplan Ltd v Caplan* (No 2) [1963] 2 All ER 930, [1963] 1 WLR 1247, *Morrison Holdings Ltd v Manders Property (Wolverhampton) Ltd* [1976] 2 All ER 205, [1976] 1 WLR 533, *Hancock & Willis (a firm) v GMS Syndicate Ltd* [1983] 1 EGLR 70 and *Wandsworth London BC v Singh* (1991) 89 LGR 737 (the one referred to by Lord Nicholls).

I propose to deal with these cases very briefly indeed, quoting only very selectively from the judgments.

#### *I & H Caplan Ltd v Caplan*

For some months whilst the tenants' right to a new tenancy was being litigated they ceased trading and vacated the premises. Having succeeded before the Court of Appeal they started trading afresh. Cross J subsequently held that although it was 'distinctly a border-line case', the 'thread of continuity' was not broken. He said ([1963] 2 All ER 930 at 938, [1963] 1 WLR 1247 at 1260):

'I think it is quite clear that a tenant does not lose the protection of Part 2 of the Landlord and Tenant Act, 1954, simply by ceasing physically to occupy the premises. They may well continue to be occupied for the purposes of the tenants business although they are de facto empty for some period of time. One rather obvious example would be if there was a need for urgent structural repairs and the tenant had to go out of physical occupation in order to enable them to be effected. Another example is that which the Court of Appeal had to deal with in *Teasdale v. Walker* ([1958] 3 All ER 307,

[1958] 1 WLR 1076). There premises were only occupied during discontinuous periods: they were closed and empty in the winter and only used in the summer. On the other hand, as the Court of Appeal pointed out, a mere intention to resume occupation if a new tenancy is granted will not preserve the continuity of the business user if the thread has once been definitely broken.' a

*Morrison Holdings Ltd v Manders Property (Wolverhampton) Ltd* b

The tenants had to cease trading as a result of a catastrophic fire next door. They required the landlords to reinstate and expressed their desire to continue trading as soon as possible. Following the landlord's demolition and reconstruction of the premises the tenants were held entitled to a new tenancy. Scarman LJ approved what Cross J had said in *Caplan's* case, and continued ([1976] 2 All ER 205 at 210, [1976] 1 WLR 533 at 540): c

'I would put it in my own words as follows: in order to apply for a new tenancy under the 1954 Act the tenant must show either that he is continuing in occupation of the premises for the purposes of the business carried on by him, or, if events over which he has no control have led him to absent himself from the premises, if he continues to exert and claim his right to occupancy ... in *I & H Caplan Ltd v Caplan (No 2)* [1963] 2 All ER 930, [1963] 1 WLR 1247 the temporary absence which did not destroy the continuity of occupation was absence at the volition of the tenant. In the present case the absents by the tenants of themselves from the premises after the devastating fire was not their choice, but was brought about by the state of the premises created by the fire ...' d

*Hancock & Willis v GMS Syndicate Ltd* e

The solicitor tenants moved to larger premises and for six months licensed the subject premises to others save for the wine cellar and save that they reserved to themselves the right to use the dining area twice a month. The Court of Appeal held that the thread of continuity had been broken. Eveleigh LJ said ([1983] 1 EGLR 70 at 72): f

'The words with which we are concerned import, in my judgment, an element of control and user and they involve the notion of physical occupation. That does not mean physical occupation every minute of the day, provided the right to occupy continues. But it is necessary for the judge trying the case to assess the whole situation where the element of control and use may exist in variable degrees. At the end of the day it is a question of fact for the tribunal to decide, treating the words as ordinary words in the way in which I have referred to them.' g

*Wandsworth London BC v Singh* h

The local authority were lessees of some 500 square metres of public open space which they and their horticultural sub-contractors visited periodically. The Court of Appeal held that sufficient to constitute occupation. Ralph Gibson LJ said ((1991) 89 LGR 737 at 750): i

'The concept [of sufficiency of physical presence and of use] was whether the occupation of the premises by the tenant was shown to be such as



a Parliament intended to be covered by the words used in section 23(1) and (2).'

Depending always, therefore, upon their individual facts, these s 23 cases seem to have turned essentially on—(1) the extent of the tenant's physical presence on, use of, and control over the premises; (2) whether or not the tenant vacated the premises voluntarily or involuntarily in the sense of leaving for reasons beyond  
b his control; (3) whether or not, having vacated, the tenant evinced an intention to return; (4) whether the thread of continuity was broken. In determining this, however, the fact that business use may be interrupted by circumstances such as seasonal closure, holiday periods and repair work was not to be regarded as inconsistent with the notion of continuing occupation.

c I come now to the authority closest in point, one concerned not with the general concept of occupation for business purposes under s 23 but with the more directly relevant question whether a tenant has occupied the demised premises 'during the whole of the fourteen years immediately preceding the termination of the current tenancy' within the meaning of s 37(3)(a), a very similar question  
d to that arising here. Falconer J in *Dept of the Environment v Royal Insurance plc* [1987] 1 EGLR 83 had to decide whether the fact that the tenants under a 14-year lease had entered into occupation of the premises one day after the term began meant that they had thereby failed to occupy for 'the whole of the fourteen years', in which event, of course, they were entitled only to the basic rate of compensation when at the end of the 14-year term they quitted the premises. In  
e holding that the tenants had indeed failed to satisfy the requirement for double compensation, Falconer J (at 87) said of the s 23 authorities:

'It seems to me that all those sorts of cases are different from the present case in that they were all examples of cases where there had been physical occupation prior to the gap or break which occurred and the real question to  
f be determined every time by the courts was: had the absence for that period, for whatever reason, effected a cesser of the occupation which had already been in existence? In the present case, as I say, it is common ground that as a physical fact the initiation of the occupation by the contractors going in did not commence until [the second day of the term].'

g Falconer J (at 88) rejected too the tenants' alternative, *de minimis*, argument:

'In section 37(3)(a), as I think I have already indicated, it seems to me that Parliament has made its intention perfectly clear. It provides for a period of 14 years and not only does it provide for a period of 14 years immediately  
h preceding the termination to be the qualifying period for the higher rate under para (a) of subsection (2) it says: "During the whole of the fourteen years immediately preceding", emphasising in my mind that there must be a complete 14 years. Cases have arisen, of course, where the occupancy has been broken in the ways I have indicated; they give rise to the question of whether the break that occurs causes a cesser of the occupation. But that  
j question does not arise when the occupation has not yet commenced.'

Mr Stead, for the respondents, submits that the present case is *a fortiori* to the *Dept of the Environment* case: there, after all, the intention was to occupy after the one day's period of absence, here there was no such intention; and here in any event the premises were empty for substantially longer. Mr Denehan for the appellant also seeks to distinguish the *Dept of the Environment* case on two

grounds, first, because there was no break there in an existing period of occupation: occupation had simply not commenced in time; secondly, because the date that business occupation was to commence was there entirely in the tenants' hands whereas here the appellant had to ensure that he gave vacant possession by 11 August.

For my part I would reject every one of these arguments. There seems to me no distinction whatever between the two cases and certainly none in principle. If the *Dept of the Environment* case was rightly decided, then the present appeal too must fail.

Before coming to a final conclusion on the point it is necessary to return briefly to the facts to see just why the appellant here physically vacated these premises 12 days before he needed to—12 days during which, of course, he remained liable under the lease for rent and subject also to all other relevant covenants, including for example as to the state of the premises. The factual position can, I think, be fairly summarised as follows.

(1) In early 1994 the appellant changed his mind about wanting a new lease because he decided it was time for him to retire. He was 60 years of age and had been in the restaurant business for nearly 40 years. He did not want the responsibility of taking on a new long-term lease.

(2) His solicitors mistakenly thought that under the statute the tenancy terminated on 29 July. On 9 June they wrote to the respondents' solicitors: '... as previously confirmed our client will be leaving at the end of July.' On 24 June 1994 they wrote: '... the application was withdrawn by us on 29th April—see copy application to the court herewith. Accordingly rent is due up to the 29th July.' On 5 July the respondents' solicitors pointed out that time runs from when the proceedings are actually discontinued and that the lease would therefore end on 11 August. Their letter concluded:

'If your client is saying that he will give possession at the end of this month and wants us to consider with our client whether he is prepared to forego the rent if early possession is given, we will take our client's instructions.'

On 22 July 1994 the appellant's solicitors replied:

'Our client proposes vacating on the 29th July providing he is released from any further liability for rent and we shall be obliged if you will confirm this is agreed by return.'

There was no response to that letter.

(3) As stated, the appellant vacated the premises and handed over the keys to his own solicitors on Friday, 29 July 1994. The restaurant had closed the previous Saturday, 23 July. The intervening six days had been spent cleaning up the premises.

Woodfall's *Law of Landlord and Tenant* (1994 edn) para 22.172, after referring to the *Dept of the Environment* case, says:

'It is not clear what the position would be if a tenant who had been in occupation for more than 14 years at the date of service of the landlord's section 25 notice quit some months before the date of termination. On one view he would not have been in occupation for the whole of the 14 years preceding the termination of the tenancy, and consequently would not be entitled to higher rate compensation. The justice of this is hard to see, but it may be compelled by a literal reading of the Act.'

a That so-called literal reading of the Act is what Mr Stead contends for here. He submits that the words 'immediately preceding' are strong words, clearly designed to ensure that compensation is only payable in cases where the business use has continued to the very end. Such a conclusion, he argues, is not unjust, particularly in a case like the present where the appellant had agreed to an exclusion of the right to compensation for disturbance and where in any event, when the opportunity of a fresh tenancy was put before him, he withdrew his application. True, at the other end of the merits spectrum would be a s 37(3)(a) case in which neither of these considerations arose, but, contends Mr Stead, there is always the possibility of casualties from the strict construction of any legislation.

b To my mind, however, the question here is not whether the words of the statute should be construed literally or otherwise but rather what is meant in this specific context by the words 'occupied for the purposes of a business'. It is at this point that the s 23 authorities provide some help.

c Once it is recognised that premises can be occupied for the purposes of a business even when they are closed for the season, or for holidays, or for repairs (as those authorities plainly establish), it must surely follow that s 38(2)(a) can perfectly well be satisfied notwithstanding that the tenancy comes to an end during such a period of closure. So much, indeed, the respondents recognise and accept; that is why they do not seek to rely upon the six-day period between 23 and 29 July when the restaurant was shut for the premises to be cleaned.

d What, then, is different about the final ten days of this appellant's lease? Mr Stead argues that none of the touchstones of occupation established by the s 23 authorities were satisfied during that period: the appellant vacated these premises voluntarily, left them empty, and had no intention of ever returning. But all that would have been equally true had the lease ended during a holiday period. What is it, therefore one asks, about periods of mid-term closure for repairs and the like that in the eyes of the law they do not destroy the continuity of business occupation? That is the critical question and the answer surely is this: each of these events is recognisable as an incident in the ordinary course or conduct of business life. By the same token that trading may have to cease mid-term for repairs, so also it may have to be delayed for the premises to be fitted out in the first place, or may have to end before the term of the lease expires so that the premises may be cleaned up and handed over with vacant possession on the due date.

e If, as one would readily have inferred in the *Dept of the Environment* case, it suited the tenants for business reasons to go into occupation a day late—perhaps because architects or fitters could not conveniently attend earlier—that seems to me no less an incident of the overall business use of the premises during the period of the lease than had mid-term repairs taken a day longer for the same reason. Indeed, whenever business premises are empty for only a short period, whether mid-term or before or after trading at either end of the lease, I would be disinclined to find that the business occupancy has ceased (or not started) for that period provided always that during it there exists no rival for the role of business occupant and that the premises are not being used for some other, non-business purpose. That to my mind is how Pt II of the 1954 Act should operate in logic and in justice. It has nothing to do with the *de minimis* principle. Rather it is a recognition that the tenant's business interests will not invariably require permanent physical possession throughout the whole term of the lease and he ought not to have to resort to devices like storage of goods or token visits to



satisfy the statutory requirements of continuing occupation. If, of course, premises are left vacant for a matter of months, the court would be readier to conclude that the thread of continuity has been broken. a

In the present case it seems plain that, having planned for some time on vacating the premises in late July through a misunderstanding of when the lease was to end, the appellant found it commercially sensible to stick to this plan even though ultimately he obtained no rent rebate (which no doubt is why he left the keys with his solicitors instead of giving immediate vacant possession to the respondents). All of this I regard as no less an incident of normal business life than the events so regarded in the s 23 cases. Here, of course, unlike in those cases, the tenant when vacating the premises had no intention of returning. But that, as I observed earlier, is because the present context necessarily predicates the ending of the business tenancy. The court in the *Dept of the Environment* case, just as Judge Bursell QC here, to my mind paid too much attention to the words 'immediately preceding' and thereby overlooked the correct approach to the concept of continuing occupation as it applies at each end of the term of a business tenancy. Had the ordinary s 23 approach been adapted to the present, different context, I have no doubt that on the facts this appellant must have been found entitled to the statutory compensation. I would therefore allow his appeal and alter Judge Bursell's order accordingly. b  
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In those circumstances the respondents' cross-appeal on costs does not arise for decision. It was in any event brought improperly without leave.

#### WARD LJ. e

##### *The material facts*

(1) After carrying out certain renovations and improvements, the appellant opened his restaurant business at the premises in April 1974. He served his last meal there more than 20 years later on Saturday, 23 July 1994. (2) He took some days to clear up and leave the premises in good order. He locked the doors on Friday, 29 July and did not return. (3) That was the chosen date for closure because his solicitors mistakenly thought that it was the date he had to quit being three months after they had applied to the court for leave to withdraw his application for a new tenancy. (4) It is now common ground that the application was only finally disposed of by the court's granting that leave on 11 May with the result that the date on which he was to quit was Thursday, 11 August. (5) The landlords held him to that later date and he remained liable under the terms of the lease and for rent until then. (6) Consequently the premises stood empty for 12 days before the proper date to quit. (7) By cl 4(7) of the lease the parties had contracted out of the obligation to pay the statutory compensation for disturbance but that clause would be void if s 38(2) of the Landlord and Tenant Act 1954 applied. f  
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##### *The issue*

The question in this appeal is, therefore, whether in the circumstances this is a case where— j

'during the whole of the five years immediately preceding the date on which the tenant under a tenancy to which this Part of this Act applies is to quit the holding, premises being or comprised in the holding have been occupied for the purposes of a business carried on by the occupier or for those and other purposes ...'

a That question poses a dilemma for me. On the one hand, successfully to argue that quitting 12 days early has the effect of breathing life into what, as the decades rolled by, must have seemed to be an increasingly moribund cl 4(7), is to achieve the triumph of technicality over merit. On the other hand, there is a remorseless compulsion to the literal construction of s 38(2) adopted by the judge. I have not found it an altogether easy matter to decide.

b My approach

(1) The purpose of the statutory scheme provided by Pt II of the Act was expressed by Ackner LJ in *Cardshops Ltd v John Lewis Properties Ltd* [1982] 3 All ER 746 at 760, [1983] QB 161 at 179 to be: 'Parliament intended that the tenant should be properly compensated for the disturbance in having to vacate the premises ...'  
c This disturbance is suffered equally when, as here, the tenant withdraws his application for a new tenancy and a tenant in these circumstances is just as much entitled to his compensation.

(2) Section 38 operates to restrict the freedom of contract which would otherwise allow the parties to agree that no such compensation shall be paid. It operates in favour of the tenant and against the landlord. Its purpose is to ameliorate the tenant's position by imposing the statutory scheme of compensation on the landlord once the tenant qualifies for relief through five years' occupation for business purposes. To give effect to that statutory purpose, the question should be approached broadly rather than narrowly.

(3) Reference to the 'whole of five years' is an indication that continuous occupation for that period is required.

(4) 'Immediately preceding' indicates that the occupation must continue up to the date of quitting.

(5) In the wholly different context where the court's jurisdiction to grant a divorce is dependant upon habitual residence for 12 months immediately preceding the presentation of the petition, I would not find it difficult to decide that the requisite period is 365 days, not 364 days and that if the petitioner had abandoned his residence 12 days before the presentation of the petition, jurisdiction would not be established and it would not avail the petitioner to pray in aid the 20 years' previous residence. This was the judge's approach and I have already acknowledged the force of his reasoning.

(6) It seems to me that the case must turn upon the meaning to be given to the words 'occupied for the purposes of a business carried on by the occupier'.

(7) None of the decided cases is exactly on the point we have to decide. *Dept of the Environment v Royal Insurance plc* [1987] 1 EGLR 83 is closest. For my part I find it very difficult to accept Falconer J's reasoning that in circumstances where the lease was taken on 23 August but the builders were not put into the premises until 25 August to begin the work everyone contemplated was to be done before the tenant's business could commence, it was appropriate to find there was no intention to occupy the premises on the first day simply because the builders began work on the second day.

(8) The other reported decisions all seem to be cases where the tenant was seeking a new tenancy which gave rise to a question under s 23 whether or not the premises were being occupied for the purposes of a business. Being in the same part of the Act, the words in ss 23 and 38 should bear an allied meaning.

(9) The authoritative decision is *Graysim Holdings Ltd v P & O Property Holdings Ltd* [1995] 4 All ER 831 at 835, [1996] AC 329 at 334, from which I extract these propositions from the speech of Lord Nicholls of Birkenhead. Firstly:

‘... the concept of occupation is not a legal term of art, with one single and precise meaning applicable in all circumstances. *Its meaning varies according to the subject matter.* Like most ordinary English words, ‘occupied,’ and corresponding expressions such as occupier and occupation, have different shades of meaning according to the context in which they are being used ... the answer in situations which are not so clear cut is affected by the purpose for which the concept of occupation is being used. In such situations the purpose for which the distinction between occupation and non-occupation is being drawn, and the consequences flowing from the presence or absence of occupation, will throw light on what sort of activities are or are not to be regarded as occupation in the particular context. In Pt II of the 1954 Act “occupied” and “occupied for the purposes of a business carried on by him” are expressions employed as the means of identifying whether a tenancy is a business tenancy and whether the property is part of the holding and qualifies for inclusion in the grant of a new tenancy. *In this context “occupied” points to some business activity by the tenant on the property in question. The Act seeks to protect the tenant in his continuing use of the property for the purpose of that activity. Thus the word carries a connotation of some physical use of the property by the tenant for the purpose of his business.*’ (My emphasis.)

There are, however, important qualifications in his speech which I again emphasise ([1995] 4 All ER 831 at 835–836, [1996] AC 329 at 335–336):

‘This [physical use of the property by the tenant for the purposes of his business] is a good starting point, *but it is not a test which will provide an answer in all cases ...* To look for a clear line between these instances would be to seek the non-existent. The difference between the two extremes is a difference of degree, not of kind ... It is, moreover, a question of fact in the sense that the answer depends upon the facts of the particular case. The circumstances of two cases are never identical, and seldom close enough to make comparisons of much value. The types of property, and the possible uses of property, vary so widely that there can be no hard and fast rules. *The degree of presence and exclusion required to constitute occupation, and the acts needed to evince presence and exclusion, must always depend upon the nature of the premises, the use to which they are being put, and the rights enjoyed or exercised by the persons in question.* Since the question is one of degree, inevitably there will be doubt and difficulty over cases in the grey area.’

(10) Earlier decisions also give some helpful guidance. In *I & H Caplan Ltd v Caplan* (No 2) [1963] 2 All ER 930 at 938–939, [1963] 1 WLR 1247 at 1260–1261 Cross J said:

‘I think it is quite clear that a tenant does not lose the protection of Part 2 of the Landlord and Tenant Act 1954 simply by ceasing physically to occupy the premises. They may well continue to be occupied for the purposes of the tenants business although they are de facto empty for some period of time ... a mere intention to resume occupation if a new tenancy is granted will not preserve the continuity of business user if the thread has once been definitely broken ... The thread of continuity ... was not broken in this case.’

In *Morrison Holdings Ltd v Manders Property (Wolverhampton) Ltd* [1976] 2 All ER 205 at 210, [1976] 1 WLR 533 at 540, the fire damage case, Scarman LJ said:



a '... if events over which he has no control had led him to absent himself from the premises [he must show he] continues to exert and claim his right to occupancy.'

In *Hancock & Willis (a firm) v GMS Syndicate Ltd* [1983] 1 EGLR 70 at 72 Eveleigh LJ said:

b 'The words with which we are concerned import, in my judgment, an element of control and user and they involve the notion of physical occupation. That does not mean physical occupation every minute of the day, provided the right to occupy continues. But it is necessary for the judge trying the case to assess the whole situation where the element of control and use may exist in variable degrees. At the end of the day it is a question of fact for the tribunal to decide.'

In *Wandsworth London BC v Singh* (1991) 89 LGR 737 at 744 Ralph Gibson LJ said:

d 'Thus if the physical occupation is not continuous, the right to occupy must continue in order for the continuity of occupation to be preserved for the purpose of section 23.'

#### *My conclusions*

e When I draw these strands together, it seems that I can properly arrive at the following conclusions.

(1) At the heart of the problem is the need to establish business activity for the requisite period of five years.

f (2) The decided cases are useful as far as they go but it must be remembered that these cases (except the *Dept of the Environment* case) were concerned with establishing a continuing business activity in order to lay the foundation for a renewal of the tenancy. Here the focus is different: here it has to centre on business activity which is now being conducted with a view to discontinuing that business on those premises and quitting them.

g (3) Just as the business activity will be treated as continuous notwithstanding seasonal breaks or interruptions for the carrying out of repairs after fire damage, so should the business activity be capable of being treated as continuous where there is an interruption caused for the purpose of quitting the premises. The thread of continuity has a degree of elasticity to it and it has that elastic quality at the end as well as in the middle of the thread.

h (4) What is necessary in the s 23-type case is the intention to return, or at least the intention to continue to exert and claim the right to occupy. Having regard to the different nature of business activity which is involved in running down a business in order to remove from the premises, there must be an associated intention not so much to return but rather to quit on the proper date, as that date is defined in the Act, and to remain responsible under the tenancy till then.

j (5) To insist, as the application of the *Dept of the Environment* case would require, that there be precise coincidence of time between cessation of all activity and the moment when the obligation to quit arises, will produce commercial absurdity. It is an affront to common sense to require a pot and pan to be left on the premises till the clock strikes midnight on the last day. Common sense surely dictates that there be an allowance for reasonable leeway.

(6) Once it is established on the particulars facts of the case that leaving the premises unattended is associated with cessation of business activity for the purpose of quitting pursuant to the statutory scheme, then it is a matter of degree whether the period of inactivity is reasonably incidental to the commercial decision to cease trading from those premises. a

(7) Thus it seems to me that the proper approach requires answers to questions like these. (a) What was the purpose of leaving the premises unattended? Was it linked to or part and parcel of the business activity which was then necessarily geared to winding down preparatory to vacating for good? I find it was. (b) What was the intention lying behind the decision to leave the premises unattended? Was it total abandonment not only of the premises but also of the accruing right to compensation, or was it to quit in orderly fashion in order to comply with the statutory obligation to do so? I find it was the latter. b  
(c) As a matter of fact and degree, was the period of non-activity reasonably incidental to the winding down for the purpose of ending all business activity on the day the tenant was required to quit? I find it was. (d) Bearing in mind the elasticity of the thread of continuity, does the thread stretch from the commencement of the business to the quitting of the premises looking at it as a coherent whole? Changing the metaphor, is there an unbroken link between the beginning and the end? I find there was. c  
d

(8) Consequently I am satisfied that s 38 does operate so as to render cl 4(7) void because in my judgment during the whole of the five years immediately preceding the date on which the tenant was to quit the holding, the premises were being occupied for the purposes of a business carried out by the occupier. I therefore agree with Simon Brown LJ and Moore-Bick J that the appeal should be allowed. e

**MOORE-BICK J.** I agree that this appeal should be allowed.

In *Graysim Holdings Ltd v P & O Property Holdings Ltd* [1995] 4 All ER 831, [1996] AC 329 Lord Nicholls emphasised that the words 'occupation', 'occupied' and corresponding expressions used in Pt II of the Landlord and Tenant Act 1954 are not legal terms of art but are ordinary English words which bear different shades of meaning according to the context in which they are used. As Simon Brown LJ has pointed out, all but one of the authorities cited to us were concerned with the position of a tenant who wished to continue his existing business and was seeking a new tenancy for that purpose. In none of them was the court concerned with the situation which arises at the end of the contractual term when the court is precluded from granting a new tenancy. In such cases there can be no continuing occupation in the future under the provisions of the Act and the business will no longer be carried on from those premises. f  
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As Mr Denehan pointed out, the tenant under these circumstances is obliged to give vacant possession at the conclusion of the term. He is not entitled to hold over beyond that date in order to wind down his business and clear out his possessions. It is inevitable, therefore, that he will have to cease trading from the premises some time before the contractual term comes to an end and will remain in occupation merely in order to make preparations for giving possession. The likelihood is that a prudent businessman will ensure that the arrangements he makes for the removal of stock and equipment will result in the premises being substantially vacated *before* the very last day of the term. Unless he leaves some possessions in the premises for purely symbolic purposes, therefore, it is unlikely that he will remain in physical occupation until the last moment, although he will j

a continue to have a right of access and to be responsible for the safety of the premises as well as for outgoings such as rent, rates, insurance and so on. This is the practical business context in which ss 37 and 38 of the Act have to be construed.

The relevant part of s 38(2)(a) refers to the position where—

b ‘premises being or comprised in the holding have been occupied for the purposes of a business carried on by the occupier or for those and other purposes ...’

The question facing the court, therefore, is whether in the circumstances which existed in the present case the appellant was occupying the premises for the purposes of his business within the meaning of this section. In the ordinary way c the fact that the tenant has ceased trading from the premises is likely to lead to the conclusion that he is no longer in occupation of them for the purposes of a business, particularly if he has not retained any physical presence in the form of furniture, equipment or stock. In *Aspinall Finance Ltd v Viscount Chelsea* [1989] 1 EGLR 103 the premises in question had been used as a gaming club. About five d years before the term expired the tenant obtained more favourable premises for which it was able to obtain a licence only by agreeing to give up its licence on the original premises. It therefore closed down the original premises and transferred its business to the new premises. The tenant retained its lease on the original premises and hoped, and indeed intended, to resume operations there if it could obtain a fresh licence, but the Gaming Board refused to grant a new licence until e a new tenancy had been obtained. The court had to decide whether the tenant was still in occupation of the original premises for the purposes of a business carried on by it. The judge recognised that a business does not have to be carried 24 hours of the day, or even 52 weeks of the year, for the tenant to be in continuous occupation. He said (at 104):

f ‘The mere fact that the tenant is not occupying at the relevant date is not conclusive. Tenants do not have to occupy and carry on business for every hour of every day. Some breaks are inevitable. At the smallest level, the premises may be closed for the night for business. They may be closed for a longer period while repairs can be carried out. They may be closed in order g that the tenant and his staff can have a holiday. They may be closed because the business is a seasonal one. So one gets businesses that are only open in the summer months and are closed throughout all the winter months. In all those types of case it can be said that the tenants are occupying for business purposes, even though when the application is made or when the lease ends, h or both, falls within a period of closure.’

On the other hand, it is not enough that the tenant is still entitled to occupy the premises and is responsible for their upkeep. In that case the court held that the tenants had ceased to occupy the premises for the purposes of their business because, having a clear choice either to continue in the old premises or to go to the new premises, they had elected of their own choice to go to the new j premises. That, with respect, seems correct as a matter of common sense, even though the tenant retained the right to occupy the premises and remained responsible for the outgoings. Similarly, if in the present case the appellant had closed the restaurant and vacated the premises six months before his tenancy expired because it was losing money, or because his health was deteriorating or because the chef had left, I think it would be difficult for him to say that he had



remained in occupation for the purposes of a business right up to the end of the term. a

Here, however, the closure of the restaurant and the removal of all the appellant's possessions were a direct consequence of the expiry of his tenancy. In many cases it must be difficult for a tenant to give vacant possession without having cleared the premises a few days before the tenancy expires, but if Mr Stead is right, the tenant would in such cases invariably lose the protection of s 38(2) (and for that matter the benefit in an appropriate case of the enhanced level of compensation provided for in s 37(3)), however long he had been in occupation before the business closed. I find it difficult to accept that that is what Parliament intended. b

If the premises remain empty and unused for a brief period of time after closure of the business due to the impending expiry of the tenancy, I think that should ordinarily be regarded as a normal aspect of carrying on the business at those premises, and as a matter of ordinary usage I think the tenant can properly be said to continue in occupation during that period for the purposes of the business. The fact that he overestimates the time needed to clear the building, or makes a mistake of a few days about the date on which he must give possession, or simply decides to clear the premises a little earlier than he need do so in order to suit his own convenience does not in my view detract from that provided that the expiry of the tenancy is the real cause of the closure of the business and the vacating of the premises. I agree with Simon Brown LJ that a similar approach ought to be taken to a period of delay in moving into the premises at the commencement of the tenancy where that is directly attributable to arrangements which have to be made to enable the premises to be used for the business purposes of the tenant. Here again the context plays an important part and requires one to give a rather broader meaning to the word 'occupy' and corresponding expressions than might be appropriate under s 23. In *Dept of the Environment v Royal Insurance plc* [1987] 1 EGLR 83 Falconer J held that the tenant had not been in occupation during the whole of the 14 years immediately preceding the termination of its tenancy because the contractors who were to carry out work on the premises prior to their use by the tenant did not begin work of any kind until the second day of the 14-year term. I agree that the case was wrongly decided. With all respect to the learned judge, I think he was persuaded to pay too much attention to cases concerned with the application of s 23 and so failed to consider whether as a matter of ordinary usage the tenant could properly be said to have been in occupation of the premises as from the first day of the tenancy. Had he done so, I think he would have been bound to conclude that it was. c  
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For these reasons and for the reasons given by Simon Brown LJ I too would allow the appeal. h

*Appeal allowed.*

Dilys Tausz Barrister.

## Airbus Industrie GIE v Patel and others

HOUSE OF LORDS

LORD GOFF OF CHIEVELEY, LORD SLYNN OF HADLEY, LORD STEYN, LORD CLYDE AND  
LORD HUTTON

24, 25 NOVEMBER 1997, 2 APRIL 1998

*Conflict of laws – Foreign proceedings – Restraint of foreign proceedings – Circumstances in which court will restrain prosecution of foreign proceedings – Plaintiffs seeking injunction from English court to restrain proceedings in Texas by English defendants arising out of aircraft crash in India – Proceedings commenced also in India – Injunction issued by Indian court ineffective as defendants not within Indian jurisdiction – Whether English court could grant injunction.*

- d Following the crash of an Airbus A-320 aircraft at Bangalore airport, the defendants, who had been passengers on board the aircraft and were British citizens of Indian origin, commenced proceedings in India against the employers of the pilots and the airport authority. They also commenced proceedings in Texas against the plaintiff company, which were consolidated with similar
- e proceedings brought by American claimants. Although there was, at the material time, no principle of forum non conveniens applicable in Texas on the basis of which they could seek a stay of proceedings in that state, the plaintiffs obtained from the court in Bangalore a declaration that the defendants were not entitled to proceed against them in any court in the world other than in India/Bangalore.
- f The plaintiffs then issued an originating summons in the United Kingdom to enforce the Bangalore judgment against the defendants, and to obtain an injunction from the English High Court restraining the defendants, who were resident in England, from continuing their action in Texas on the grounds that the pursuit of that action would be contrary to justice and/or vexatious or oppressive. The judge refused the application, but the Court of Appeal allowed the plaintiffs' appeal and granted the injunction sought. The defendants appealed.
- g

- Held** – As a general rule, before an anti-suit injunction could be granted by an English court to restrain a person from pursuing proceedings in a foreign jurisdiction, comity required that the English forum should have a sufficient
- h interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which such an injunction entailed. That principle should not however be interpreted too rigidly, and in cases where the conduct of the foreign state exercising jurisdiction was such as to deprive it of the respect normally required by comity, no such limit was required in the exercise of the jurisdiction to grant an anti-suit injunction. Since, in the instant case, the
- j English court had no interest in, or connection with, the matter in question, and the defendants had not appealed from the judge's decision not to enforce the judgment of the Indian court, but were relying simply on the English court's power to grant an injunction, the court could not grant the injunction sought because it would be inconsistent with the principles of comity. Accordingly, the appeal would be allowed and the injunction granted by the Court of Appeal set aside (see p 269 a b, p 270 c d j and p 271 c g to j, post).

## Notes

For general principles governing an injunction to restrain foreign proceedings see 8(1) *Halsbury's Laws* (4th edn reissue) para 1092, and for cases on the subject, see 11(2) *Digest* 423–521 3185–3223.

## Cases referred to in opinions

*Allendale Mutual Insurance v Bull Data Systems* (1993) 10 F 3d 425, US Ct of Apps (Seventh Cir).

*Amchem Products Inc v British Columbia (Workers' Compensation Board)* (1993) 102 DLR (4th) 96, Can SC.

*Atlantic Star, The, Atlantic Star (owners) v Bona Spes (owners)* [1973] 2 All ER 175, [1974] AC 436, [1973] 2 WLR 795, HL.

*Bank of Tokyo Ltd v Karoon* [1986] 3 All ER 468, [1987] AC 45, [1986] 3 WLR 414, CA.

*British Airways Board v Laker Airways Ltd* [1984] 3 All ER 39, [1985] AC 58, [1984] 3 WLR 413, HL.

*China Trade and Development Corp v MV Choong Yong* (1987) 837 F 2d 33, US Ct of Apps (Second Cir).

*Club Méditerranée NZ v Wendell* [1989] 1 NZLR 216, Aust CA.

*CSR America Inc v Cigna Insurance Australia Ltd* (1997) 146 ALR 402, Aust HC.

*Gau Shan Co v Bankers Trust Co* (1992) 956 F 2d 1349, US Ct of Apps (Sixth Cir).

*Gulf Oil Corp v Gilbert* (1947) 330 US 501, US SC.

*Laker Airways Ltd v Sabena, Belgian World Airlines* (1984) 731 F 2d 909, US Ct of Apps.

*Midland Bank plc v Laker Airways Ltd* [1986] 1 All ER 526, [1986] QB 689, [1986] 2 WLR 707, CA.

*Philips Medical Systems International BV v Bruetman* (1993) 8 F 3d 600, US Ct of Apps (Seventh Cir).

*Piper Aircraft Co v Reyno* (1981) 454 US 235, US SC.

*SNI Aérospatiale v Lee Kui Jak* [1987] 3 All ER 510, [1987] AC 871, [1987] 3 WLR 59, PC.

*Spiliada Maritime Corp v Cansulex Ltd, The Spiliada* [1986] 3 All ER 843, [1987] AC 460, [1986] 3 WLR 972, HL.

*Voth v Manildra Flour Mills Pty Ltd* (1990) 65 ALJR 83, Aust HC.

## Appeal

The defendants, Jaisukh Arun Bhai Patel, Neeta Jaisukh Patel, Deena Jaisukh Patel, Ratna Kunverji Patel, Valbai Ratna Patel and Tulsi Bhanji Vaghjiani appealed with leave of the Appeal Committee given on 9 December 1996 from the decision of the Court of Appeal (Nourse, Hobhouse and Aldous LJ) ([1997] 2 Lloyd's Rep 8) delivered on 31 July 1996 allowing the appeal by the plaintiffs, Airbus Industrie GIE, from the order of Colman J made on 28 February 1996 whereby he dismissed the plaintiffs' application for declaratory relief and an injunction restraining the defendants from claiming damages against them in any court in the world except India/Bangalore, and ordering inter alia that the defendants be restrained by injunction from prosecuting further in the courts of Texas any proceedings against the plaintiffs arising out of or relating to the crash in Bangalore on 14 February 1990 of Indian Airlines Corp's flight IC 605. The facts are set out in the opinion of Lord Goff.

*Sydney Kentridge QC, Jeremy Russell QC and Poonam Melwani* (instructed by *Clyde & Co*) for the defendants.

*Michael Crane QC and Akhil Shah* (instructed by *Cameron McKenna*) for the plaintiffs.

Their Lordships took time for consideration.



2 April 1998. The following opinions were delivered.

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**LORD GOFF OF CHIEVELEY.** My Lords, this appeal is concerned with the circumstances in which an English court may grant what is usually called an 'anti-suit injunction'. The proceedings in question have arisen from a very serious air crash which occurred at Bangalore airport on 14 February 1990. An Airbus A-320 aircraft crashed when coming in to land. Many of the passengers died and the remainder were injured. Among the passengers on board were two families of Indian origin who were British citizens with homes in London. Four of them were killed, and the remaining four were injured. They are, or are represented by, the six defendants in the appeal now before your Lordships' House. Following the publication in December 1990 of the report of a court of inquiry in India, in which the cause of the crash was identified as error on the part of the pilots (both of whom were killed in the crash), claims were made by solicitors acting for the defendants, their primary claim being against Indian Airlines Corp (IAC), the employers of the pilots. When it appeared that these claims would not be settled within the two-year time limit for such proceedings in India, proceedings were commenced in India on 12 February 1992 against IAC, and also against Hindustan Aeronautics Ltd (HAL), the airport authority at Bangalore airport. HAL was criticised by the court of inquiry for failing to make adequate arrangements for dealing with accidents, and in particular for extinguishing fires such as that which broke out in the aircraft when it crashed; the court considered that, if such arrangements had been in place, the loss of life and the injuries suffered would not have been so severe. On 6 March 1992 the defendants settled their claim against IAC for the full amount recoverable up to the limit of IAC's liability. This resulted in a total recovery of £120,000 by all the defendants which, taking into account irrecoverable expenses, left a net sum of no more than £75,000. Little progress has been made in the proceedings against HAL. This may be due to delay in the Indian proceedings; but there may also be difficulty in establishing that the death or injuries of the passengers in question were attributable to negligence on the part of HAL.

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Meanwhile in February 1992 the defendants also commenced proceedings in Texas, where they sued a number of parties who might have had some connection with the aircraft or its operation. These included the plaintiff company, Airbus Industrie GIE (Airbus), which designed and assembled the aircraft at Toulouse in France. Similar proceedings were brought in Texas in respect of three American passengers who died in the same crash. The two sets of proceedings were later consolidated. In response to these proceedings in Texas, on 21 November 1992 Airbus brought proceedings in the Bangalore City Civil Court against, inter alia, the defendants and the American claimants, and on 22 April 1995 the presiding judge made a number of declarations designed to deter the defendants in those proceedings (ie the defendants and the American claimants) from pursuing their claims in Texas. These included a declaration that the defendants were not entitled to proceed against Airbus in any court in the world other than in India/Bangalore, and an injunction which purported to restrain the defendants from claiming damages from Airbus in any court in the world except the courts in India/Bangalore. However, since the defendants were not within the Indian jurisdiction, the injunction had little deterrent effect.

Airbus then issued an originating summons in this country with the purpose of (1) enforcing the Bangalore judgment against the defendants, and (2) obtaining an injunction from the English High Court restraining the defendants, who are resident in England, from continuing with their action against Airbus in Texas on the grounds that pursuit of that action by the defendants would be contrary to justice

and/or vexatious or oppressive. The originating summons came before Colman J, who, on 23 April 1996, refused to enforce or to recognise the Bangalore judgment and also refused to grant an injunction. Airbus then appealed to the Court of Appeal against the refusal of Colman J to grant an injunction, and on 31 July 1996 the Court of Appeal ([1997] 2 Lloyd's Rep 8) allowed the appeal and granted an injunction restraining the defendants from pursuing their action in Texas against Airbus. The defendants now appeal to your Lordships' House from that order, with the leave of this House.

### *The proceedings in Texas*

Jurisdiction was established over Airbus in Texas on the basis that Airbus had in the past done business with a Texas-based corporation. Airbus nevertheless challenged the jurisdiction of the Texas courts under the United States Foreign Sovereign Immunity Act, on the ground that Airbus was a corporation which was more than 50% government-owned. The Texas State District Court upheld this challenge, but it failed before the Texas Court of Appeals. Airbus is now seeking to appeal to the Texas Supreme Court. There was, at the material time, no principle of forum non conveniens applicable in Texas on the basis of which Airbus could seek a stay of proceedings in that state. Legislation has been passed to remedy this deficiency, but it was not in force at the material date (the date of commencement of the proceedings). The claims in the proceedings were founded principally on allegations that the aircraft was physically defective and that Airbus was liable under United States product liability law, but also on alleged negligence by Airbus in the training of the pilots in the handling of the aircraft. It appeared to the Court of Appeal that the claim against Airbus in Texas was to be based simply on a principle of strict liability, under which the claimants would have to establish only that some part of the aircraft was in a defective condition and that the condition of that part was a cause of the claimants' injury. Furthermore, as regards the assessment of damages the principles applicable in Texas include a power to award punitive damages, and it was on this basis that the claimants were advancing their claim. Contingency fees are available in Texas, and it followed that the legal expenses of the defendants in Texas were covered by their Texas lawyers against an agreement to pay to the lawyers a percentage of any eventual recovery. Hobhouse LJ, who delivered the leading judgment in the Court of Appeal, observed ([1997] 2 Lloyd's Rep 8 at 11–12):

'Such an arrangement is clearly very strongly influenced by, if not wholly dependent upon, the availability of strict liability in Texas and the ability to recover damages which exceed the claimants' actual loss and far exceed those recoverable in other jurisdictions. If the English claimants [the defendants] had to prove fault on the part of Airbus Industrie and if their recovery was restricted to the actual loss suffered by the claimants, the scope for a contingent fee arrangement might well be very different. It similarly is no doubt influenced by the fact that in Texas there is no opportunity for Airbus Industrie to object that for this action the forum is inappropriate.'

The view of the Court of Appeal, as expressed in the judgment of Hobhouse LJ, was that, if the defendants were required to make their claims against Airbus in a jurisdiction which applied fault based principles of liability, their claims would probably be abandoned.

### *Colman J's reasons for refusing an injunction*

Colman J approached the matter as follows. He first of all concluded, in the light of the authorities, that the availability of the English courts for the conduct of the

a substantive proceedings was not an essential pre-condition for the exercise of the jurisdiction to grant an anti-suit injunction; but where, as here, the English court is being asked in effect to adjudicate between two foreign jurisdictions, the jurisdiction to grant an injunction would be exercised with very considerable caution and for that reason would probably be very rarely exercised, and an injunction should in such circumstances only be granted where the very clearest case of oppression is made out. In the present case he concluded that, although India was the natural forum for the resolution of the dispute, nevertheless Airbus had not established that it was obviously vexatious or oppressive for the defendants to pursue proceedings elsewhere, ie in Texas. In weighing the balance of justice between the parties, he recognised the force of an argument by Airbus that, if held liable in Texas, it would have to relitigate the question of its own liability in India if it sought contribution from IAC or HAL, thus facing the risk of inconsistent decisions. On the other side of the balance, however, the defendants could rely on a number of factors, viz: (1) Airbus was also being sued in Texas by the American claimants, and there was no reason to suppose that their action would not continue if the defendants were restrained from proceeding in Texas. (2) Without the benefit of the contingency fee arrangement which enabled the defendants to litigate in Texas, they could not litigate anywhere else. (3) There was a substantial risk that litigation in India would be subject to serious delay. On the whole of the evidence, Colman J concluded that Airbus had failed to establish such a decisive balance of injustice as would justify the grant of an injunction restraining the defendants from proceeding in Texas.

e *The reasoning of the Court of Appeal*

The principal judgment was delivered by Hobhouse LJ, with whom Aldous LJ and Nourse LJ (in a brief judgment) agreed. Hobhouse LJ first considered whether there exists jurisdiction to grant an injunction to restrain foreign proceedings when the application is not made for the purpose of protecting proceedings in this country. Having reviewed the authorities, including the decision of the Privy Council in *SNi Aérospatiale v Lee Kui Jak* [1987] 3 All ER 510, [1987] AC 871, he concluded ([1997] 2 Lloyd's Rep 8 at 16), as Colman J did, that such jurisdiction did exist; and that the question to be decided by the court, in the exercise of its discretion, was whether an injunction was necessary in order to prevent injustice.

Hobhouse LJ then turned to the exercise of the discretion. First, he considered that Colman J had erred in holding that, in a case such as the present where the English court was being asked in effect to adjudicate between two foreign jurisdictions, an injunction should only be granted where the clearest case of oppression was made out. Hobhouse LJ considered that Colman J had only reached this conclusion because he treated as irrelevant the fact that the courts of Texas paid no regard to the question of forum conveniens. Hobhouse LJ (at 17), then identified three aspects of the situation which were relevant to the question whether there was in fact an injustice. These were:

(1) The identification of the natural forum for the resolution of the dispute between the defendants and Airbus. He held that India was the appropriate forum, and that France was an appropriate forum. The defendants were suing in a third forum, Texas, which was clearly inappropriate. Their conduct was *prima facie* oppressive.

(2) Whether Airbus would be prejudiced by the continuation of the proceedings in Texas. He held that they would, because the liability of Airbus would be determined on the basis of strict liability, and Airbus would be exposed to potential liability in penal damages, both of which applied under Texas law but were otherwise inappropriate to the determination of the liability of Airbus. Further, an



adverse decision to Airbus on the basis of strict liability would place it in the impossible position, when seeking contribution against IAC and HAL in India, of having to prove that it was itself at fault. a

(3) Whether an injunction restraining the defendants from proceeding in Texas would deprive them of a legitimate advantage. There were two such advantages on which the defendants relied. The first was the avoidance of delay in the Indian courts, but this was of limited cogency in the present case, having regard to the scope for time-consuming manoeuvres in Texas. The second was the availability of the contingency fee system in Texas, whereas in India the lack of financial resources to litigate meant that, if an injunction was granted, the prosecution of the defendants' claim against Airbus would come to an end. However this state of affairs arose from the fact that the defendants had attempted to obtain illegitimate and unjust advantages by suing in Texas. b  
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In the light of the foregoing Hobhouse LJ concluded that Colman J had wrongly evaluated the factors which he had to take into account in the exercise of his discretion, and that his judgment could not stand. The conduct of the defendants in suing Airbus in Texas was clearly oppressive, and caused significant injustice to Airbus. He therefore held that an injunction should be granted restraining them from further prosecuting their proceedings against Airbus in Texas. d

#### *The submissions of the defendants before the Appellate Committee*

At the forefront of the defendants' case before the Appellate Committee was the submission that, where England is not the natural forum for the trial of the substantive dispute, the English court should not, as a matter of policy or law, restrain proceedings in one foreign jurisdiction where the purpose of the injunction is to favour proceedings in another jurisdiction. In other words, as Mr Kentridge QC summarised the point for the defendants, it is no part of the function of the English courts to act as an international policeman in matters of this kind. This submission raises an important question of principle. e  
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The remainder of the defendants' submissions were directed towards the principles applicable in the event that it was open to the English courts to grant an injunction in such circumstances. They raised (inter alia) the following questions: whether the English courts should, in such a case, apply a different test to that applicable where England was a natural forum for the trial; the relevance, if any, of the fact that, at the relevant time, there was no doctrine of forum non conveniens in Texas law; the relevance of any advantages derived by the defendants from suing in Texas; whether the Court of Appeal was entitled to interfere with the exercise of discretion by Colman J, and, if so, whether the Court of Appeal exercised its discretion properly. However I should record at once that this part of the argument was much affected, indeed transformed, by two concessions which were made by the defendants, the first at the commencement of the reply of Mr Kentridge, and the second after the close of the argument. Both concessions were made without prejudice to the defendants' primary submission, which I have already recorded. Subject to that, the defendants undertook (1) to waive their claim to punitive damages, and (2) to waive reliance on the principle of strict liability, in the proceedings in Texas. It will at once be seen that these concessions, if applicable, must have a profound effect on the exercise of the court's discretion to grant an injunction. However, before I reach that part of the argument, it is necessary for me first to consider whether Mr Kentridge was right in his primary submission. For that purpose I must turn to the principles which underlie the exercise of the English court's power to grant an anti-suit injunction. g  
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*The underlying principles*

- a This part of the law is concerned with the resolution of clashes between jurisdictions. Two different approaches to the problem have emerged in the world today, one associated with the civil law jurisdictions of continental Europe, and the other with the common law world. Each is the fruit of a distinctive legal history, and also reflects to some extent cultural differences which are beyond the scope of an opinion such as this.
- b On the continent of Europe, in the early days of the European Community, the essential need was seen to be to avoid any such clash between member states of the same community. A system, developed by distinguished scholars, was embodied in the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968) (Sch 1 to the Civil Jurisdiction and Judgments Act 1982), under which jurisdiction is allocated on the basis of well-defined rules. This system achieves its purpose, but at a price. The price is rigidity, and rigidity can be productive of injustice. The judges of this country, who loyally enforce this system, not only between United Kingdom jurisdictions and the jurisdictions of other member states, but also as between the three jurisdictions within the United Kingdom itself, have to accept the fact that the practical results are from time to time unwelcome. This is essentially because the primary purpose of the Convention is to ensure that there shall be no clash between the jurisdictions of member states of the Community.

- In the common law world, the situation is precisely the opposite. There is, so to speak, a jungle of separate, broadly based, jurisdictions all over the world. In England, for example, jurisdiction is founded on the presence of the defendant within the jurisdiction, and in certain specified (but widely drawn) circumstances on a power to serve the defendant with process outside the jurisdiction. But the potential excesses of common law jurisdictions are generally curtailed by the adoption of the principle of *forum non conveniens*—a self-denying ordinance under which the court will stay (or dismiss) proceedings in favour of another clearly more appropriate forum. This principle, which has no application as between states which are parties to the Brussels Convention, appears to have originated in Scotland (partly, perhaps, because of the exorbitant Scottish jurisdiction founded upon arrestment of the defendant's goods in Scotland—see *The Atlantic Star, Altantic Star (owners) v Bona Spes (owners)* [1973] 2 All ER 175 at 199, [1974] AC 436 at 475 per Lord Kilbrandon), and to have been developed primarily in the United States; but, at least since the acceptance of the principle in England by your Lordships' House in *Spiliada Maritime Corp v Cansulex Ltd*, *The Spiliada* [1986] 3 All ER 843, [1987] AC 460, it has become widely accepted throughout the common law world—notably in New Zealand (see *Club Méditerranée NZ v Wendell* [1989] 1 NZLR 216); in Australia, though in a modified form (see *Voth v Manildra Flour Mills Pty Ltd* (1990) 65 ALJR 83); in Canada (see *Amchem Products Inc v British Columbia (Workers' Compensation Board)* (1993) 102 DLR (4th) 96), in India, as is exemplified by the litigation in the present case. It is of interest that it also appears to have been adopted in Japan, a country whose system has been much influenced by German law: see the article by Ellen Hayes in (1992) 26 U Br Col LR 112. The principle is directed against cases being brought in inappropriate jurisdictions and so tends to ensure that, as between common law jurisdictions, cases will only be brought in a jurisdiction which is appropriate for their resolution. The purpose of the principle is therefore different from that which underlies the Brussels Convention. It cannot, and does not aim to, avoid all clashes between jurisdictions; indeed parallel proceedings in different jurisdictions are not of themselves regarded as unacceptable. In that sense the principle may be regarded as an imperfect weapon; but it is both flexible and practical and, where it is effective, it produces a result which is conducive to practical justice.

It is however dependent on the voluntary adoption of the principle by the state in question; and, as the present case shows, if one state does not adopt the principle, the delicate balance which the universal adoption of the principle could achieve will to that extent break down. a

It is at this point that, in the present context, the jurisdiction to grant an anti-suit injunction becomes relevant. This jurisdiction has a long history, finding its origin in the grant of common injunctions by the English Court of Chancery to restrain the pursuit of proceedings in the English courts of common law, thereby establishing the superiority of equity over the common law. In the course of the 19th century we can see the remedy of injunction being employed to restrain the pursuit of proceedings in other jurisdictions within the United Kingdom, and even in other jurisdictions overseas. The principles upon which the jurisdiction may be exercised have recently been examined and restated by the Privy Council in *SNI Aérospatiale v Lee Kui Jak* [1987] 3 All ER 510, [1987] AC 871, and it is therefore unnecessary for me to restate them in this judgment. I wish to record however that the principles there stated have found broad acceptance in the Supreme Court of Canada (see *Amchem Products Ltd v British Columbia (Workers' Compensation Board)* (1993) 102 DLR (4th) 96, in which the judgment of the court was delivered by Sopinka J) and the High Court of Australia (see the judgment of the majority of the court in *CSR America Inc v Cigna Insurance Australia Ltd* (1997) 146 ALR 402); and a similar jurisdiction is exercised by the Indian courts, as the present litigation shows. The broad principle underlying the jurisdiction is that it is to be exercised when the ends of justice require it. Generally speaking, this may occur when the foreign proceedings are vexatious or oppressive. Historically these terms have different meanings (see the *Aérospatiale* case [1987] 3 All ER 510 at 519–529, [1987] AC 871 at 893); but in the *Amchem Products* case (1993) 102 DLR 96 at 119 Sopinka J expressed a preference for a formulation of the principle based simply on the ends of justice, without reference to vexation or oppression. But, as was stressed in the *Aérospatiale* case [1987] 3 All ER 510 esp at 521, [1987] AC 871 esp at 895, in exercising the jurisdiction regard must be had to comity, and so the jurisdiction is one which must be exercised with caution: (see [1987] 3 All ER at 510 at 519, [1987] AC 871 at 892). This aspect of the jurisdiction has been stressed both by the Supreme Court of Canada (see the *Amchem Products* case (1993) 102 DLR 96 at 120–121 per Sopinka J) and by the High Court of Australia (see the *CSR* case (1997) 146 ALR 402 at 436), and it is, in my opinion, of particular relevance in the present case. d  
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I must stress again that, as between common law jurisdictions, there is no system as such, comparable to that enshrined in the Brussels Convention. The basic principle is that each jurisdiction is independent. There is therefore, as I have said, no embargo on concurrent proceedings in the same matter in more than one jurisdiction. There are simply these two weapons, a stay (or dismissal) of proceedings and an anti-suit injunction. Moreover, each of these has its limitations. The former depends on its voluntary adoption by the state in question, and the latter is inhibited by respect for comity. It follows that, although the availability of these two weapons should ensure that practical justice is achieved in most cases, this may not always be possible. h  
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### *The problem in the present case*

As I have already indicated, the first and crucial question which arises in the present case is whether the English court will grant an anti-suit injunction in circumstances where there is no relevant connection between the English jurisdiction and the proceedings in question other than that the defendants, who are



a resident in this country, are subject to the jurisdiction and so can effectively be restrained by an injunction granted by an English court.

I wish first to observe that this question may arise not only in cases such as the present, usually described as 'alternative forum cases' (the two most relevant jurisdictions here being India and Texas), but also in what have been called 'single forum cases,' in which (for example) the English court is asked to grant an anti-suit injunction to restrain a party from proceeding in a foreign court which alone has jurisdiction over the relevant dispute. The distinction is of some importance in the present context, and I shall have to refer to it later. But for the moment it is enough for me to say that, in both categories of case, the basis of the jurisdiction has been traditionally stated in broad terms which are characteristic of the remedy of injunction as used in our domestic law. In alternative forum cases, it has been stated that the jurisdiction will be exercised as the ends of justice require, and in particular where the pursuit of the relevant proceedings is vexatious or oppressive; in single forum cases, it is said that an injunction may be granted to restrain the pursuit of proceedings overseas which is unconscionable. The focus is, therefore, on the character of the defendant's conduct, as befits an equitable remedy such as an injunction. In particular, although it has frequently been stated that comity requires that the jurisdiction to grant an anti-suit injunction should be exercised with caution, no requirement has been imposed specifically to prevent the grant of an anti-suit injunction in circumstances which amount to a breach of comity. The present case raises for the first time, and in a stark form, the question whether such a requirement should be recognised and, if so, what form it should take.

e In alternative forum cases, in which the choice is between the English forum and some other forum overseas, an anti-suit injunction will normally only be applied for in an English court where England is the natural forum for the resolution of the dispute; and, if so, there will be no infringement of comity. England was assumed to be the natural forum in a passage in the judgment of the Privy Council in *SNI Aérospatiale v Lee Kui Jak* [1987] 3 All ER 510, [1987] AC 871, which was delivered by myself. There, with reference in particular to cases such as the present, I said ([1987] 3 All ER 510 at 520–521, [1987] AC 871 at 894):

g 'Their Lordships refer, in particular, to the fact that litigants may now be encouraged to proceed in foreign jurisdictions, having no connection with the subject matter of the dispute, which exercise an exceptionally broad jurisdiction and which offer great inducements, in particular greatly enhanced, even punitive, damages, that they may tempt litigants to pursue their remedies there. In normal circumstances, application of the now very widely recognised principle of forum non conveniens should ensure that the foreign court will itself, where appropriate, decline to exercise its own jurisdiction ... But a stay may not be granted; and, if the English court concludes that it is the natural forum for the adjudication of the relevant dispute, and that by proceeding in the foreign court the plaintiff is acting oppressively, the English court may, in the interests of justice, grant an injunction restraining the plaintiff from pursuing the proceedings in the foreign court.'

j It is to be observed that the example there given presupposes that the English court is the natural forum for the adjudication of the dispute, though it is not stated in terms whether that is a prerequisite of the exercise of the jurisdiction in an alternative forum case, no doubt because the point did not there arise for decision. In a later passage in the same judgment I did however state that, as a general rule, the court granting the injunction must conclude that it is the natural forum for the trial of the action (see [1987] 3 All ER 510 at 522, [1987] AC 871 at 896).

In this connection it is helpful to refer to other common law jurisdictions. In *Amchem Products Inc v British Columbia (Workers' Compensation Board)* (1993) 102 DLR (4th) 96 at 118 Sopinka J, delivering the judgment of the Supreme Court of Canada, stated:

'If the foreign court stays or dismisses the action there, the problem is solved. If not, the domestic court must proceed to entertain the application for an injunction but only if it is alleged to be the most appropriate forum and is potentially an appropriate forum.'

There follows (at 118–121) a valuable account by Sopinka J of the manner in which the domestic court should approach the question whether to grant an anti-suit injunction in an alternative forum case, to which I will return later. I am glad to have this opportunity to pay my respectful tribute to the work of a distinguished judge, whose untimely death was announced during the hearing of the argument in the present case before the Appellate Committee.

Again, in *CSR America Inc v Cigna Insurance Australia Ltd* (1997) 146 ALR 402 at 437–438 it was stated by the majority of the High Court of Australia:

'In a case in which an anti-suit injunction is sought on equitable grounds, the central question is whether the court to which application is made or some other court should hear and determine the matter in issue or, at least, that aspect of it involved in the application for injunction. And where the courts concerned are, respectively, an Australian court and a court of another country, there is involved in that question the further question whether the Australian court is an appropriate forum, in the *Voth* sense [*Voth v Manildra Flour Mills Pty Ltd* (1990) 65 ALJR 83] of it not being clearly inappropriate, for the determination of that matter. The fact that there is that further question, the preclusive nature of an interlocutory anti-suit injunction and the importance of comity combine to require an Australian court to consider whether it is appropriate, in the sense that it is not clearly inappropriate, for it to determine the matter in issue before granting an anti-suit injunction.'

I stress the reference to comity in that passage.

I turn to the United States of America, where the situation is more complicated. The principle of forum non conveniens has long been recognised in the United States: see generally American Law Institute's *Restatement of the Law, Conflict of Laws* 2d (as adapted and promulgated 1971–1996) § 84, and *Scole and Hay on Conflict of Laws* (2nd edn, (1992) p 373. Notable judgments on the subject by the Supreme Court of the United States are to be found in *Gulf Oil Corp v Gilbert* (1947) 330 US 501, and *Piper Aircraft Co v Reyno* (1981) 454 US 235. The jurisdiction to grant an anti-suit injunction is likewise recognised in the United States: see American Law Institute's *Restatement of the Law, Conflict of Laws* § 84, comment h and *Scoles and Hay on Conflict of Laws* pp 356–359.

In the well-known anti-trust suit brought by Laker Airways Ltd in the United States against (among others) the British Airways Board and British Caledonian Airways Ltd, in which the liquidator of Laker alleged a conspiracy among a number of major airlines to force Laker out of the market for transatlantic flights by predatory low pricing, there developed a battle of anti-suit injunctions between the courts of this country and those of the District of Columbia, where Laker's anti-trust proceedings were brought. An injunction was granted in this country restraining Laker from so proceeding against certain European airlines; and Judge Greene, sitting in Washington DC, then granted an injunction restraining airlines which had

a not obtained such an injunction in England from seeking an anti-suit injunction here. His decision was affirmed by the Court of Appeals for the District of Columbia Circuit (see *Laker Airways Ltd v Sabena, Belgian World Airlines* (1984) 731 F 2d 909); but the matter was laid to rest by the decision of the House of Lords in *British Airways Board v Laker Airways Ltd* [1984] 3 All ER 39, [1985] AC 58, where it was made plain that no anti-suit injunction should have been granted in that case by the English courts. For present purposes, however, it is the judgment of Judge Wilkey in the District of Columbia Court of Appeals which is significant. In his judgment, for which I have expressed my respectful admiration on a previous occasion (see *Bank of Tokyo Ltd v Karoon* [1986] 3 All ER 468, [1987] AC 45), Judge Wilkey stated ((1984) 731 F 2d 909 at 926–927), that anti-suit injunctions are most often necessary (a) to protect the jurisdiction of the enjoining court, or (b) to prevent the litigant's evasion of the important public policies of the forum. Judge Wilkey's judgment has been most influential in the United States, but there has nevertheless developed a division of opinion among the circuits as to the circumstances in which an anti-suit injunction may be granted. A valuable account of this is to be found in an article by Dr Lawrence Collins, 'International jurisdiction and forum shopping: an overview', contained in *Current Legal Issues in International Commercial Litigation* (1997) pp 6–8 published by the Faculty of Law of the National University of Singapore. One approach, embodying what Dr Collins calls 'the stricter standard', is applied by the second circuit, the sixth circuit and the District of Columbia circuit. This is derived from Judge Wilkey's judgment in the *Laker Airways Ltd* case. It requires that the court should have regard to comity, and should only grant an anti-suit injunction to protect its own jurisdiction or to prevent evasion of its public policies: see eg *China Trade and Development Corp v MV Choong Yong* (1987) 837 F 2d 33 and *Gau Shan Co v Bankers Trust Co* (1992) 956 F 2d 1349. The other approach, embodying what has been called a laxer standard, is applied in the fifth, seventh and ninth circuits. On this approach, an anti-suit injunction will be granted if the foreign proceedings are vexatious, oppressive or will otherwise cause inequitable hardship. In deciding whether to grant an injunction, the court will take into account the effect on a foreign sovereign's jurisdiction as one factor relevant to the grant of relief (see *Philips Medical Systems International BV v Bruetman* (1993) 8 F 3d 600 at 605 per Judge Posner), but will require evidence that comity is likely to be impaired (see *Allendale Mutual Insurance v Bull Data Systems* (1993) 10 F 3d 425 at 431 per Judge Posner).

g *Single forum cases*

Before I attempt to formulate the principle applicable in the present case, I find it useful to return to the single forum cases which arose out of the *Laker Airways* litigation in this country. There are two decisions in question. In the first case, *British Airways Board v Laker Airways Ltd* [1984] 3 All ER 39, [1985] AC 58, to which I have already referred, the House of Lords held that British Airways and British Caledonian Airways were not entitled to an injunction. These two airlines had, by becoming parties to the applicable agreement between the United Kingdom and United States governments regulating transatlantic air traffic between the two countries, accepted that they were subject to the private law of both countries; and for that reason they failed to establish that *Laker Airways'* conduct in instituting the proceedings against them in the United States was unconscionable. The second case, *Midland Bank plc v Laker Airways Ltd* [1986] 1 All ER 526, [1986] QB 689, is of more relevance to the present case. *Laker Airways* had joined the Midland Bank (together with another bank) to its anti-trust proceedings in the United States on the basis that the bank, having been involved in mounting a financial rescue operation for *Laker Airways*, had withdrawn its support in circumstances which suggested that



the bank was party to the conspiracy to put Laker Airways out of business. The Court of Appeal granted the bank an anti-suit injunction to restrain Laker Airways from proceeding against the bank in the anti-trust suit in the United States. The basis for so doing appears to have been that the dealings between the two parties were part of the domestic business of the bank, which took place subject to English law and in an English context. The position was put very clearly by Neill LJ in his judgment ([1986] 1 All ER 526 at 544, [1986] QB 689 at 714-715):

'It is legitimate to look very closely at the suggestion that a resident in country A who has a series of dealings in country A with another resident of country A and who conducts his dealings in accordance with and subject to the law of country A is at the same time exposing himself to a potential liability in country B because the way in which he conducts the dealings may offend some law in country B. This question may arise in many different situations, often in fields far removed from antitrust legislation. Where the question does arise, then, in my judgment, the court has jurisdiction to consider whether it is just and equitable for the party affected to be brought before the courts of country B ... In my view, the dealings between [the plaintiff banks] and Laker were ... part of the domestic business of [the banks]. The dealings took place subject to English law and in an English context ... [The plaintiff banks] did not at any stage subject the relevant banking dealings and operations to the scrutiny or control of the United States authorities. Accordingly, in my judgment, the English court has jurisdiction to intervene to prevent [the plaintiff banks] from being subjected to proceedings in the New York court.'

Your Lordships' House is not here concerned to consider whether that case was correctly decided. Moreover it was not a case in which our present problem arises. That would have happened if the bank in that case had been a bank which carried on business in a third country, for example India, and all the relevant business had been transacted in India subject to Indian law. The question would then have arisen whether an English court should be prepared, in such circumstances, to grant an injunction restraining Laker Airways from joining the Indian bank to its anti-trust suit in the United States, simply because Laker Airways was a company carrying on business in England and so amenable to being sued in this country; and my immediate reaction is that it would be surprising if that question was to be answered in the affirmative. At all events it is striking that, in *Midland Bank plc v Laker Airways Ltd* [1986] 1 All ER 526, [1986] QB 689, the injunction was granted in circumstances where the relevant transaction was overwhelmingly English in character. It can therefore be said that, on this basis, the decision was consistent with comity, though the point was not articulated in the judgments because it did not arise for consideration; and, by parity of reasoning, it can be said that the grant of an injunction at the suit of British Airways and British Caledonian to restrain Laker from proceeding against them in the United States could not be justified in this way. These single forum cases demonstrate that any limiting principle requiring respect for comity cannot simply be expressed by reference to the question whether the English court may be the natural forum for the dispute. Such a principle would have to be stated on a wider basis. I wish to stress however that, in attempting to formulate the principle, I shall not concern myself with those cases in which the choice of forum has been, directly or indirectly, the subject of a contract between the parties. Such cases do not fall to be considered in the present case.

*Comity*

*a* I approach the matter as follows. As a general rule, before an anti-suit injunction can properly be granted by an English court to restrain a person from pursuing proceedings in a foreign jurisdiction in cases of the kind under consideration in the present case, comity requires that the English forum should have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which an anti-suit injunction entails.

*b* In an alternative forum case, this will involve consideration of the question whether the English court is the natural forum for the resolution of the dispute. The proper approach in such cases was considered in some depth by Sopinka J in *Amchem Products Inc v British Columbia (Workers' Compensation Board)* (1993) 102 DLR (4th) 96 at 118–119, where he said:

*c* 'The first step in applying the SNI analysis [*Société Nationale Industrielle Aérospatiale*] is to determine whether the domestic forum is the natural forum, that is the forum that on the basis of relevant factors has the closest connection with the action and the parties. I would modify this slightly to conform with the test relating to *forum non conveniens*. Under this test the court must determine whether there is another forum that is clearly more appropriate. The result of this change in stay applications is that where there is no one forum that is the most appropriate, the domestic forum wins out by default and refuses a stay, provided it is an appropriate forum. In this step of the analysis, the domestic court as a matter of comity must take cognizance of the fact that the foreign court has assumed jurisdiction. If, applying the principles relating to *forum non conveniens* outlined above, the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the application should be dismissed. When there is a genuine disagreement between the courts of our country and another, the courts of this country should not arrogate to themselves the decision for both jurisdictions. In most cases it will appear from the decision of the foreign court whether it acted on principles similar to those that obtain here, but, if not, then the domestic court must consider whether the result is consistent with those principles. In a case in which the domestic court concludes that the foreign court assumed jurisdiction on a basis that is inconsistent with principles relating to *forum non conveniens* and that the foreign court's conclusion could not reasonably have been reached had it applied those principles, it must go then to the second step of the [*Aérospatiale*] test.' (ie whether to grant an injunction on the ground that the ends of justice require it).

*f* His exposition is of considerable interest; for present purposes, however, it is not necessary for me to give the matter detailed consideration.

*g* In a single forum case this approach, as I have pointed out, can have no application. In such a case it may however be possible to establish a sufficient connection with the English forum. In particular this may, as the *Midland Bank* case suggests, involve consideration of the extent to which the relevant transactions are connected with the English jurisdiction or it may, as Judge Wilkey's statement of principle (*Laker Airways Ltd v Sabena, Belgian World Airlines* (1984) 731 F 2d 909 at 926–927) suggests, involve consideration of the question whether an injunction is required to protect the policies of the English forum.

*j* The general principle which I have outlined above is, I understand, consistent with the approach adopted by the Supreme Court of Canada in the *Amchem Products* case. It is also close to the stricter approach adopted by the second circuit, the sixth circuit and the District of Columbia circuit in the United States. It may be said that

the traditional way in which the principles applicable in cases of anti-suit injunctions have been formulated in this country corresponds to the 'laxer' approach applied in the fifth, seventh and ninth Circuits, in that the latter refers to vexation, oppression and inequitable hardship. But, as I see it, the problem which has arisen in such an acute form in the present case requires the English courts to identify, for the first time, the limits which comity imposes on the exercise of the jurisdiction to grant anti-suit injunctions. In truth, the solution which I prefer gives (as does the statement of the law by Judge Wilkey) due recognition to comity but, subject to that, maintains (as do the statements of the law by Judge Posner) the traditional basis of the jurisdiction as being to intervene as the ends of justice may require.

In any event, however, I am anxious that the principle which I have stated should not be interpreted too rigidly. I have therefore expressed it as a general rule. This is consistent with my statement of the law in *SNI Aérospatiale v Lee Kui Jak* [1987] 3 All ER 510 at 522, [1987] AC 871 at 896, an alternative forum case, to the effect that 'as a general rule' the court granting the injunction must conclude that it is the natural forum for the trial of the action. It is also consistent with Judge Wilkey's statement (*Laker Airways Ltd v Sabena, Belgian World Airlines* (1984) 731 F 2d 909 at 926-927), that anti-suit injunctions are 'most often' necessary for the two purposes which he specified. Indeed there may be extreme cases, for example where the conduct of the foreign state exercising jurisdiction is such as to deprive it of the respect normally required by comity, where no such limit is required to the exercise of the jurisdiction to grant an anti-suit injunction. In the present case Hobhouse LJ attached particular importance to the fact that, at the material time, the State of Texas did not recognise the principle of forum non conveniens. For my part, however, I cannot accept that this was sufficient to entitle the English court to intervene in the present case, bearing in mind that the principle is by no means universally accepted, and in particular is not accepted in most civil law countries.

#### *The present case*

I ask myself therefore whether there is any other aspect of the present case which would render the intervention of the English court consistent with comity. The facts upon which Airbus particularly relies are that there is a forum other than Texas, viz India, which is indeed the natural forum for the dispute, but which is unable to grant effective injunctive relief restraining the defendants from proceeding in Texas because they are outside the jurisdiction of the Indian courts; however, since the defendants are amenable to the jurisdiction of the English courts, Airbus is in effect seeking the aid of the English courts to prevent the pursuit by the defendants of their proceedings in Texas, which may properly be regarded as oppressive but which the Indian courts are powerless to prevent.

I must first point out that, for the English court to come to the assistance of an Indian court, the normal process is for the English court to do so by enforcing a judgment of the Indian court. However, as the present proceedings have demonstrated, that is not possible here. An attempt was made by Airbus to persuade Colman J to enforce, or at least to recognise, the Indian judgment; but he declined to do so, and Airbus has not appealed from that part of Colman J's decision. So Airbus is relying simply on the English court's power of itself, without direct reliance on the Indian court's decision, to grant an injunction in this case where, unusually, the English jurisdiction has no interest in, or connection with, the matter in question. I am driven to say that such a course is not open to the English courts because, for the reasons I have given, it would be inconsistent with comity. In a world which consists of independent jurisdictions, interference, even indirect interference, by the courts of one jurisdiction with the exercise of the jurisdiction of a foreign court cannot in



- a my opinion be justified by the fact that a third jurisdiction is affected but is powerless to intervene. The basic principle is that only the courts of an interested jurisdiction can act in the matter; and if they are powerless to do so, that will not of itself be enough to justify the courts of another jurisdiction to act in their place. Such are the limits of a system which is dependent on the remedy of an anti-suit injunction to curtail the excesses of a jurisdiction which does not adopt the principle, widely accepted throughout the common law world, of *forum non conveniens*.
- b

### *Conclusion*

- For the reasons I have given, I would allow the appeal on the first issue, and set aside the injunction ordered by the Court of Appeal. It follows that the question of oppression does not arise. Had it done so the result would have been that the appeal
- c would have been allowed on the terms of the undertakings offered by the defendants at the end of the hearing, with the effect that Airbus would have had the benefit of the undertakings, and there would have been an order for costs against the defendants. On the conclusion I have reached, however, that stage in the argument is not reached, and in my opinion the appeal should be allowed with costs, both
- d before your Lordships' House and in the courts below. It should not however be inferred from the mere fact that your Lordships have not reviewed the decision of the Court of Appeal to interfere with Colman J's exercise of his discretion that, had the point arisen, your Lordships would necessarily have approved of the decision of the Court of Appeal in this respect.

### *Postscript*

- I have no doubt that it will be of some comfort to your Lordships, though of none to Airbus, that the State of Texas has now, like other common law jurisdictions, adopted the principle of *forum non conveniens*, so that the situation which has arisen in the present case is unlikely to arise again. The principle is now so widespread that it may come to be accepted throughout the common law world;
- f indeed, since it is founded upon the exercise of self-restraint by independent jurisdictions, it can be regarded as one of the most civilised of legal principles. Whether it will become acceptable in civil law jurisdictions remains however to be seen.

- g **LORD SLYNN OF HADLEY.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Goff of Chieveley. For the reasons he gives I would allow the appeal.

- LORD STEYN.** My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Goff of Chieveley. For the reasons contained
- h in his speech I would also allow the appeal.

**LORD CLYDE.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Goff of Chieveley. For the reasons which he has given I would also allow the appeal.

- j **LORD HUTTON.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Goff of Chieveley. For the reasons which he has given I also would allow the appeal.

*Appeal allowed.*

# Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council a

COURT OF APPEAL, CIVIL DIVISION

MORRITT, WALLER AND ROBERT WALKER LJ b

28, 29 JANUARY, 19 FEBRUARY 1998

*Contract – Restitution – Interest rate swap agreement – Bank entering into interest rate swap agreement with local authority – Agreement ultra vires the local authority and void ab initio – Interest rate swap agreement fully performed according to its terms – Bank claiming repayment of net amount received by local authority under agreement – Whether bank entitled to recover payments – Whether full performance of void contract precluding claim for recovery – Whether distinction to be drawn between open swap and closed swap agreements.* c

On 23 September 1982 the defendant local authority purported to enter into an interest rate swap agreement with the plaintiff bank. The local authority agreed to borrow £5m from a building society for a period of five years at an interest rate of 11.625% pa. Over the same five-year period, it was agreed that, at the expiration of each successive period of six months, the bank should pay the local authority sums equal to the interest payments to be made by the local authority to the building society for that period and the local authority should pay to the bank interest at a floating rate on a notional loan of £5m for the same period. Thus, if the floating rate prescribed was less than 11.625% pa, the local authority would receive from the bank more than it paid to the bank and vice versa. The five-year period ended on 22 September 1987. By that date, when all swaps had been effected, the local authority had received from the bank £384,409 more than it had paid. However, the Queen's Bench Divisional Court subsequently declared, in an unrelated case, that interest rate swap transactions were ultra vires the powers of local authorities and therefore void ab initio and its decision was upheld by the House of Lords. Thereafter, the bank brought proceedings against the local authority, claiming repayment of the net amount which the local authority had received under the transaction, and obtained judgment in the sum of £101,781 and interest. The local authority appealed to the Court of Appeal, and the issue arose whether full performance of a void contract precluded a claim for recovery which would have succeeded in the case of partial performance. d  
e  
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**Held** – There was no principle which could justify drawing a distinction between a closed swap and an open swap. A contract which was ultra vires one of the parties to it was and always had been devoid of any legal effect and payments made in purported performance thereof were necessarily made for a consideration which had totally failed and were therefore recoverable as money had and received. Accordingly, a party to an apparent swap contract which was void as being ultra vires one party was entitled to recover the amount by which what he had paid exceeded what he had received, whether or not the apparent contract had been completely performed, for there was a total failure of consideration whether it was regarded entire or severable. Moreover, the fact that the swap contract, although ultra vires and void, had been fully performed did not constitute a defence or bar to the recovery of the net payment as money had and received, since the recipient had no more right to receive or retain the h  
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- a payment at the conclusion of the contract than he did before. In the instant case, the agreement made between the bank and the local authority was beyond the latter's powers and void ab initio, with the result that the bank could recover its net payments notwithstanding that the agreement had been fully performed. It followed that the local authority's appeal would therefore be dismissed (see p 279 c d, p 282 c to e h j, p 283 b, p 284 h to p 285 d, p 288 d to f, p 290 d, p 293 j and p 294 e to j, post).

b Dictum of Dillon LJ and of Leggatt LJ in *Westdeutsche Landesbank Girozentrale v Islington London BC* [1994] 4 All ER 890 at 961, 969 applied.

*Kleinwort Benson Ltd v Sandwell BC* [1994] 4 All ER 890 considered.

### Notes

- c For a local authority's power to incur expenditure, see 28 *Halsbury's Laws* (4th edn) paras 1245, 1247.

### Cases referred to in judgments

- Chillingworth v Esche* [1924] 1 Ch 97, [1923] All ER Rep 97, CA.
- d *Cotman v Brougham* [1918] AC 514, [1918–19] All ER Rep 265, HL.
- Davis v Bryan* (1827) 6 B & C 651, 108 ER 591.
- Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] 2 All ER 122, [1943] AC 32, HL.
- Goss v Chilcott* [1997] 2 All ER 110, [1996] AC 788, [1996] 3 WLR 180, PC.
- Hazell v Hammersmith and Fulham London BC* [1991] 1 All ER 545, [1992] 2 AC 1, [1991] 2 WLR 372, HL.
- e *Hicks v Hicks* (1802) 3 East 16, 102 ER 502.
- Kleinwort Benson Ltd v Sandwell BC* [1994] 4 All ER 890.
- Linz v Electric Wire Co of Palestine Ltd* [1948] 1 All ER 604, [1948] AC 371, PC.
- Midland Bank Trust Co Ltd v Green* [1981] 1 All ER 153, [1981] AC 513, [1981] 2 WLR 28, HL.
- f *Pearce v Brain* [1929] 2 KB 310, [1929] All ER Rep 627, DC.
- Phoenix Life Assurance Co, Re, Burges and Stock's Case* (1862) 2 John & H 441, 31 LJ Ch 749, 70 ER 1131.
- Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912, CA; *rvsg* [1987] BCLC 540.
- g *Rowland v Divall* [1923] 2 KB 500, [1923] All ER Rep 270, CA.
- Rugg v Minett* (1809) 11 East 210, 103 ER 985
- Sinclair v Brougham* [1914] AC 398, [1914–15] All ER Rep 622, HL.
- Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452, [1923] All ER Rep 239, CA.
- Warman v Southern Counties Car Finance Corp Ltd (WJ Ameris Car Sales, third party)* [1949] 1 All ER 711, [1949] 2 KB 576.
- h *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] 2 All ER 961, [1996] AC 669, [1996] 2 WLR 802, HL; *rvsg* [1994] 4 All ER 890, [1994] 1 WLR 938, CA; *affg* [1994] 4 All ER 890.
- Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737, [1993] AC 70, [1992] WLR 366, HL.

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### Cases also cited or referred to in skeleton arguments

- Ames' Settlement, Re, Dinwiddy v Ames* [1946] 1 All ER 689, [1946] Ch 217.
- Brougham v Dwyer* (1913) 108 LT 504, DC.
- David Securities Pty Ltd v Commonwealth Bank of Australia* (1942) 175 CLR 353, Aust HC.
- Essery v Cowlard* (1884) 26 Ch D 191.



*Ferguson (D O) & Associates v Sohl* (1992) 62 BLR 95, CA.

*Flood v Irish Provident Assurance Co Ltd* [1912] 2 Ch 597n, Ir CA.

*London Celluloid Co, Re* (1888) 39 Ch D 190, CA.

*Orakpo v Manson Investments Ltd* [1977] 3 All ER 1, [1978] AC 95, HL.

## Appeal

Kensington and Chelsea Royal London Borough Council (the council) appealed with leave of Staughton LJ granted on 19 April 1996 from the order of Phillips J made on 4 March 1995, whereby it was ordered, with the consent of the parties: that the judgment in default of service of notice of intention to defend dated 9 December 1994 be set aside; and that there be judgment for the plaintiff, Guinness Mahon & Co Ltd (the bank), in the sum of £101,781 with interest in respect of payments which it had made to the council in March 1987 and September 1987 in purported performance of an interest rate swap agreement entered into by the parties. The facts are set out in the judgment of Morritt LJ.

*Charles Béar* (instructed by *A G Phillips*) for the council.

*George Leggatt QC* (instructed by *Norton Rose*) for the bank.

*Cur adv vult*

19 February 1998. The following judgments were delivered.

**MORRITT LJ.** On 23 September 1982 Kensington and Chelsea Royal London Borough Council (the council) apparently entered into an agreement with Guinness Mahon & Co Ltd (the bank) setting out the terms of a transaction of a type known as an interest rate swap. The council agreed to borrow £5m from a building society for a period of five years at an interest rate of 11.625% pa. Over the same period of five years, it was agreed that at the expiration of each successive period of six months the bank should pay to the council sums equal to the interest payments to be made by the council to the building society for that period and the council should pay to the bank interest at a floating rate on a notional loan of £5m for the same period. Thus, if the floating rate prescribed was less than 11.625% pa the council would receive from the bank more than it paid to the bank and vice versa.

The five-year period ended on 22 September 1987. By that date, when all swaps had been effected, the council had received from the bank £384,409 more than it had paid. There matters might have rested but for the fact that on 1 November 1989 the Queen's Bench Divisional Court declared, as subsequently upheld in the House of Lords in *Hazell v Hammersmith and Fulham London BC* [1991] 1 All ER 545 [1992] 2 AC 1, that such an agreement as the council had apparently concluded with the bank was ultra vires the council and so void from the start.

In early 1993 two actions selected as test actions for the resolution of the problems arising from the invalidity of such interest rate swaps came before Hobhouse J. They were *Westdeutsche Landesbank Girozentrale v Islington London BC* and *Kleinwort Benson Ltd v Sandwell BC* [1994] 4 All ER 890. In the former, the period prescribed in the agreements during which such swaps should take place had not expired at the time the proceedings were commenced. In the latter, the period specified in one of the agreements sued on had, as in this case, expired, all relevant swaps having been duly paid before the writ was issued. In each case the bank sought repayment of the net amount it had paid the local authority.

a Hobhouse J gave judgment in February 1993 upholding the claims of the banks in all cases. In particular, he refused to draw a distinction between what might be described as 'open swaps', where the period prescribed in the ultra vires agreement had not expired, and 'closed swaps', where it had.

b These proceedings were commenced by the bank on 26 July 1993. On 9 November 1994 judgment in default of notice of intention to defend was entered by the bank. On 4 March 1995 Phillips J made a consent order setting aside the judgment entered in default and, but without prejudice to the council's right to appeal therefrom, substituting for it a judgment in favour of the bank in the sum of £101,781 and interest. It is from that judgment that the council now appeals with the leave of Staughton LJ. Though there were appeals in the *Westdeutsche* case on certain points in relation to open swaps, there was none in the *Sandwell* case, because it was settled, and therefore none in relation to a closed swap. Accordingly this appeal has been argued on the footing that it is in substance an appeal from the order of Hobhouse J in the *Sandwell* case in so far as it related to a closed swap.

c It is necessary at the outset to consider in some detail the decisions of Hobhouse J in the *Westdeutsche* and *Sandwell* cases and of the Court of Appeal ([1994] 4 All ER 890, [1994] 1 WLR 938) and the House of Lords ([1996] 2 All ER 961, [1996] AC 669) in *Westdeutsche* for the purpose of ascertaining the basis on which sums paid under an open swap are, as is common ground, recoverable if the agreement was ultra vires one of the parties to it. In the *Westdeutsche* case the interest rate swaps were of the conventional kind but the agreement provided for the bank to pay to the local authority a lump sum at the commencement of the period for which the agreement was intended to run. All of them were open swaps. In the *Sandwell* case there was no such lump sum payment and, as I have pointed out, one of them was a closed swap. The judgment of Hobhouse J, after a review of the facts of the case, is helpfully divided into sections. In section (1) he dealt with a number of preliminary matters, namely: (a) the historical development of claims for restitution; (b) the effect of the ultra vires principle; (c) the passing of property in money; (d) the decision of the House of Lords in *Sinclair v Brougham* [1914] AC 398, [1914–15] All ER Rep 622; and (e) the effect of certain annuity cases. For present purposes it is sufficient to note the conclusions of Hobhouse J in relation to (d) and (e). With regard to the former, he considered that *Sinclair v Brougham* was direct authority for the proposition that if it were ultra vires the payor to make the payment in question then it had an equitable right against the recipient, in the nature of an equitable charge, to trace the money so paid into its general assets (see [1994] 4 All ER 890 at 921). In the case of the latter, he concluded (at 923) that the annuity cases, which he described in some detail, established that the right of restitution existed in respect of payments made under void contracts even though there were payments both ways so that on a contractual analysis there was no total failure of consideration. He also considered and found to be inapplicable in *Sandwell* the statement of Bayley J in *Davis v Bryan* (1827) 6 B & C 651 at 655, 108 ER 591 at 592 to the effect that where one party received the whole of that for which he bargained it was against conscience to claim that the contract was void from the start.

j In section (2) Hobhouse J analysed the restitutionary claim of money had and received under five headings, of which only the second, 'Void contracts and absence of consideration', is directly material. He recorded two arguments for the banks; first, that payments made under a void contract do not amount to consideration for the purposes of the law of restitution; second, that the banks did not get the benefit for which they had bargained, sc payments which would

discharge a legal obligation and which, therefore, the banks might lawfully retain, but, by contrast, obtained under a void contract money which the local authority was prima facie entitled to recover. After referring to *Rowland v Divall* [1923] 2 KB 500, [1923] All ER Rep 270, *Linz v Electric Wire Co of Palestine Ltd* [1948] 1 All ER 604, [1948] AC 371 and *Rover International Ltd v Cannon Film Sales Ltd* (No 3) [1989] 3 All ER 423, [1989] 1 WLR 912, he said ([1994] 4 All ER 890 at 929):

'In my judgment, the correct analysis is that any payments made under a contract which is void ab initio, in the way that an ultra vires contract is void, are not contractual payments at all. They are payments in which the legal property in the money passes to the recipient, but in equity the property in the money remains with the payer. The recipient holds the money as a fiduciary for the payer and is bound to recognise his equity and repay the money to him. This relationship and the consequent obligation have been recognised both by courts applying the common law and by Chancery courts. The principle is the same in both cases: it is unconscionable that the recipient should retain the money. Neither mistake nor the contractual principle of total failure of consideration are the basis for the right of recovery.'

In the concluding passage of that section he decided that it was irrelevant to the existence of a cause of action in connection with the payments made under the first *Sandwell* swap that the supposed contract was in fact fully performed and there was no failure of consideration in the contractual sense. In section (3) Hobhouse J considered 'Equitable tracing' and decided that the banks were entitled to that remedy. Sections (4) to (6) dealt respectively with the Limitation Act 1980, the defence of change of position and interest. His ultimate conclusion was (at 955):

'The plaintiff is entitled to recover that sum either as money had and received by the defendant to the use of the plaintiff or as money which in equity belongs to the plaintiff and which it is entitled to trace in the hands of the defendant and have repaid to it out of the present assets of the defendant. The basis of the plaintiff's claim, whether at common law or in equity, is that the defendant has been unjustly enriched at the expense of the plaintiff and that in conscience the defendant must repay to the plaintiff, save in so far as it has already done so, the sum which it received from the plaintiff. The right to restitution arises from the fact that the payment made by the plaintiff to the defendant was made under a purported contract which, unknown to the plaintiff and the defendant, was ultra vires the defendant and wholly void.'

Counsel for the council criticises this judgment on three grounds. First, he submits, Hobhouse J was wrong to distinguish *Davis v Bryan*. Second, Hobhouse J failed properly to apply the principle stated by Kerr LJ in *Rover International Ltd v Cannon Film Sales Ltd* (No 3). Third, Hobhouse J was wrong to consider that the equitable interest in money paid under an ultra vires contract remained in the payor.

There is no issue with regard to the third criticism for the House of Lords decided the point in the contrary sense in the subsequent appeal in the *Westdeutsche* case. However it is clear from the judgment of Hobhouse J as a whole that he found for the banks on two grounds, money had and received and the equitable right to trace. Though the House of Lords disagreed on the second



a ground both the Court of Appeal and the House of Lords agreed with Hobhouse J on the first.

b The order made by Hobhouse J in the *Westdeutsche* case awarded to the banks the net sum paid by them to the local authority with compound interest from the date of the decision of the Divisional Court in *Hazell's* case. The appeal in *Sandwell* was settled. In the *Westdeutsche* case the local authority appealed against the award of compound interest and the bank cross-appealed in respect of the date from which interest should run. The Court of Appeal ([1994] 4 All ER 890, [1994] 1 WLR 938) dismissed the local authority's appeal, so it remained liable for compound interest, but allowed the appeal of the bank so as to award interest on the balance due to the bank from time to time. Both those apparently limited issues involved the further consideration of the basis of the liability of the local authority.

c Dillon LJ considered that the liability of the local authority was established in both restitution and equity. In the case of the former the claim was for money had and received on the basis of a total failure of consideration. Dillon LJ rejected the contention of the local authority that such claim must fail because of the interest payments it had made by way of swap. After referring to *Rugg v Minnett* (1809) 11 East 210, 103 ER 985, Dillon LJ said ([1994] 4 All ER 890 at 961, [1994] 1 WLR 938 at 945):

e 'I do not see why a similar process of severance should not be applied where what has happened, in a purely financial matter, is that there has been a payment of money one way and a payment of smaller sums of money the other way. The effect of severance is that there has been a total failure of consideration in respect of the balance of the money which has not come back. Severance apart, however, to hold that as the interest swap transaction and contract were ultra vires and void there was no consideration for the payment by Westdeutsche of the £2.5m and therefore the balance which has not so far been repaid by Islington can be recovered by Westdeutsche in quasi contract as money had and received or on the ground of unjust enrichment is warranted by early cases decided under the Grants of Life Annuities Act 1777.'

g He concluded that the bank was entitled to recover the balance from the local authority as money had and received or unjust enrichment at the expense of the owner of the money. He also considered and upheld the decision of Hobhouse J in respect of the liability of the local authority on equitable grounds, but that part of his judgment cannot now stand in view of the subsequent decision of the House of Lords.

h The judgment of Leggatt LJ was to the same effect. In rejecting the submission for the local authority that because of the payments it had made there could not have been a total failure of consideration, he said ([1994] 4 All ER 890 at 969, [1994] 1 WLR 938 at 953):

j 'There can have been no consideration under a contract void ab initio. So it is fallacious to speak of the failure of consideration having been partial. What is meant is that the parties did, in the belief that the contract was enforceable, part of what they would have been required to do if it had been. As it was, they were not performing the contract even in part: they were making payments that had no legal justification, instead of affording each other mutual consideration for an enforceable contract. In my judgment, the payments made are in those circumstances recoverable by

Westdeutsche, in so far as they exceed the payments made by Islington, as money had and received to the use of Westdeutsche by which Islington have been unjustly enriched.' a

There is in that passage an echo of the judgment of Lord Ellenborough CJ in *Hicks v Hicks* (1802) 3 East 16 at 17, 102 ER 502, where in one of the annuity cases he said: b

'This was either an annuity or not an annuity. If not an annuity, the sums paid on either side were money had and received by the one party to the other's use. If the consideration of the annuity be money had and received, it must be money had and received with all its consequences; and therefore the defendant must be at liberty to set off his payments as such on the same score.' c

Leggatt LJ also considered the claims of the bank to be justified on equitable grounds, but for the same reason as in the case of the judgment of Dillon LJ that part of his judgment cannot stand. Kennedy LJ agreed with both judgments. I have referred to these judgments in some detail for it seems to me that, as submitted by counsel for the bank, the Court of Appeal decided, quite separately from their conclusion on the claim on equitable grounds, that the bank was entitled to succeed in its claim on the grounds of money had and received on the basis of a total failure of consideration, notwithstanding that in one sense consideration was given by the local authority in performing its part of the swap. d

The local authority appealed to the House of Lords against the order of the Court of Appeal awarding compound interest on the net balance due from time to time. The appeal was allowed in respect of the award of compound rather than simple interest but dismissed in respect of the time from which interest should be payable. The House of Lords disagreed with Hobhouse J and the Court of Appeal in respect of the bank's claim on equitable grounds. In doing so they re-examined their own decision in *Sinclair v Brougham* [1914] AC 398, [1914-15] All ER Rep 622. Though the claim in respect of money had and received was not in issue the decisions of Hobhouse J and the Court of Appeal in that respect were evidently approved. Thus Lord Goff of Chieveley ([1996] 2 All ER 961 at 967, [1996] AC 669 at 683) said in relation to the annuity cases on which Hobhouse J had relied: e

'... they were concerned with cases in which payments had been made, so to speak, both ways; and the courts had to decide whether they could, in such circumstances, do justice by restoring the parties to their previous positions. They did not hesitate to do so, by ascertaining the balance of the account between the parties, and ordering the repayment of the balance. Moreover the form of action by which this was achieved was the old action for money had and received—what we nowadays call a personal claim in restitution at common law. With this precedent before him, Hobhouse J felt free to make a similar order in the present case; and in this he was self-evidently right.' f

Lord Browne-Wilkinson said of the decision: g

'... in *Sinclair v Brougham* the depositors should have had a personal claim to recover the moneys at law based on a total failure of consideration. The failure of consideration was *not* partial: the depositors had paid over their money in consideration of a promise to repay. The promise was ultra vires h

a and void; therefore the consideration for the payment of the money wholly failed. So in the present swaps case (though the point is not one under appeal) I think the Court of Appeal were right to hold that the swap moneys were paid on a consideration that wholly failed. The essence of the swap agreement is that, over the whole term of the agreement, each party thinks he will come out best: the consideration for one party making a payment is an obligation on the other party to make counter-payments over the whole term of the agreement.' (See [1996] 2 All ER 961 at 993, [1996] AC 669 at 710; Lord Browne-Wilkinson's emphasis.)

I have referred at length to the course of the proceedings in the *Westdeutsche* case to demonstrate that the true basis for the recovery by the bank of the net amount it paid to the local authority, which had no capacity to enter into the swap agreement, was for money had and received as on a total failure of consideration. I take this to have been one of the two distinct grounds of decision of Hobhouse J and of the Court of Appeal and that ground was expressly approved by at least two of the members of the Appellate Committee of the House of Lords.

Except for the decision of Hobhouse J in the *Sandwell* case, all these conclusions were reached in the case of an open swap, whereas this case concerns a closed swap. For the council Mr Béar, in his excellent argument, submitted that this makes all the difference. He pointed out that the only interest the bank had ever had in the capacity of the council was to ensure performance of the swap agreement but once it had been completed the bank was in exactly the same position as it would have been if the council had had the necessary capacity. He submitted that there were two stages to the consideration of any question of restitution: first, did the circumstances give rise to a case of unjust enrichment which should prima facie lead to a recovery; if so, did the circumstances give rise to a defence or bar to recovery, negating the prima facie case of unjust enrichment, for example, in the circumstances it was not unjust. He submitted that there is no authority binding on this court on the question whether full performance of a void contract precluded a claim for recovery which would have succeeded in the case of partial performance. He submitted that the decision of Hobhouse J in the *Sandwell* case was in conflict with the observation of Bayley J in *Davis v Bryan*. He suggested that to answer the question in the negative would fail to give effect to *Rover International Ltd v Cannon Film Sales Ltd* (No 3) [1989] 3 All ER 423, [1989] 1 WLR 912. Quite apart from authority he argued that there was nothing unjust in refusing recovery for the enrichment of the council which would result because it would be exactly that for which the parties had bargained. He sought support for his arguments from the statements in Goff and Jones *The Law of Restitution* (4th edn, 1993) p 61:

'No doubt it is right that a party who has received the very thing which he has contracted to receive should be unable to reopen the transaction to recover his money'

and in Professor Birks' article 'No Consideration: Restitution after Void Contracts' (1993) 23 University of Western Australia Law Review (UWALR) 195 at 206:

'... if we stand back from authority, there is in fact no compelling reason to allow a plaintiff to recover the value of his performance if he has received in



exchange for it all that he expected. His ground for restitution, if it exists, must be purely technical.' a

He pointed out that acceptance of his argument would align the law of England and Wales with the American Law Institute's *Restatement of the Law, Restitution* (1937) para 47, in which it is stated:

'A person who, in order to obtain the performance of a promise given or believed to have been given by another and in exchange therefor, has conferred upon the other a benefit other than the performance of services or the making of improvements to the land or chattels of the other, is entitled to restitution from the other if the transferor, because of a mistake of law, (a) erroneously believed the promise to be binding upon him and (b) did not obtain the benefit expected by him in return.' b

The notes to that paragraph state (p 94):

'If the transferor receives what he expected to receive in exchange for what he gave, his right to restitution is discharged, as where the other party ratifies the act of an unauthorised agent with whom the transferor had dealt or where a married woman, not bound by her promises, gives what she had promised.' c

Mr Béar's concluding submission was to the effect that if the argument for the bank was right it would amount to giving a right in restitution to repayment of money on the sole ground that its original payment had not been due. This he contended would be contrary to the proposition expressed by Lord Goff of Chieveley in *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737 at 759, [1993] AC 70 at 172 that English law did not recognise such a cause of action. d

Before considering these submissions in greater detail it is helpful to consider the position of the parties to an open swap and a closed swap. I assume a swap period of five years with swap payments between the bank and local authority every six months. The penultimate payments made four and a half years after the date of the agreement have given rise to a net balance in favour of the local authority of £100,000. *Westdeutsche* establishes that if the original swap agreement was ultra vires the local authority the bank would have a cause of action for repayment of that balance as money had and received or for restitution at common law. Then I assume that six months later the final swap payments are made by a net payment from the bank to the local authority of a further £50,000. The argument for the council, if accepted, would deny the bank any right of recovery. But if the restitutionary principle requires the recognition of a cause of action for recovery of £100,000 when the penultimate payments were made it is difficult to see on what basis it denies any claim at all when on the final payments the balance in favour of the local authority rises to £150,000. e

It was not suggested that the position differed depending on which party was the net winner. Thus I assume the converse case. After four and a half years the balance of £100,000 is in favour of the bank. That sum is recoverable from the local authority because it had no capacity to enter into the agreement under which the various sums making up the balance were paid. On the last payment the balance in favour of the bank is increased by a further £50,000. That payment was made by the local authority with the same lack of capacity as all the earlier ones. It is hard to see any basis of logic or justice which would justify allowing the claim of the local authority to the balance due after the penultimate swap but f

a denying it in respect of the final balance. The council seeks to justify the distinction on two theoretical legal bases.

The first theoretical basis on which the case for the council is put is that because over the whole of the term of the swap agreement the parties paid and received exactly what they had bargained for there can be no failure of consideration in the case of the closed swap. By contrast, in the case of the open swap, one or more of the swaps envisaged has not been carried out; therefore, it is said, there is a total failure of consideration for the parties have not received all that for which they bargained. But this argument assumes that in the case of a swap contract the relevant bargain was for the payments which were actually made rather than the legal obligation to make them. It is true that in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] 2 All ER 122 at 129, c [1943] AC 32 at 48 Viscount Simon LC said:

‘... when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise.’

d But that case concerned a contract originally valid but subsequently frustrated due to the outbreak of war and not a contract void from the outset. In any event the statement was not intended to be exhaustive as is apparent from the qualification introduced by the words ‘generally speaking’.

e In *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912 the relevant agreement was invalid from the start because the party with which it was expressed to be made had not been incorporated at the time it was executed. The consequence was that Rover was not entitled to the benefit of the profit sharing agreement it contained. The judge had rejected the claim of Rover to recover sums it had advanced in the belief that it was a valid and effective agreement on the ground that ‘the consideration, if it had been a f contract, had not failed’ because Rover had received some of the benefits for which the contract provided (see [1989] 3 All ER 423 at 432, [1989] 1 WLR 912 at 923). Kerr LJ considered that the judge had adopted the wrong test. He said ([1989] 3 All ER 423 at 433, [1989] 1 WLR 912 at 923):

g ‘The question whether there has been a total failure of consideration is not answered by considering whether there was any consideration sufficient to support a contract or purported contract. The test is whether or not the party claiming total failure of consideration has in fact received any part of the benefit bargained for under the contract or purported contract.’

h Kerr LJ then considered the passage from the speech of Viscount Simon LC in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*, which I have already quoted, the decision of the Court of Appeal in *Rowland v Divall* [1923] 2 KB 500, [1923] All ER Rep 270 and of Finnemore J in *Warman v Southern Counties Car Finance Corp Ltd (WJ Ameris Car Sales, third party)* [1949] 1 All ER 711, [1949] 2 KB j 576. Kerr LJ considered that in the latter two cases what was bargained for was lawful possession and a good title to the car and the use of and option to purchase the car. He concluded in relation to the case before him:

‘The relevant bargain, at any rate for present purposes, was the opportunity to earn a substantial share of the gross receipts pursuant to cl 6 of the schedule to the agreement, with the certainty of at least breaking even by recouping their advance. Due to the invalidity of the agreement Rover

got nothing of what they had bargained for, and there was clearly a total failure of consideration.' (See [1989] 3 All ER 423 at 434, [1989] 1 WLR 912 at 925.) a

Dillon LJ did not find it necessary to consider the claim based on a total failure of consideration. Nicholls LJ agreed with the reasoning of both Kerr and Dillon LJJ. I accept, as Mr Béar argued, that this case concerned a contract void from the start. But I do not accept Mr Béar's further submission that Kerr LJ was considering only the performance of the promise. It seems to me that he was considering whether Rover obtained the legal rights for which it had stipulated as well as the fruits of such rights. b

But whether or not my reading of the judgment of Kerr LJ is correct, one principle clearly established by the Court of Appeal in *Westdeutsche* is that in the case of a contract void from the start there must for that reason have been a total failure of consideration (see [1994] 4 All ER 890 at 961, 969, [1994] 1 WLR 938 at 945, 953 per Dillon and Leggatt LJJ). To the same effect is the speech of Lord Browne-Wilkinson in the House of Lords (see [1996] 2 All ER 961 at 993, [1996] AC 669 at 710–711). These passages, which I have already quoted, demonstrate that it is the very fact that the contract is *ultra vires* which constitutes the total failure of consideration justifying the remedy of money had and received or restitution for unjust enrichment. If partial performance of that assumed obligation in the case of an open swap does not preclude a total failure of that consideration then there is no basis on which complete performance of a closed swap could do so. c  
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The second theoretical basis on which the council tries to justify the distinction between an open and closed swap for which they contend is by reference to the principle of the severability or apportionment of consideration. Such a concept was referred to by Lord Wright in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] 2 All ER 122 at 137, [1943] AC 32 at 64. He considered that where the entire consideration was severable there might be a total failure of consideration as to a severed part. The authority relied on was *Rugg v Minett* (1809) 11 East 210, 103 ER 985, which was referred to by Dillon LJ in the *Westdeutsche* case. The principle was further explained and applied in *Goss v Chilcott* [1997] 2 All ER 110 at 116–117, [1996] AC 788 at 797–798. Counsel for the council sought to apply that principle by severing each six-monthly swap both from the overall agreement and also from each of the others. In this manner he drew a distinction between the open swap, where it was suggested that there was a total failure of consideration with regard to the outstanding swap, and the closed swap, where there was no such failure because all had been performed. But a distinction cannot in my view be drawn on those lines. On that basis each six-monthly swap would be severable. If the relevant consideration for each swap was the *performance* of the obligation each party thought it was under in respect of that swap, then each swap would be fully performed and neither party could recover from the other either during the term of the swap agreement or thereafter the amount by which what he paid exceeded what he received. If, on the other hand, the consideration for each swap was the *benefit* of the contractual obligation then there was a total failure of consideration in the case of each swap either before or after the term of the agreement had elapsed, thereby entitling the loser to recover the balance under a closed swap as well as an open one. Thus neither horn of the dilemma justifies a distinction between a closed swap and an open swap. As Mr Leggatt QC submitted for the bank, the proposition either proved too much or too little. f  
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a Mr Leggatt also relied by way of analogy on the provisions of s 84 of the Marine Insurance Act 1906 and cases decided thereunder. I do not think that it is necessary to deal with them further for I do not think that his argument requires any such support. I should for completeness add that I am not sure that the field of insurance is necessarily analogous with regard to claims paid under a policy made void by the section. In many such cases the insurer's claim for repayment of the insurance moneys paid would be likely to be met by the defence of change of position. No such defence is suggested in this case.

b For these reasons I do not accept either of the theoretical bases on which the council seeks to justify a distinction between an open and a closed swap agreement. In dealing with the first of them I have covered the criticism of the judgment of Hobhouse J based on the judgment of Kerr LJ in *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912. It is necessary then to consider the remaining criticism of the judgment of Hobhouse J, namely that based on the judgment of Bayley J in *Davis v Bryan* (1827) 6 B & C 651, 108 ER 591, one of the annuity cases the application of which was expressly approved by Lord Goff of Chieveley in *Westdeutsche* [1996] 2 All ER 961 at 967–968, [1996] AC 669 at 683. The council contend that the conclusion of Hobhouse J is contrary to that judgment. In *Davis v Bryan* the defendant had sold to the deceased an annuity for the life of the latter, whose estate was represented by the plaintiff, for a capital sum. The defendant had paid the annuity until the death of the annuitant. But as no memorial of the grant of the annuity had been registered the original grant was void. The plaintiff sought to recover the sum paid for the purchase of the annuity. He failed. Bayley J said (6 B & C 651 at 655–656, 108 ER 591 at 591):

f 'This appears to be a clear case on principles both of law and honesty. This is an action for money had and received, and I learned many years ago that such an action could not be maintained, if it were against equity and good conscience that the money should be recovered. Here a bargain was made, and the testator paid a consideration of 300l., and the defendant agreed for that to pay a certain annuity. The testator received the whole of that which he bargained for, and now his representative says that the contract was void from the beginning. Is there any thing like good conscience in the claim? Then is the contract void? The act of parliament says, that unless a memorial be duly enrolled, the deed of which no memorial is enrolled shall be void; but in many cases such words have been held to make the instrument voidable only at the will of the party, and I think we are at liberty to put that construction upon them in the present case.'

h Holroyd J gave as an additional ground the fact that the agreement had been fully executed. Littledale J concurred. Hobhouse J observed that that case appeared to be based on three grounds but had subsequently been regarded as authority for only the second, namely that the grantee who had failed to register the transaction could not unilaterally avoid it. He concluded that it did not establish any proposition of assistance to the *Sandwell* case in relation to the closed swap, save that in an action for money had and received it is always necessary to have regard to considerations of equity and good conscience. I agree with Hobhouse J. The grant of the annuity had not, according to the decision of the court, been void from the start because the grantor had never sought to avoid it and the grantee could not rely on his own failure to register. Accordingly there had not been a total failure of consideration because not only had the annuity been paid in full but also the grant had never been avoided by the grantor. Thus that case

is distinguishable from that of a contract void from the start because it was ultra vires. a

It must be borne in mind that the ultra vires doctrine exists for the protection of the public. This was stated in relation to limited companies by Lord Parker of Waddington and Lord Wrenbury in *Cotman v Brougham* [1918] AC 514 at 520–522, [1918–19] All ER Rep 265 at 268–269 and in relation to statutory corporations by Lord Templeman in *Hazell v Hammersmith and Fulham London BC* [1991] 1 All ER 545 at 560, [1992] 2 AC 1 at 36. It is true, as Hobhouse J observed in the *Westdeutsche* case, that once the transaction has been held to have been void from the start the effect of the doctrine has been exhausted so far as the corporation is concerned for no illegality is involved, though it may have further implications and effect on the officers of the corporation. But that does not mean that the court should apply the law of restitution so as to minimise the effect of the doctrine. If as the council contends there is no claim for money had and received in the case of a completed swap then practical effect will be given to a transaction which the doctrine of ultra vires proclaims had no legal existence. The House of Lords declined so to do in *Sinclair v Brougham* [1914] AC 514, [1914–15] All ER Rep 622 on the theory, now discredited, that the restitutionary claim was based on an implied promise; if the contractual promise was void because it was ultra vires how could the law imply a promise to the like effect? Though the basis of the implied promise may now have gone, in my view the general principle must remain that an ultra vires transaction is of no legal effect. It must follow that the recipient of money thereunder has no right to it. If he keeps it he will be enriched. If he does not then or subsequently obtain a right to keep it such enrichment will be unjust. The claim for money had and received may be defeated by the defence of change of position. But in the absence of such a defence, and none was suggested in this case, it seems to me to be no answer to the claim to say that once the transaction has been fully performed the bank no longer has any interest in the capacity of the corporation or that both parties have received the expected return. Nor does it appear to me to be accurate to describe the party's ability to recover his net payments as a windfall. If any of those factors, not amounting to the defence of change of position, was an answer to the claim it would attribute some effect to the transaction the law had declared to have none. b  
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The passage in *Goff and Jones* p 401 which I quoted earlier is not specifically related to payments made in purported performance of an ultra vires contract. Nor, with respect to Professor Birks, do I agree that there is no compelling reason to allow the bank to recover the value of its performance. The bank did not get in exchange for that performance all it expected for it did not get the benefit of the contractual obligation of the local authority. Likewise in reference to para 47 of the *American Restatement* the bank did not get the benefit it expected in the form of a contractual obligation. g  
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I agree with Hobhouse J that there is no principle which could justify drawing a distinction between a closed swap and an open swap. I can summarise my reasons for that conclusion in the following propositions.

(1) A contract which is ultra vires one of the parties to it is and always has been devoid of any legal contractual effect. j

(2) Payments made in purported performance thereof are necessarily made for a consideration which has totally failed and are therefore recoverable as money had and received. Thus at the first stage of the inquiry suggested in the submissions of Mr Béar the circumstances do give rise to a case of unjust enrichment which should prima facie lead to a recovery.

a (3) A party to an apparent swap contract which is void because ultra vires one party is entitled so to recover the amount by which what he paid exceeds what he received whether or not the apparent contract has been completely performed for there is a total failure of consideration whether it is regarded as entire or severable.

b (4) The fact that the swap contract, though ultra vires and void, has been fully performed does not constitute a defence or bar to the recovery of the net payment as money had and received for the recipient had no more right to receive or retain the payment at the conclusion of the contract than he did before. Thus at the second stage of the inquiry suggested by Mr Béar there are no grounds negating the prima facie case of unjust enrichment

c (5) Proposition (1) is not disputed. Propositions (2) and (3) are established by the decision of the Court of Appeal in the *Westdeutsche* case and supported by dicta in the House of Lords in the same case. Proposition (4) is inherent in that decision and those dicta and is a necessary corollary of the principle of ultra vires and the purpose for which it exists.

I would dismiss this appeal.

d **WALLER LJ.** I agree that this appeal should be dismissed, essentially for the reasons given by Morritt LJ. I would however like to express shortly certain thoughts of my own.

e I need not repeat Morritt LJ's analysis of the facts or his full history of the litigation relating to 'swaps', and I will gratefully adopt his terminology. Although I think Morritt LJ is right that the general statements he quotes from the judgments of Dillon and Leggatt LJ in their judgments in the Court of Appeal in *Westdeutsche Landesbank Girozentrale v Islington London BC* [1994] 4 All ER 890, [1994] 1 WLR 938 are decisive of this case, I have at certain stages had some doubt about it. I am furthermore doubtful whether the passages quoted from the f speeches of Lord Goff and Lord Browne-Wilkinson in the House of Lords in the same case ([1996] 2 All ER 961, [1996] AC 669) can be taken as supporting fully the basis on which Hobhouse J and the Court of Appeal formulated the grounds for recovery for money had and received in the swaps context. This may not be important in the open swaps situation but could be relevant in the closed swaps case.

g The Court of Appeal and the House of Lords were of course dealing only with an open swap situation, and it seems to me that Lord Goff was clearly sounding a note of caution as to whether the basis for recovery was correctly analysed in a way that might make a difference in the closed swaps context.

h Lord Goff ([1996] 2 All ER 961 at 968, [1996] AC 669 at 683) refers to Professor Birks' article 'No Consideration: Restitution after Void Contracts' (1993) 23 University of Western Australia Law Review (UWALR) 195 and other articles. He ends that passage recognising the fact that there was not before the Appellate Committee any appeal as to the correctness or otherwise of the decision relating to the basis of recovery, but saying:

j '... I think it right to record that there appears to me to be considerable force in the criticisms which have been expressed; and I shall, when considering the issues on this appeal, bear in mind the possibility that it may be right to regard the ground of recovery as failure of consideration.'

Because only open swaps were under consideration, that statement should not, as it seems to me, be taken as indorsement necessarily that closed swaps could be



analysed on the basis that there had been a failure of consideration. Reference to Professor Birks' article and approval of the criticisms should, if anything, be taken as an indication to the contrary.

I was much persuaded by Mr Béar's arguments expanding on Professor Birks' article, that there should be a distinction between open and closed swaps. There is in my view great force in the argument that absence of consideration as opposed to failure of consideration should not by itself be a ground for restitution. If one applies the concept of failure as opposed to absence of consideration, failure of consideration still provides a ground for restitution in relation to an open swap. This much is clearly recognised by Lord Goff, and was accepted by Mr Béar. If however the proper concept is failure, and not absence, the position may well be different in relation to a closed swap, although (and this seems to me important in the context of this case) Professor Birks would suggest depending on the circumstances that there may be some other basis for restitution.

I follow the force of the absurdity argument that Morritt LJ relies on for suggesting that there should be no difference between an open swap and a closed swap. But prima facie, the right which A has to reclaim money paid flows from the fact that B has been able to refuse to perform the contract, or been released or prevented from performing or obtaining performance of the contract, but if the remedy of restitution is not allowed that will leave B unjustly enriched at the expense of A. I have serious doubts as to whether simply because a party can show that a contract between them duly completed was void, for whatever reason, that that should automatically lead to the court being prepared simply to unravel the contract.

I can illustrate the point I wish to make by reference to one of the cases cited to us and referred to in Professor Birks' article, *Re Phoenix Life Assurance Co, Burges and Stock's Case* (1862) 2 John & H 441, 31 LJ Ch 749, 70 ER 1131. In that case the court was concerned with an insurance company acting ultra vires by issuing marine policies when its powers were only to issue life policies. Three points had to be dealt with. First, could those insured under marine policies prove for their claims under those policies; the answer was No. Second, could insureds prove on judgments already obtained and or bills of exchange already issued; one report (2 John & H 441 at 448, 70 ER 1131) would suggest Yes, but the other report (31 LJ Ch 749 at 752) would suggest there was a change of mind by Page Wood V-C. Third, could the insureds reclaim the premiums paid; the answer was Yes. The case does not deal with whether the insurance company would have been able to reclaim moneys actually paid out on claims under the void marine policies, but the impression one gains from the debate on the judgments already obtained and the bills of exchange is that it was not contemplated that they could do so. My instinct would further suggest that even now with the further recognition of restitutionary remedies, and even in the absence of a change of position defence, the court would be reluctant to allow the insurance company to recover, there being nothing unconscionable in the insureds retaining the benefit of the claims which they received not being aware of the ultra vires point and believing the same to be due for the premiums paid. There was little argument before us by reference to those cases demonstrating that payments made to 'close the transaction' are regarded as voluntary payments and irrecoverable (see e.g. Lord Goff's speech in *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737 at 754, [1993] AC 70 at 165). But it may be that would be a basis on which recovery would be refused.

a In my view authorities also referred to in Professor Birks' article, such as *Pearce v Brain* [1929] 2 KB 310, [1929] All ER Rep 627 (a case relating to a contract at that time absolutely void under which an infant had exchanged his motorcycle for a car, but where despite the nullity of the contract the court did not order restitution and counter restitution) and *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452, [1923] All ER Rep 239 (a case where an infant under a contract by this time voidable avoided a contract, and then surrendered the shares to avoid further calls, but could not recover the price), also point in the direction of there not being a simple principle that if a contract is void, but completed as expected, there is still a right to restitution and counter-restitution so as to unravel the contract. That principle would seem to be contrary to the principles recognised by Lord Goff in the *Woolwich* case [1992] 3 All ER 737 at 754 and 759, [1993] AC 70 at 165 and 172. What is more, if the principle were so simple and straightforward, voidness equals rights on both sides simply to have returned to them that which has been transferred, why has that not been spelled out clearly in some authority prior to the *Westdeutsche* case.

d But the fact that there is no general principle entitling one party to a void contract to obtain restitution, and an unravelling of a contract on that basis does not mean that the court should never provide that remedy in a situation in which a contract is held to be void ab initio. Professor Birks indeed does not suggest that there may or should not be restitutionary remedies available where void contracts have been entered into and completed in certain circumstances. He simply argues for the basis of the remedy being accurately recognised and described so that recovery is only allowed in appropriate situations. One difficulty for Mr Béar seems to me to be that Professor Birks would suggest that, in the swaps cases, the banks should be entitled to recover even on a closed swap. The first basis suggested is that of mistake. It is of course recognised that English law would have to be liberalised to achieve that result since mistake of law is still not a recognised basis for recovery despite criticisms (see the *Woolwich* case [1992] 3 All ER 737 at 753, [1993] AC 70 at 164 per Lord Goff).

f The other alternative suggested by Professor Birks as a basis of recovery would be as he puts it at one stage 'some policy transcending both the plaintiff's intentions and the defendant's conduct which requires that restitution be granted' (see (1993) 23 UWALR 195 at 206).

g It is I think of interest that one can recognise in the judgment of, for example Leggatt LJ in the Court of Appeal in *Westdeutsche*, support for the view he is taking being gained from policy considerations. The passage with which his judgment starts is pure policy ([1994] 4 All ER 890 at 967, [1994] 1 WLR 938 at 951):

h "The parties believed that they were making an interest swaps contract. They were not, because such a contract was ultra vires the local authority. So they made no contract at all. Islington say that they should receive a windfall, because the purpose of the doctrine of ultra vires is to protect council taxpayers whereas restitution would disrupt the Islington's finances. They also contend that it would countenance "unconsidered dealings with local authorities". If that is the best that can be said for refusing restitution, the sooner it is enforced the better. Protection of council taxpayers from loss is to be distinguished from securing a windfall for them. The disruption of the Islington's finances is the result of ill-considered financial dispositions by Islington and its officers. It is not the policy of the law to require others to deal at their peril with local authorities, nor to require others to undertake

their own inquiries about whether a local authority has power to make particular contracts or types of contract. Any system of law, and indeed any system of fair dealing, must be expected to ensure that Islington do not profit by the fortuity that when it became known that the contract was ineffective the balance stood in their favour. In other words, in circumstances such as these they should not be unjustly enriched.' a

There is also, dare I say it, a hint in the above passage, and indeed in a later passage, of Leggatt LJ ([1994] 4 All ER 890 at 969, [1994] 1 WLR 938 at 953) being influenced by the fact that the banks were under a mistaken belief that the contract was valid. It follows that thus for long periods while the contracts were being worked out the banks were exposed to the possibility that if payments came in their direction they might have to repay them. b

I wholeheartedly agree with the passage in Leggatt LJ's judgment quoted above and would suggest that there is no injustice in the council being bound to repay. Indeed in one sense it can be said that the council were 'unjustly' enriched, though the sense seems to me slightly different from the unjust enrichment usually relied on. c

We may in one sense be at a crossroads. Hobhouse J has held that the bank should succeed on a closed swap possibly stretching the lack (to use a neutral word) of consideration basis in order to do so. That basis has in fact been approved by the Court of Appeal and we are bound by it. I have no compunction in dismissing the appeal not only because of the binding nature of that decision but because although I feel (if the matter were considered at a higher level) there may well be further elaboration of the appropriate basis, the result will be the same. d

**ROBERT WALKER LJ.** I have had the advantage of reading in draft the judgment of Morritt LJ. I agree that this appeal should be dismissed, very largely for the reasons set out in the judgment of Morritt LJ, but I add some comments in my own words. e

I gratefully adopt Morritt LJ's summary of the facts and of the course of the proceedings in *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] 2 All ER 961, [1996] AC 669 and *Kleinwort Benson Ltd v Sandwell BC* [1994] 4 All ER 890, [1994] 1 WLR 938. As Morritt LJ says, this appeal is in substance (though not in form) an appeal from the decision of Hobhouse J on the first, closed swap in the *Sandwell* case. Hobhouse J dealt with that point quite shortly (see [1994] 4 All ER 890 at 923–924, and in summaries at 936 and 954). He said of the fully performed annuity case, *Davis v Bryan* (1827) 6 B & C 651, 168 ER 591, that it— f

'does not establish any proposition of assistance to Sandwell in relation to the first Sandwell swap save that in any action for money had and received it is always necessary to have regard to considerations of equity and good conscience.' (See [1994] 4 All ER 890 at 924.) g

The Court of Appeal ([1994] 4 All ER 890, [1994] 1 WLR 938) upheld Hobhouse J's conclusions in *Westdeutsche* both as to the personal restitutionary remedy (money had and received) and as to the proprietary restitutionary remedy (no passing of property in equity). Had that case not proceeded to the House of Lords on the narrow issue of compound interest, the resolution of the present appeal would, I think, have presented little difficulty. This court would have been bound by its previous decision (which in turn rested on the decision of the House of Lords in *Sinclair v Brougham* [1914] AC 398, [1914–15] All ER Rep h



a 622) that the recipient of a net payment under a swaps transaction received money which belonged in equity to the payer. On that basis retention of the payer's money would on the face of it be unconscionable, subject to any defence of change of position, whether or not the swaps transaction had run its course. It is understandable that Hobhouse J, having concluded that he was not bound by any contrary principle in *Davis v Bryan*, dealt with the point so shortly (it is however noteworthy that the learned article by Professor Birks relied on by the b appellant, 'No Consideration: Restitution after Void Contracts' (1993) 23 University of Western Australia Law Review (UWALR) 195, was published before the *Westdeutsche* case had proceeded to either higher court).

The House of Lords, although concerned only with the issue of compound interest, departed from *Sinclair v Brougham* as to the passing of property in equity, and so upset the symmetry between the claims at law and in equity which is a c salient feature of the judgment of Hobhouse J ([1994] 4 All ER 890 esp at 929 and again at 955): 'The plaintiff is entitled to recover that sum either as money had and received by the defendant to the use of the plaintiff or as money which in equity belongs to the plaintiff...'; see also, in this court, Dillon and Leggatt LJ ([1994] 4 All ER 890 at 962–963 and 967–968, [1994] 1 WLR 938 at 946–948 and 951–953). In the House of Lords it was the opinion of Lord Browne-Wilkinson ([1996] 2 All ER 961 at 993–996, [1996] AC 669 at 711–714) that *Sinclair v Brougham* should be departed from on the equitable proprietary claim, and Lord Slynn, Lord Woolf and Lord Lloyd ([1996] 2 All ER 961 at 1000, 1002 and 1018, [1996] AC 669 at 718, 720 and 737–738) agreed on that point. Lord Goff ([1996] 2 All ER e 961 at 972, [1996] AC 669 at 688) would not have departed from *Sinclair v Brougham* although he contemplated that it might 'fade into history' or be reinterpreted. Lord Goff ([1996] 2 All ER 961 at 968, [1996] AC 669 at 683) had already referred to Professor Birks' article and thought it right to record that he saw considerable force in its criticisms of Hobhouse J's approach on 'absence of f consideration' (see [1994] 4 All ER 890 at 925). The other members of their Lordships' House did not refer to this point, except for a short passage in the speech of Lord Browne-Wilkinson (see [1996] 2 All ER 961 at 993, [1996] AC 669 at 710).

Since the *Westdeutsche* litigation evolved in that way, and the appeal to this court in the *Sandwell* case was compromised, the resolution of this appeal is not a short or simple matter, despite the excellent submissions from counsel on both sides. Three different lines of approach can be discerned in both sides' submissions: first impression, legal principle, and authority.

(1) As a matter of first impression, the appellant's best point is that the swap transaction was carried through to completion, just as the parties intended. One h party ended up better off than the other (subject to any passing on) but that was always predictable. The appellant was enriched, but it was not unjustly enriched. The respondent's best point, as a matter of first impression, is the apparent absurdity pointed out in the judgment of Morritt LJ that after four and a half years one party might be £100,000 down and able to recover; what justice is there is denying it recovery if it is £150,000 down after five years?

j (2) As a matter of legal principle, it is debatable whether the 'injustice' of the defendant's enrichment depends on the fact that (what was supposed to be) an entire contract has been interrupted before it has run its course, or simply on the invalidity of the supposed contract. The appellant argues for the former, calling in aid Professor Birks' article (23 UWALR 195 at 206): 'his ground for restitution, if it exists, is purely technical'. The respondent argues for the latter, calling in aid Professor Birks' textbook, *An Introduction to the Law of Restitution* (1989) p 223:

'Failure of the consideration for a payment ... means that the state of affairs contemplated as the basis or reason for the payment has failed to materialise or, if it did exist, has failed to sustain itself.'

(3) As a matter of authority, the appellant submits that the case is concluded in this court by its decision in *Rover International Ltd v Cannon Film Sales Ltd* (No 3) [1989] 3 All ER 423, [1989] 1 WLR 912; the respondent submits that the case is concluded in this court by its decision in *Westdeutsche*, untouched (so far as the claim for money had and received is concerned) by the House of Lords' departure from *Sinclair v Brougham*. The appellant also relies on *Davis v Bryan*, but the respondent says that *Hobhouse J* was right to treat it as largely irrelevant.

Although I have referred to these as different lines of approach they cannot easily be kept distinct. The tracks soon begin crossing and recrossing. I make two brief preliminary points, one on severance and the other on absurdity.

I do not find the notion of severance helpful to the resolution of this appeal. A swaps contract must, it seems to me, be regarded as an entire contract. That is obviously correct for a transaction (such as the Islington transaction described in the *Westdeutsche* case [1994] 4 All ER 890 at 900-905) which provides for an up-front payment by the bank. It is also correct, it seems to me, for a series of matched payments, since the transaction as a whole involves the parties taking a view as to the trend of short-term or medium-term interest rates over the whole period of the transaction. It is no more capable of dissection into separate obligations than a term policy, at annual premiums, on human life.

Moreover it is in the stark financial nature of a swaps transaction that one party or the other will be seen, with the benefit of hindsight, to have got the better of the transaction; and if the other party is doing badly six months before the end of the transaction it is quite likely (but not, of course, certain) that it will be found to have done even worse when the transaction period comes to an end. That diminishes (but does not entirely remove) the force of the argument based on absurdity.

In the *Rover* case this court held, in relation to a void contract, that one party's claim to recover advance payments as money had and received was not barred by the defendant's plea that there had been no total failure of consideration. In the *Westdeutsche* case this court preferred *Hobhouse J*'s formulation, in relation to a void contract, of 'absence of consideration'. This difference of approach calls for examination, although it may not in the end provide a clear answer to the issue raised in this appeal.

In English law the expression 'consideration' has at least three possible meanings. Its primary meaning is the 'advantage conferred or detriment suffered' (*Midland Bank Trust Co v Green* [1981] 1 All ER 153 at 159, [1981] AC 513 at 531) which is necessary to turn a promise (not under seal) into a binding contract. In the context of failure of consideration, however, it is (in the very well-known words of Viscount Simon LC in *Fibrosa Spolka v Fairbairn Lawson Combe Barbour* [1942] 2 All ER 122 at 129, [1943] AC 32 at 48) 'generally speaking not the promise which is referred to as the consideration, but the performance of the promise'. Then there is the older and looser (and potentially very confusing) usage of consideration as equivalent to the Roman law 'causa', reflected in the traditional conveyancing expression 'in consideration of natural love and affection' (see Professor Birks *Law of Restitution* (1989) p 223; Professor Birks appears, at least superficially, to have moved his position in the last part of his more recent article (1993) 23 UWLRL 195 at 233-234).

a Where a contract is void ab initio there is in the eyes of the law no contract at all, and so speaking of failure of consideration (in the sense of failure of contractually promised performance) may be confusing. That is why Hobhouse J preferred, as he explained, to speak of 'absence of consideration' in the case of a purported contract which was void because ultra vires. If on the other hand a plaintiff (of full age and capacity) has got all that he bargained for that is at first blush the opposite of failure of consideration. The proposition that such a plaintiff cannot complain, because he has got all that he bargained for, has a simple and direct appeal. It is a proposition which has been stated, more or less in those terms, in a number of otherwise disparate cases, several of which were cited in argument.

b *Davis v Bryan* (1827) 6 B & C 651, 108 ER 591 was one of the cases of annuities void for non-registration under the Annuity Act 1813 (re-enacting the Grants of Life Annuities Act 1777). The claim (for repayment of the purchase price) was made after the annuitant's death by his executrix. It failed. Bayley J said (6 B & C 651 at 655, 108 ER 591 at 591):

d 'The testator received the whole of that which he bargained for, and now his representative says that the contract was void from the beginning. Is there anything like good conscience in the claim?'

In that case there had been a bargain, and its statutory avoidance for non-registration within 20 days (the obligation being treated as one which fell on the grantee) seems to have been treated as making the annuity voidable (ab initio) by the grantor. That is one of the grounds of decision discernible in *Davis v Bryan*, and in the view of Hobhouse J that has emerged as the main ground of decision.

e In *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452, [1923] All ER Rep 239 the plaintiff, a minor, had paid for shares allotted to her, and sought to recover the payment on the ground of total failure of consideration. The shares had been registered in her name and she could have sold them. Lord Sterndale MR said ([1923] 2 Ch 452 at 459, [1923] All ER Rep 239 at 241):

f 'If the plaintiff were a person of full age suing to recover the money back on the ground, and the sole ground, that there had been a failure of consideration it seems to me it would have been impossible for her to succeed, because she would have got the very thing for which the money was paid and would have got a thing of tangible value.'

This is the case referred to in a footnote in Goff and Jones *The Law of Restitution* (4th edn, 1993) p 61, to a sentence on which the appellant strongly relies:

h 'No doubt it is right that a party who has received the very thing which he has contracted to receive should be unable to reopen the transaction to recover his money.'

(That is not in a section of the work dealing with void contracts.)

j In *Rowland v Divall* [1923] 2 KB 500, [1923] All ER Rep 270 a car dealer had bought a car to which the seller had no title. The dealer succeeded in his claim to recover the purchase price on the ground of total failure of consideration. Atkin LJ said ([1923] 2 KB 500 at 506, [1923] All ER Rep 270 at 274):

'... in this case there has been a total failure of consideration, that is to say that the buyer has not got any part of that for which he paid the purchase money. He paid the money in order that he might get the property, and he has not got it. It is true that the seller delivered to him the de facto



possession, but the seller had not got the right to possession and consequently could not give it to the buyer.' a

The vendor had gone through the motions of performance of his contract by handing over a car, but in the eyes of the law that was no performance because the car was stolen.

Then there is the decision, referred to by *Goff and Jones* p 402 as anomalous, of the Privy Council in *Linz v Electric Wire Co of Palestine Ltd* [1948] 1 All ER 604, [1948] AC 371. The appellant had been allotted what purported to be preference shares in the defendant company. Unlike the plaintiff in the *Scala* case, she was of full age; but her case (which the Privy Council assumed to be correct) was that the company had no power under its memorandum and articles to issue the preference shares. After four years she sold her preference shares at a loss, still apparently unaware of the defect in title. Then another shareholder raised the issue in proceedings which were compromised, and the company made an offer to all its registered preference shareholders (including, presumably, the plaintiff's successor in title) to repay the amounts paid up on the shares. That offer was not made to the plaintiff herself, and she sued for repayment on the ground of total failure of consideration. The Privy Council rejected the claim. Lord Simonds said ([1948] 1 All ER 604 at 606, [1948] AC 371 at 377), echoing language which is becoming familiar: b  
c  
d

'... having been duly registered as a shareholder and having parted for value with her shares by a sale which the company recognised ... she got exactly that which she bargained to get.' e

He rejected the plaintiff's counsel's reliance on *Rowland v Divall*:

'That case might have assisted him if the fact was that the appellant still held the shares ... but it does not avail him in a case where the shareholder has sold her shares.' f

In fact, the car dealer in *Rowland v Divall* had resold the stolen car to a customer, and had very properly returned the purchase money to the customer. In the *Westdeutsche* case Hobhouse J treated *Linz's* case and *Rowland v Divall* as depending on an analysis of whether the defendant's breach was 'fundamental to the particular contractual transaction'. That was, he said— g

'very different from the present case where there was in truth no bargain at all and problems of deciding what was the essential part of the bargain do not arise ...' (See [1994] 4 All ER 890 at 928.) h

In *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912 a complicated commercial contract was void because one of the parties, Rover, had not been incorporated at the date of the purported contract. Non-existence is the most extreme form of incapacity. Rover had made a series of payments to Cannon in the expectation of a share of substantial profits from the distribution of cinema films in Italy. The parties fell out, and the invalidity of the supposed contract was discovered before Rover had received any share of profits. It was conceded that Rover was entitled to a quantum meruit. But it was argued that the Rover could not recover its payments because it had obtained possession of films, and would get a quantum meruit payment. Kerr LJ said ([1989] 3 All ER 423 at 433, [1989] 1 WLR 912 at 923): j

a 'The test is whether or not the party claiming total failure of consideration has in fact received any part of the benefit bargained for under the contract or purported contract.'

Then he applied that test to the facts ([1989] 3 All ER 423 at 434, [1989] 1 WLR 912 at 924–925):

b 'And delivery and possession were not what Rover had bargained for. The relevant bargain, at any rate for present purposes, was the opportunity to earn a substantial share of the gross receipts pursuant to cl 6 of the schedule to the agreement, with the certainty of at least breaking even by recouping their advance. Due to the invalidity of the agreement Rover got nothing of what they had bargained for, and there was clearly a total failure of consideration. This equally disposes of [Cannon's counsel's] ingenious attempt to convert his concession of a quantum meruit, in particular the element of reasonable remuneration, into consideration in any relevant sense. Rover did not bargain for a quantum meruit, but for the benefits which might flow from cl 6 of the schedule. That is the short answer to this point.'

Dillon LJ ([1989] 3 All ER 423 at 440, [1989] 1 WLR 912 at 933) saw the case as a classic case of money paid under a mistake of fact. He expressed no view on the issue of total failure of consideration ([1989] 3 All ER 423 at 443, [1989] 1 WLR 912 at 935). Nicholls LJ agreed with both judgments.

e In the *Westdeutsche* case Hobhouse J discussed the *Rover* case in some detail and differed from Kerr LJ's 'essentially contractual' analysis. He said ([1994] 4 All ER 890 at 929):

f 'In my judgment, the correct analysis is that any payments made under a contract which is void ab initio, in the way that an ultra vires contract is void, are not contractual payments at all. They are payments in which the legal property in the money passes to the recipient, but in equity the property in the money remains with the payer.'

In the Court of Appeal Dillon LJ made no reference to the *Rover* case; Leggatt LJ ([1994] 4 All ER 890 at 968–969, [1994] 1 WLR 938 at 952–954) did and agreed with g Hobhouse J's approach, although he also agreed with Kerr LJ's statement of the test as being whether the plaintiff had in fact received any 'benefit bargained for under the contract or purported contract' (my emphasis).

h It may be important to note that the *Rover* case was an appeal to this court after a three-week trial which appears from the report to have concentrated on issues of fact and (so far as the law was concerned) on estoppel by convention (see [1987] BCLC 540). The judge (at 545–546) dealt very shortly indeed with the issues which occupied this court's attention. In this court Kerr LJ referred to Viscount Simon LC's well-known statement in the *Fibrosa Spolka* case and to *Rowland v Divall* (both cases where there had initially been a valid contract). He was concerned to point out that Rover's position was clearer and stronger. His earlier j reference ([1989] 3 All ER 423 at 433, [1989] 1 WLR 912 at 923) to 'the contract or purported contract', cannot have been intended, in the context, to make any general equation of valid and void contracts in relation to failure of consideration.

I am not therefore persuaded that there is any serious difference in principle between the decisions of this court in *Rover* and *Westdeutsche* (and the fact that Dillon LJ was a member of both constitutions, but did not advert to a difference, tends to confirm that there is none). The point was more fully considered in the

*Westdeutsche* case, especially by Leggatt LJ in the passages to which I have already referred (see [1994] 4 All ER 890 at 968–969, [1994] 1 WLR 938 at 952–953). Leggatt LJ concluded (after referring to the part of Hobhouse J's judgment), 'There can have been no consideration under a contract void ab initio. So it is fallacious to speak of the failure of consideration having been partial.'

I respectfully agree with that. Either there was total failure of consideration, in that neither side to the supposed contract undertook any valid obligation, or there was (in Hobhouse J's preferred expression) 'absence of consideration' (see [1994] 4 All ER 890 at 925). The choice between the two expressions may be no more than a matter of which is the apter terminology (when the *Westdeutsche* case was in the House of Lords, Lord Goff ([1996] 2 All ER 961 at 967, [1996] AC 669 at 683) pointed out that 'the concept of failure of consideration need not be so narrowly confined'). It becomes more than a matter of terminology only if the expression 'absence of consideration' is supposed to take the case right out of any contractual context and into a claim to recover a payment simply because it was not due, a broader ground of recovery than has so far been recognised by English law (see *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737 at 754–760, [1993] AC 70 at 166–172).

Where there is initially a valid contract, total failure of consideration connotes a failure by one contracting party to perform any part of his essential obligation under the contract, as the vendor failed in *Rowland v Divall*, even though he had delivered a car to the purchaser. Where a supposed contract is void ab initio, or an expected contract is never concluded (as in *Chillingworth v Esche* [1924] 1 Ch 97, [1923] All ER Rep 97), no enforceable obligation is ever created, but the context of a supposed or expected contract is still relevant as explaining what the parties are about. An advance payment made in such circumstances is not a gift, and is not to be treated as a gift. A net payment under an ultra vires swaps transaction has this much at least in common with the purchase of a stolen car, that the recipient thinks he is getting a clean title, but he is wrong. That conclusion is not affected by the House of Lords' decision that property in the net payment passes in equity as well as at law. The recipient's title is still overshadowed by the payer's personal restitutionary claim, and if that shadow is there throughout the period of the transaction, it would be paradoxical if it vanished at the moment when (and simply because) the contract, had it been a valid contract, would then have been fully performed. With a valid contract total failure of consideration and full performance are at the opposite ends of the spectrum. The same is not true of a void contract. That is to my mind the real force of the argument based on absurdity. The injustice of the appellant's enrichment does not vanish because the term of the void contract ran its course.

I am in full agreement with Morritt LJ's observations on *Davis v Bryan*. On the facts of that case it would have been remarkable (and unconscionable) if the executrix had been able to recover. The reasoning in *Linz's* case is difficult to understand and the case is probably best regarded (as is suggested by Goff and Jones) as anomalous.

For those reasons, and for the reasons given in the judgment of Morritt LJ, I agree that this appeal should be dismissed.

*Appeal dismissed.*



## **R v Governor of Glen Parva Young Offender Institution, ex parte G (a minor)**

QUEEN'S BENCH DIVISION

SIMON BROWN LJ AND MANCE J

14 JANUARY 1998

*Criminal law – Bail – Magistrates' court – Arrest of bailed defendant for absconding or breaking bail conditions – 24-hour time limit for bringing person arrested before justice of the peace – Applicant arrested for breaking bail conditions and taken to magistrates' court within 24 hours of arrest – Applicant brought before justices after expiration of 24-hour period – Applicant applying for writ of habeas corpus – Whether justices having jurisdiction to remand in custody applicant brought before them out of time – Bail Act 1976, s 7.*

The applicant, a 17-year-old minor, was arrested in respect of two alleged offences of taking motor vehicles without consent and one of failing to surrender to an earlier grant of police bail. He was granted conditional bail by the police and fresh bail conditions were imposed as to residence, curfew restrictions and reporting to the police. The applicant failed to observe the curfew restrictions and was duly arrested, pursuant to s 7(3)<sup>a</sup> of the Bail Act 1976, at 1328 hrs on 8 December 1997. At about 1205 hrs the following day, the police took the applicant to the magistrates' court where he was taken straight to the cells. He was not, however, brought into court before the magistrates until 1530 hrs that afternoon, some 26 hours after his arrest. The applicant contended that, since he had not been brought before a justice within the period specified under s 7(4)(a)<sup>b</sup> of the 1976 Act, ie 'as soon as practicable and in any event within 24 hours after his arrest', the court had no jurisdiction to deal with the breach of bail conditions and therefore had to release him. The court took the view that there had been sufficient compliance with s 7(4), since the applicant had been brought within the stipulated period to the court cells, and, being satisfied that the bail conditions had been breached as alleged, remanded the applicant in custody pursuant to s 7(5) of the Act. The applicant applied for a writ of habeas corpus.

**Held** – On its true construction, s 7(4)(a) of the 1976 Act required that a detainee be brought not merely to the court precincts or cells but actually before a justice of the peace within 24 hours of his arrest. That requirement was absolute and, since the justices' jurisdiction under s 7(5) to remand a detainee in custody only arose once s 7(4) had been complied with, a detainee who was brought before the justices out of time could not be remanded in custody. In the instant case, the applicant had been brought before the magistrates out of time, and, as such, they had no jurisdiction to remand him in custody. Accordingly, once the 24-hour period after his arrest had expired, the applicant ought automatically to have been set at liberty and his continued detention thereafter was unlawful (see p 298 c to j, p 299 b h j and p 300 c, post).

<sup>a</sup> Subsection (3) is set out at p 297 a to c, post

<sup>b</sup> Subsection (4) is set out at p 297 c to e, post

## Notes

For liability to arrest for absconding or breaking conditions of bail, see 11(2) *Halsbury's Laws* (4th edn reissue) para 911, and for cases on the subject, see 15(1) *Digest* (2nd reissue) 200–202, 13465–13474.

For the Bail Act 1976, s 7, see 12 *Halsbury's Statutes* (4th edn) (1997 reissue) 650.

## Cases referred to in judgments

*R v Holmes, ex p Sherman* [1981] 1 All ER 612, DC.

*R v Liverpool Magistrates' Court, ex p DPP* [1992] 3 All ER 249, [1993] QB 233, [1992] 3 WLR 20, DC.

## Cases also cited or referred to in skeleton arguments

*Khawaja v Secretary of State for the Home Dept* [1983] 1 All ER 765, [1984] AC 74, HL.

*Marshall, Re* (1995) 159 JP 688.

*R v Governor of Pentonville Prison, ex p Azam* [1973] 2 All ER 741, [1974] AC 18, CA; *affd* sub nom *Azam v Governor of Pentonville Prison* [1973] 2 All ER 765, [1974] AC 18, HL.

*R v Secretary of State for the Home Dept, ex p Muboyayi* [1991] 4 All ER 72, [1992] QB 244, CA.

## Application for a writ of habeas corpus

The applicant applied for a writ of habeas corpus ad subjiciendum directed to the governor of HM Young Offender Institution Glen Parva on the ground that his detention under s 7(5) of the Bail Act 1976 for breach of bail conditions was unlawful because he had not been brought before a justice within 24 hours of his arrest contrary to s 7(4) of the Act. The facts are set out in the judgment of Simon Brown LJ.

*Jeremy Roussak* (instructed by *Bird & Co*, Grantham) for the applicant.

*Ian Ashford-Thom* (instructed by the *Treasury Solicitor*) for the Crown.

**SIMON BROWN LJ.** This habeas corpus application raises two short points under s 7 of the Bail Act 1976: (i) is the requirement in s 7(4) to bring an arrested person before a justice of the peace 'as soon as practicable and in any event within 24 hours after his arrest before a justice of the peace' satisfied by bringing him within that period to the court's cells, albeit not before one or more of the justices sitting there until sometime later; (ii) if not, does the court nevertheless have power to order that person's detention to continue thereafter. The points arise in the following brief circumstances.

The applicant is a 17-year-old minor. Towards the end of last year he was granted conditional bail by Lincolnshire Police at Grantham Police Station following his arrest in respect of two alleged offences of taking motor vehicles without consent and one of failing to surrender to an earlier grant of police bail. Fresh bail conditions were imposed as to residence, curfew restrictions and reporting to the police.

At 1328 hrs, on 8 December 1997, not having observed the curfew restrictions, the applicant was arrested for breach of his bail conditions, the validity of that arrest not being in dispute. At about 1205 hrs the following day, 9 December, the police brought him to the Grantham Magistrates' Court, where he was taken straight to the cells. He was not, however, brought into court before the magistrates until about 1530 hrs that afternoon.

a It is convenient at this stage to set out the material provisions in the 1976 Act. Section 7, so far as material, provides:

b '... (3) A person who has been released on bail in criminal proceedings and is under a duty to surrender into the custody of a court may be arrested without a warrant by a constable—(a) if a constable has reasonable grounds for believing that that person is not likely to surrender to custody; (b) if the constable has reasonable grounds for believing that that person is likely to break any of the conditions of his bail or has reasonable grounds for suspecting that that person has broken any of those conditions; or (c) in a case where that person was released on bail with one or more surety or sureties, if a surety notifies a constable in writing that that person is unlikely to surrender to custody and that for that reason the surety wishes to be relieved of his obligations as a surety.

d (4) A person arrested in pursuance of subsection (3) above—(a) shall, except where he was arrested within 24 hours of the time appointed for him to surrender to custody, be brought as soon as practicable and in any event within 24 hours after his arrest before a justice of the peace for the petty sessions area in which he was arrested; and (b) in the said excepted case shall be brought before the court at which he was to have surrendered to custody. In reckoning for the purposes of this subsection any period of 24 hours, no account shall be taken of Christmas Day, Good Friday, or any Sunday.

e (5) A justice of the peace before whom a person is brought under subsection (4) above ... if of the opinion that that person—(a) is not likely to surrender to custody, or (b) has broken or is likely to break any condition of his bail, remand him in custody or commit him to custody, as the case may require, or alternatively, grant him bail subject to the same or to different conditions, but if not of that opinion shall grant him bail subject to the same conditions (if any) as were originally imposed ...'

f Paragraph 6 of Pt I of Sch 1 to the Act provides:

'The defendant need not be granted bail if, having been released on bail in or in connection with the proceedings for the offence, he has been arrested in pursuance of section 7 of this Act.'

g Upon the applicant's eventual appearance before the Grantham Magistrates, his solicitor took a jurisdictional point. He submitted that, having regard to the failure to bring the applicant before a justice within the required 24-hour period, the court had no jurisdiction to deal with the breach of bail conditions and, accordingly, no alternative but to release the applicant. The court, however, h on the advice of its clerk, took the view that it was a sufficient compliance with s 7(4) that the applicant had been brought within the stipulated period to the court cells. In the event, the court being satisfied that the bail conditions had, as alleged, been breached, the applicant was remanded in custody, bail again being refused on 15 December when the applicant pleaded guilty to one of two charges of taking a vehicle without consent (the other being withdrawn) and to failing to surrender j to police bail on 19 November 1997. Those events prompted the present challenge brought by way of a writ for habeas corpus.

The matter came *ex parte* before Moses J on 23 December, when he adjourned it to this court. In the meantime he released the applicant on bail subject to the same conditions as had earlier been imposed upon him. As it happens, the application has, in one sense, now been overtaken by events. Since the applicant



was released on bail by Moses J he has committed a further breach of his bail conditions, for which he is now, again, in custody, this time, on any view, lawfully.

It has seemed to us, however, given that we are fully seized of the points at issue and that they are, perhaps, of some general importance, that we ought properly to deal with them. In doing so, I, for my part, would express my gratitude to both counsel and also to the Treasury Solicitor for having responded to the Crown Office's request, initiated by myself, to instruct counsel to assist the court rather than, as had at first apparently been intended, allow the challenge to go by default. Although, for reasons to which I now turn, I prefer, in the end, the applicant's arguments in the case, it has been most helpful and, as I believe, essential to have had the advantage of listening to the opposing arguments.

#### *Issue (i)*

Does the prisoner have to be brought within the stipulated time before a justice of the peace, or is it sufficient to bring him to the court cells? There seems to me very little room for argument on this issue. Subsection (4) seems to me plain in its wording and to mean what it says.

Mr Ashford-Thom points to the exception within the subsection which requires that someone arrested within 24 hours of the time for him to surrender to custody has merely to be brought before the court at which he was to have surrendered. However, that seems to me rather to underline than to cast doubt on the apparent distinction between, on the one hand, bringing a detainee to court, which will involve his production not before a single justice of the peace but before a full bench, perhaps at a distant court, and which may, understandably, take place somewhat more than 24 hours after his s 7(3) arrest and, on the other hand, what s 7(4)(a) specifies in this case, 'brought as soon as practicable and in any event within 24 hours after his arrest before a justice of the peace for the petty sessions area in which he was arrested'. A similar distinction is to be found between s 7(4) and s 46(2) of the Police and Criminal Evidence Act 1984 to which counsel also referred us.

I unhesitatingly conclude, therefore, that the 24-hour provision is absolute and that it requires that the detainee be brought not merely to the court precincts or cells but actually before a justice of the peace, who may, of course, be, indeed is envisaged to be, but a single justice rather than a whole bench.

#### *Issue (ii)*

What is the consequence of a failure to comply with s 7(4)(a)? More particularly, if, as here, a detainee is brought before the magistrates out of time, can they, nevertheless, then remand him in custody?

In submitting that they can, Mr Ashford-Thom relies, in particular, upon a combination of para 6 of Pt I of Sch 1 to the Act and the language of s 7(5). The difficulty in this argument, however, is surely this: s 7(5) postulates expressly that the detainee has been brought before the justice(s) 'under subsection (4)'. This applicant, it seems to me, and indeed any others like him, once the 24 hours have expired, ought automatically to have been set at liberty. His continued detention thereafter was unlawful. He could theoretically, were it possible to move this court fast enough, have successfully brought habeas corpus proceedings—see e.g. *R v Holmes, ex p Sherman* [1981] 1 All ER 612, that case, in fact, being concerned with a less specific provision, s 38(4) of the Magistrates' Courts Act 1952, which provides:

a 'Where a person is taken into custody for an offence without a warrant and is retained in custody, he shall be brought before a magistrates' court as soon as practicable.'

b That being the situation, I find it impossible to see how the detainee can properly be said, assuming that he is kept unlawfully in detention and then brought before the magistrates whilst thus detained, to have been brought before them 'under subsection (4)'. In other words, for the justices' jurisdiction to arise under sub-s (5), sub-s (4) must, in my judgment, have been faithfully complied with.

c Mr Ashford-Thom suggested that this could well create a problem, given that the primary obligation upon the police under sub-s (4) is to bring the detainee before a justice of the peace 'as soon as practicable'. If, however, justices adopt the robust approach enjoined upon them by this court's judgment in *R v Liverpool Magistrates' Court, ex p DPP* [1992] 3 All ER 249, [1993] QB 233, any such difficulty, to my mind, appears illusory: justices should have no problem in deciding whether, in reality, the s 7(4) requirement as to time has been substantially satisfied.

d The other difficulty which it is said would follow from this strict approach to s 7 is with regard to the various situations envisaged by s 7(3). Assume, for example, that the constable has taken the person concerned back into custody because he has been given reasonable grounds to believe that that person is not likely to surrender to custody of his own volition. If then he fails to bring the freshly detained person before a justice of the peace within 24 hours, is he to be e debarred for all time from seeking his re-arrest on that ground? Similarly, under para (c) of s 7(3), if the police fail to bring a re-arrested person before a justice in time, despite a surety having notified them in writing that the person is unlikely to surrender to custody and for that reason the surety wishes to be relieved of his obligations, how does that leave the surety?

f Again, to my mind, these problems are more theoretical than real. So far as the surety is concerned, although, perhaps, he might not in that situation be formally released from his obligations, it would seem inconceivable that the court would thereafter estreat his recognisance. As for the constable with reasonable grounds for fearing a non-surrender to custody, if his original fears were supplemented by g later information, then, of course, he would have a fresh basis for a s 7(3) arrest, otherwise not.

h Tempting though it may be to accommodate these sort of difficulties by adopting a less stringent approach to these provisions, in my judgment it is a temptation to be resisted. Section 7, it must be remembered, confers upon the police draconian powers. Arrested people prima facie entitled to bail—and perhaps even granted bail despite police objection by a Crown Court—are able to be detained without warrant on what may be a hotly disputed basis. The detainee may vigorously deny that he has broken any condition of his bail or that there is any basis for doubting his intention to surrender for custody.

i It seems to me appropriate, in those circumstances, to afford the police no more than the absolute maximum period of 24 hours stipulated by Parliament to bring him back into the presence of a justice of the peace. If they fail in that, it would be quite wrong to overlook that failure and, in effect, allow them to re-arrest the person concerned on the self-same basis and re-detain him for a further significant period of time.

In short, I would hold the original challenge well founded, and declare the position to be as expressed in this judgment.

**MANCE J.** I agree with Simon Brown LJ's reasons and conclusion.

I was at one stage troubled by the implications of our decision on the power to act under s 7(3)(a), (b) and (c) of the Bail Act 1976. If after expiry of 24 hours of arrest a person detained must be released under sub-s (4)(a), could a constable claim to act again under s 7(3)? It might, in some circumstances, appear unfortunate if no such steps could be taken, at least unless and until fresh circumstances justify and emerged. On the other hand, it might be that it would be an abuse if the constable did simply attempt to repeat the prior arrest.

Ultimately, however, it seems to me, for the reasons given by Simon Brown LJ, unnecessary in the context of the present case to go into this further or to regard it as an obstacle to the conclusion reached. Section 7(4) is an important provision for the protection of the persons detained and must be given its full and natural effect.

*Declaration granted.*

Dilys Tausz Barrister.



# General of Berne Insurance Co v Jardine Reinsurance Management Ltd and others

COURT OF APPEAL, CIVIL DIVISION

HIRST, MAY LJ AND SIR BRIAN NEILL

28 JANUARY, 12 FEBRUARY 1998

*Costs – Taxation – Solicitor – Contentious business agreement – Statutory provision limiting costs recoverable to amount payable to solicitor under agreement – Whether statutory provision to be applied on an item by item basis – Whether statutory provision providing a global cap, so that receiving party may recover hourly expense rates exceeding those agreed – Solicitors Act 1974, s 60(3).*

Section 60(3)<sup>a</sup> of the Solicitors Act 1974 embodies the indemnity principle of costs and precludes a client from recovering under an order for costs to which a contentious business agreement relates more than the amount payable by him to his solicitor in respect of those costs under the agreement. In determining the application of that section, the costs referable to parts of the litigation for which the receiving party does not have the benefit of an order for costs have to be taken out of account. Moreover, since the comparison is to be made between the costs to which the order relates and the amount payable by the receiving party to his solicitor 'in respect of those costs', costs which are irrecoverable have to be left out of both sides of the comparison. It follows that s 60(3) has to be applied, where appropriate, on an item by item basis and does not provide a global cap. Thus, where the agreement provides for the solicitor to be remunerated by reference to an hourly rate, s 60(3) precludes the recovery of uplifted hourly rates which exceed those agreed (see p 302 e f, p 303 e, p 304 b to e, p 309 j to p 310 j, p 311 h, and p 312 d e, post).

*Universal Thermosensors Ltd v Hibben* (6 March 1992, unreported) overruled.

## Notes

For agreements regulating amount of costs, see 44(1) *Halsbury's Laws* (4th edn reissue) paras 177–183.

For taxation of bill of costs, see *ibid* para 202.

For the Solicitors Act 1974, s 60, see 41 *Halsbury's Statutes* (4th edn) (1995 reissue) 86.

## Cases referred to in judgments

*Deeny v Gooda Walker* (unreported).

*Eastwood (decd), Re, Lloyds Bank Ltd v Eastwood* [1974] 3 All ER 603, [1975] Ch 112, [1974] 3 WLR 454, CA.

*Gundry v Sainsbury* [1910] 1 KB 645, CA.

*Harold v Smith* (1860) 5 H & N 381, 157 ER 1229.

*Universal Thermosensors Ltd v Hibben* (6 March 1992, unreported), Ch D.

## Cases also cited or referred to in skeleton arguments

*Company, Re a* (No 004081 of 1989) [1995] 2 All ER 155.

*Johnson v Reed Corrugated Cases Ltd* [1992] 1 All ER 169.

<sup>a</sup> Section 60, so far as material, is set out at p 303 h to p 304 a, post

*Lazarus (Leopold) Ltd v Secretary of State for Trade and Industry* (1976) Butterworths Costs Service N 341. a

*Loveday v Renton* (No 2) [1992] 3 All ER 184.

*Nossen's Patent, Re* [1969] 1 All ER 775, [1969] 1 WLR 638.

### Appeal

By notice dated 21 August 1997 the defendants, Jardine Reinsurance Management Ltd, Jardine Thompson Graham Ltd and TGI Anstalt, appealed with leave from the decision of Tuckey J given on 25 July 1997 upholding the decision of Master Campbell that the plaintiffs, General of Berne Insurance Co, were entitled to claim from the defendants on taxation hourly expense rates including uplift which were greater than they were obliged to pay their own solicitors under a contentious business agreement. The facts are set out in the judgment of May LJ. b  
c

*Sydney Kentridge QC* (instructed by *Herbert Smith*) and *Terry Mehigan* of that firm for the defendants.

*John Lockey* (instructed by *Barlow Lyde & Gilbert*) for the plaintiffs. d

*Cur adv vult*

12 February 1998. The following judgments were delivered.

**MAY LJ** (giving the first judgment at the invitation of Hirst LJ). This is an appeal from an interim decision upon a taxation of costs. By an interim certificate dated 7 April 1997, Master Campbell held that the plaintiffs are entitled to claim from the defendants on taxation hourly expense rates including uplift which are greater than they themselves are obliged by contract to pay to their own solicitors. By order dated 25 July 1997, Tuckey J, who sat with assessors, upheld Master Campbell's decision. He granted the defendants leave to appeal. The appeal turns on the construction of s 60(3) of the Solicitors Act 1974. e  
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The respondent is one of thirteen insurance companies which brought proceedings against the appellants, Jardine Reinsurance Management Ltd, Jardine Thompson Graham Ltd and TGI Anstalt (Jardines), in connection with the management of underwriting pools. The pools sustained losses and the thirteen insurance companies each started actions against Jardines. These actions which started in 1988 were conducted together. On 10 April 1990 the actions against the third defendants were stayed. On 31 July 1991 one action was discontinued with no order as to costs. In January 1994 ten of the actions were settled by acceptance of payments into court. On 18 January 1994 orders were made by consent in those 10 actions providing among other things for the payment by Jardines of the insurance companies' costs on a standard basis to be taxed if not agreed. The remaining two actions were settled by acceptance of payments into court on 3 February 1994 and orders by consent in similar terms were made. g  
h

In February 1994 Jardines made a voluntary interim payment of £1.5m towards the insurance companies' costs. In August 1995 a draft bill of costs was produced which claimed a total amount of £3,370,753.97 inclusive of disbursements. More than £3m of this was solicitors' profit costs. The bill was lodged for taxation on 18 September 1996. In October 1996 the claim for costs in one of the actions was settled. The claim for costs in the remaining actions remain unresolved. The j

a taxation is due to continue in February 1998 after a decision of this court on the point raised in this appeal.

During the litigation, various costs orders were made in favour of Jardines for interlocutory matters. Bills for these costs have been lodged on behalf of Jardines which seek recovery of a total of £73,610.06.

b The insurance companies were represented in the litigation sequentially by two firms of solicitors, Freshfields and then Barlow Lyde & Gilbert. Their agreement with Freshfields did not stipulate identifiable charging rates. Their agreement with Barlow Lyde & Gilbert did so stipulate. This was a 'contentious business agreement' within s 59 of the Solicitors Act 1974. Master Campbell was shown the relevant parts of the agreement confidentially. We are told that it provides for Barlow Lyde & Gilbert to charge their clients at various specific hourly rates for different classes of people working on the case. Whether it should remain confidential may be a matter for future consideration.

c The method stipulated by Rules of Court for assessing solicitors' costs on a taxation is to assess appropriate hourly expense rates which may then be increased by various percentage uplifts for care and conduct to reflect the difficulty and complexity of the work—see RSC Ord 62, r 12 and App 2 to Ord 62 at 62/A2/4 and 62/A2/17ff. These rates are then multiplied by the time taken by each person involved. This method has been used in the bill lodged on behalf of the insurance companies. Some of the rates thus claimed including the percentage uplift are greater than the equivalent rate which Barlow Lyde & Gilbert are entitled to recover from their clients. The question which this appeal raises is whether the difference must be disallowed on taxation. It is suggested that sums in excess of £700,000 turn on this question. But the total account of Barlow Lyde & Gilbert to their clients exceeds the amount claimed on taxation.

Section 59 of the Solicitors Act 1974 provides:

f '(1) Subject to subsection (2), a solicitor may make an agreement in writing with his client as to his remuneration in respect of any contentious business done, or to be done, by him (in this Act referred to as a "contentious business agreement") providing that he shall be remunerated by a gross sum, or by reference to an hourly rate, or by a salary, or otherwise, and whether at a higher or lower rate than that which he would otherwise have been entitled to be remunerated ...'

The words 'or by reference to an hourly rate' were added by s 98(5) of the Courts and Legal Services Act 1990, which however made no change to s 60(3)—see below.

h Section 60 of the 1974 Act provides:

j '(1) Subject to the provisions of this section and to sections 61 to 63, the costs of a solicitor in any case where a contentious business agreement has been made shall not be subject to taxation or (except in the case of an agreement which provides for the solicitor to be remunerated by reference to an hourly rate) to the provisions of section 69.

(2) Subject to subsection (3), a contentious business agreement shall not affect the amount of, or any rights or remedies for the recovery of, any costs payable by the client to, or to the client by, any person other than the solicitor, and that person may, unless he has otherwise agreed, require any such costs to be taxed according to the rules for their taxation for the time being in force.



(3) A client shall not be entitled to recover from any other person under an order for the payment of any costs to which a contentious business agreement relates more than the amount payable by him to his solicitor in respect of those costs under the agreement.'

The appeal turns, as I say, on the construction of s 60(3) of the 1974 Act. It is said to enshrine a common law principle to which the label 'the indemnity principle' has been given. The principle is simply that costs are normally to be paid in compensation for what the receiving party has or is obliged himself to pay. They are not punitive and should not enable the receiving party to make a profit. Another guiding principle of taxation is that contained in Ord 62, r 12, which provides that on a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the taxing officer may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party. Thus amounts which the receiving party is obliged to pay his own solicitors may nevertheless not be recovered on a taxation on a standard basis if they were not reasonably incurred or not reasonable in amount.

Jardines contend that the indemnity principle as it appears in s 60(3) of the 1974 Act is to be applied, where appropriate, on an item by item basis. The insurance companies contend that it only provides a global cap, so that the receiving party may recover on taxation uplifted hourly expense rates which are judged to be reasonable even if they exceed the rates which Barlow Lyde & Gilbert are entitled to receive from their client, provided that the total amount allowed on the taxation does not exceed the total amount which Barlow Lyde & Gilbert are entitled to recover from their client.

In *Gundry v Sainsbury* [1910] 1 KB 645 a solicitor acted for a client in a county court action having agreed verbally with the client that the client should not pay the solicitor any costs. The client recovered damages in the action. But he recovered no costs. This was on the grounds that under the proviso to s 5 of the Attorneys and Solicitors Act 1870, the client was not entitled to recover from the defendant more costs than were payable by him to his solicitor under the agreement. The proviso to s 5 of the 1870 Act was in much the same terms as s 60(3) of the 1974 Act but significantly did not include the words 'in respect of those costs' which are now in s 60(3) of the 1974 Act. The Court of Appeal held that, apart from the 1870 Act, the plaintiff could not recover from the defendant more costs than he was liable to pay his solicitor, since party and party costs were awarded as an indemnity only. They also held on the construction of the 1870 Act that the county court judge had made the correct costs order. Cozens-Hardy MR said (at 649):

'I think that the common law point made by counsel for the respondent, which has not been dealt with by counsel for the appellant in his reply, is a good point and is sufficient to dispose of this case. What are party and party costs? They are not a complete indemnity, but they are only given in the character of an indemnity. I cannot do better than read the opinion expressed by Bramwell B. in *Harold v. Smith* ((1860) 5 H & N 381 at 385, 157 ER 1229 at 1231): "Costs as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained."

- a* Now in the face of the evidence which the learned county court judge has accepted, and which he was perfectly justified in accepting, if he had ordered the defendant to pay these costs he could have been giving a bonus to the party receiving them. That is contrary to justice and to common sense and also to the law as laid down in *Harold v. Smith*. That is a decision which has remained undisturbed for fifty years, and I am not prepared to depart from it. On that ground alone I think that this appeal must fail.'
- b*

Cozens-Hardy MR also considered that the matter came within the proviso to s 5 of the 1870 Act notwithstanding that the agreement was not in writing. Fletcher Moulton and Buckley LJ both agreed. Fletcher Moulton LJ said (at 651):

- c* 'The principle that party and party costs are only an indemnity—an imperfect indemnity, it is true, but never more than an indemnity—is so deeply rooted in our law that the proviso is put in for the purpose of preventing the earlier part of s. 5 from ever giving rise to a case in which costs could be made a profit. By this proviso it is enacted that the client who has entered into such an agreement shall not recover from the person liable to pay to him the costs a greater sum than he himself is under the agreement liable to pay to the solicitor. This proviso is only declaratory in a special instance of what is the general law as to awarding costs throughout our legal system.'
- d*

- e* It seems to me that *Gundry v Sainsbury* states a general principle. It does not address the question whether the principle has to be applied to individual items or once only by comparing the total amount of the taxed costs with the total amount which the solicitor is entitled to receive from his client.

- f* In *Re Eastwood (decd)*, *Lloyds Bank Ltd v Eastwood* [1974] 3 All ER 603, [1975] Ch 112 the costs of the Attorney General were ordered to be taxed. An item was included in the bill of costs to cover the care and conduct of the matter which was dealt with throughout by a senior solicitor in the Treasury Solicitor's office. The taxing master reduced the amount by disallowing 'profit costs' on the grounds that the Crown was not represented by an independent solicitor but by the Treasury Solicitor and his department, and that a different method of assessment should be applied to a bill of costs of a party represented by a salaried solicitor.
- g* The taxing master's decision was upheld by Brightman J sitting with assessors on review. The Court of Appeal allowed an appeal holding that the appropriate method of taxation of a bill of costs where a party was represented by a salaried solicitor was to treat it as though it were the bill of an independent solicitor, assessing the reasonable and fair amount of a discretionary item having regard to all the circumstances of the case and to the principle that the taxed costs should not be more than an indemnity to the party against the expense he had incurred in the litigation. There might be special cases where costs awarded on the conventional basis would exceed the principle of indemnity, but it would be wrong and impracticable in cases of a salaried solicitor to require a break down of the expenses of a department in order to insure that the principle was not infringed. Thus the case in essence concerned the means whereby the court could be satisfied that the indemnity principle was not infringed. It did not address questions central to the present appeal. But it was a case where the court was in fact considering an individual item in a larger bill.
- j*

In *Universal Thermosensors Ltd v Hibben* (6 March 1992, unreported) there was a costs order in favour of the plaintiffs down to the end of September 1990 and a

costs order in favour of the defendants from 1 October 1990 onwards for two-thirds of their costs. The defendants entered into a contentious business agreement with solicitors who acted for them from approximately March 1991 that the solicitors would not charge more than £80,000 plus value added tax and disbursements. Nicholls V-C held that the £80,000 was a ceiling to be imposed at the end of taxation and not a ceiling which the bill lodged for taxation might not exceed. The starting point for taxation was such sum as the solicitors could justify on taxation regardless of the contentious business agreement. The £80,000 plus disbursements operated as a cap once the process of taxation had taken place. Nicholls V-C described the plaintiff's approach as contrived and artificial. He did not address any question arising from the fact that the defendants were to recover only two-thirds of their costs. He also said:

'The second question which arises regarding this costs arrangement concerns how this formula works if a disbursement which is allowable as between the solicitors and their own clients is disallowed on the inter partes taxation. I confess that my first impression was that the amount which the defendants could recover from the plaintiffs in respect of Herbert Smith's profit costs was £80,000 and in respect of disbursements was whatever disbursements were allowed on the party and party taxation, and that was all there was to it. On reflection, however, I am quite satisfied that what this arrangement did and does is to impose a cap on the total amount of the bill payable by the defendants to Herbert Smith. So long as the total amount sought to be recovered by the defendants from the plaintiffs does not exceed that sum which, having regard to this agreement, Herbert Smith can recover from their clients, then the cap does not preclude recovery.

On the face of it, this decision favours the insurance companies' submission. Mr Kentridge QC, who appeared before us for Jardines, submitted that this was a cryptic and 'throw away' passage in an ex tempore judgment which did not refer explicitly to the indemnity principle nor to s 60(3) of the 1974 Act nor discuss its terms. He submitted that the decision relating to the £80,000 and the disbursements was wrong and should be overruled. If the disbursements had been disallowed, to include them nevertheless in the cap would be to allow the client to receive a bonus over that which he was liable to pay his solicitor for costs which were recoverable.

Jardines contended before Master Campbell that it would not be difficult in practice to apply a cap item by item. Master Campbell considered this question by reference to detailed examples and concluded that Jardines were incorrect. He considered that it would not be a simple arithmetical exercise for the taxing master, at the end of a taxation, merely to reduce the hourly rates to the level of the rates agreed between the solicitor and their client. It would on the contrary be a painstaking task. I am persuaded that examples could arise where complicated and painstaking reductions would be required. I do not, however, consider that difficulties of this kind are persuasive to any particular conclusion. Taxation of costs can be a laborious procedure in any event, and can be expensive in taxing fees.

Master Campbell noted that there was nothing in s 60(3) of the 1974 Act which states that the receiving party cannot recover costs calculated by reference to hourly rates which exceed the hourly rates payable by them to their solicitors. He noted that this subsection had not been amended when s 59(1) was amended by the Courts and Legal Services Act 1990 to include as a contentious business



a agreement an agreement providing that the solicitor shall be remunerated by reference to an hourly rate. He then said:

b 'I accept that *Hibben's* case is authority for the global approach and that there is no restriction on the amount the receiving party can claim by reference to hourly rates or globally provided the figure recoverable on taxation does not exceed the sum payable to his solicitor. In the absence of  
c any express reference to hourly rates in s 60(3) following the amendment to the Act in 1990, the word "amount" means the global sum payable by the client to his own solicitor, no distinction being drawn between the hourly rates claimed inter partes and those charged as between solicitor and his own client. In short, provided he is liable to pay his own solicitor as much as he recovers from his opponent on taxation the client does not make a "bonus" or "profit", even if the hourly expense rates including uplift allowed by the taxing master are higher than the rates actually charged by his own solicitor.'

d Master Ellis had decided the same point the other way in a taxation in *Deeny v Gooda Walker* (unreported). Bearing in mind that s 60(3) of the 1974 Act did no more than express the common law, Master Ellis could find nothing in s 60 to enable the receiving party to recover costs calculated by reference to hourly rates which exceeded the agreed hourly rates payable by them to their own solicitors. He said:

e 'Since the plaintiffs and their solicitors have agreed specific charge out rates for each fee earner, then any bill of costs inter partes should reflect such agreement so that the relevant expense rate combined with any uplift does not exceed the agreed charge out rates.'

f District Judge Brown in a Chancery case in the Bristol District Registry held on 21 January 1997 that 'the proper application of the indemnity principle demands that one looks at the detail of the work done rather than simply at the total. In particular, the hourly rate inter partes should never exceed that charged to the client'. He said that—

g 'it would be an infringement of the indemnity principle to look at the overall total bill to the client including disbursements and value added tax because such a comparison would distort what had been taxed off by me on taxation on the basis that those costs had not been "reasonably incurred" and therefore were irrecoverable on an indemnity. Individual items must be looked at, eg counsel's fee.'

h In the case now before us, Tuckey J upheld Master Campbell's decision. He observed that sub-s (3) does not refer to the ways in which a solicitor may be remunerated under a contentious business agreement identified in s 59 but simply to 'the amount ... payable under the agreement'. He continued:

j 'In this context, I think use of the words "the amount" are apt to refer to a total. This is obviously so in the case of remuneration by gross sum or salary. I also think it is so in the case of remuneration "by reference to an hourly rate". What is being described is the total remuneration payable by reference to hourly rates but not the hourly rates themselves ... The subsection makes it clear that the comparison has to be made between costs payable under an order and the amount payable in respect of *those* costs under the contentious business agreement (the CBA). So, s 60(3) does not in my judgment impose

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a simple overall cap. It imposes a cap in respect of the costs to which the order relates. Where a party is awarded all his costs of the action the comparison will be simple. If the taxing officer is only concerned with a discrete interlocutory order, or issues costs, it will be necessary to isolate the costs payable under the CBA in respect of those matters in order to make the comparison. In the instant case where Jardines and the third defendants have obtained discrete costs orders in their favour, it seems to me that the amounts payable by the plaintiffs under the CBA in respect of these matters fall to be deducted from the total paid under the CBA in order to make a proper comparison, since such costs simply do not come into the reckoning under s 60(3).'

By their respondent's notice, the insurance companies seek to challenge this last part of Tuckey J's decision. They seek to persuade us that the total amount payable by the receiving party to his solicitor under the contentious business agreement is the only cap on the costs recoverable from the paying party even in a case where there were discrete costs orders made in favour of the paying party. They submit that the subsection only provides that the client cannot recover more than the amount payable under the agreement as the costs of the relevant proceedings.

Each of the parties' cases has its problems. The problem with the insurance companies' case was that identified by Tuckey J. If costs orders have been made disallowing parts of the receiving party's costs or if they themselves have been ordered to pay some of the paying party's costs, they nevertheless submit that the costs which they themselves have to pay their solicitors for those parts of the litigation are available to contribute to the cap. That seems wrong and Tuckey J held otherwise. You would at least expect that the cap should be limited to that part of what they were obliged under the contentious business agreement to pay their own solicitors which was referable to the part or parts of the litigation for which the paying party was obliged to pay them their costs. If this were not so, the receiving party would either make a profit on the costs to which they were entitled or would be recovering part of the costs to which they were not entitled. That would offend the indemnity principle.

A difficulty with Jardine's case was identified by both Master Campbell and Tuckey J. If the cap is not applied once only, but to individual items, the paying party could get what might appear to be a windfall where some costs are reduced below an individual cap because, for instance, they are held to be unreasonable, but other costs are capped at the agreed rate although, but for the cap, they would have been allowed in a greater amount. Examples may be given of agreements between a client and his solicitor which could readily produce such a result, as for instance if a single hourly rate was agreed for partners which was higher than that which would be allowed for attendance at interlocutory hearings but lower than that which would otherwise be allowed for preparation.

In the end, this is a very short point of construction. It is true that *Hibben's* case generally favours a global approach, but the agreement in that case was for a single gross sum plus disbursements and the specific question which arises in this appeal did not arise in that case. Nicholls V-C's observations that disallowed disbursements might nevertheless contribute to the cap does however by analogy support the global approach in this appeal and is inconsistent with Jardine's case. In my view therefore, this court cannot avoid considering whether Nicholls V-C was correct in *Hibben's* case on the subject of disbursements and we

a should not avoid considering how a decision in this case, where there is an agreement for hourly rates, would affect a case such as *Hibben* where there was an agreement for a single gross rate plus disbursements.

For convenience, I repeat s 60(3) of the 1974 Act:

b 'A client shall not be entitled to recover from any other person under an order for the payment of any costs to which a contentious business agreement relates more than the amount payable by him to his solicitor in respect of those costs under the agreement.'

c Mr Lockey on behalf of the insurance companies submits that 'amount' in s 60(2) and (3) is singular. The process of taxation results in a singular result—a certificate under Ord 62, r 22. The certificate is necessary to enforce the costs order. He submits that the starting point for comparison is the certificate, which you examine for the purpose of applying the indemnity principle. The comparison then is with the total amount payable to the receiving party's solicitor under the contentious business agreement. This is consistent with the language of the subsection and with *Gundry v Sainsbury* [1910] 1 KB 645. Mr d Lockey submits that *Hibben's* case was correctly decided. It is also just, because the receiving party does not recover more than an objectively reasonable amount for the work done which is the product of the taxation before the contentious business agreement is considered. The receiving party does not receive a profit. Mr Lockey invited us to adopt what he referred to as a benevolent attitude to the construction of the words of s 60(3), recognising, I think, that otherwise they e present him with a problem. He stressed that taxation is an inexact science.

f Mr Lockey accepted that, if there were a contentious business agreement for a solicitor to conduct several actions but the client obtained an order for costs in one action only, a breakdown of the costs payable under the agreement would have to be made. He did not accept that a similar process would be necessary if the receiving party obtained a costs order for only part of one action, eg if a defendant recovered the costs of Ord 14 proceedings but otherwise recovered no costs in an action fought to judgment.

g Mr Kentridge submits that the words of s 60(3) of the 1974 Act require a comparison between the costs which are the subject of the order and the comparable costs payable under the contentious business agreement—otherwise irrecoverable costs would be recovered by means of the excess on the recoverable items. He submits by reference to Ord 62 that the process of taxation is such that costs are not taxed and fixed on a global basis. They are looked at item by item. He submitted, as I have said, that *Hibben's* case was wrongly decided. h Not only would the client be able to recover sums by reference to a cap which included disbursements which had been disallowed. The client would also have the benefit of a cap of the full total of his costs when the order in *Hibben's* case only entitled him to recover two-thirds of his taxed costs. Mr Kentridge submits that in this case the taxing master must look at the individual rates in the agreement. In a case such as *Hibben*, where there is an agreement for a gross sum, j the taxing master would have to make an apportionment of the gross sum to reach the part of it referable to the allowable costs under the order.

In my judgment, Tuckey J was right to conclude that costs referable to parts of the litigation for which the receiving party did not have the benefit of an order for costs have to be taken out of account in determining the application of s 60(3). That in my view is the natural and necessary construction of the words 'under an order for the payment of any costs' and 'in respect of those costs'. 'Those costs'



refers back to the costs payable under the order. If a contentious business agreement encompassed more than one action, it would obviously be necessary to exclude costs payable by the client to his solicitor for any action in which he had recovered no costs from another party. The same in my view applies where the order for costs is for part only—it may be a small part—of the total costs of a single action. A comparison is to be made between the costs to which the order relates and the amount payable by the receiving party to his solicitor ‘in respect of those costs’. So much is, I think, clear. Mr Lockey’s construction does not accord with what I consider to be the plain meaning of the words of the subsection. His construction also means that there could in many instances be a pointless comparison between, for example, costs recoverable under an order for a small part of the action and costs payable to the solicitor for the entire action. The meaning for which Mr Lockey contends would in my view have required this different wording of the subsection:

‘A client shall not be entitled to recover from any other person under an order for the payment of costs to which a contentious business agreement relates more than the amount payable by him to his solicitor under the agreement.’

At this point, however, I respectfully disagree with Tuckey J. Once it is seen that the comparison is to be made between the costs to which the order relates and the amount payable by the receiving party to his solicitor ‘in respect of those costs’, it must follow that costs which are irrecoverable have to be left out of both sides of the comparison. ‘Those costs’ are the costs recoverable under the order after taxation but before consideration of the cap. I respectfully disagree here with Nicholls V-C’s decision in *Hibben’s* case in relation to disbursements in that case. It also means that the comparison is not global and may require in appropriate circumstances an item by item comparison. In my view, the observations of District Judge Brown in the Bristol case which I have quoted are persuasive. The exact nature of the comparison will of course depend on the nature of the contentious business agreement. If the agreement itself is not itemised but for a gross sum and if the costs order relates to the entire action with no items at all disallowed, there would be a single comparison. This will perhaps rarely be the case, since in most litigation there will be items of work which are properly the subject of a charge to the client but which would be disallowed on taxation. If the agreement is itemised, there can be an itemised comparison and in my view there should be. Here again I consider that Mr Kentridge is correct in his submission that *Hibben’s* case was wrongly decided. If the agreement is for a gross sum, there will in appropriate circumstances have to be an apportionment of that sum.

In my view, once it is seen that Tuckey J was correct in that part of his decision which is the subject of the respondent’s notice, the other and first part of his decision cannot stand. Tuckey J’s construction would in my view require this different wording of the subsection:

‘A client shall not be entitled to recover from any other person under an order for the payment of costs to which a contentious business agreement relates more than the amount payable by him to his solicitor under the agreement in respect of the part or parts of the litigation to which the order for costs relates.’

a There is no proper distinction to be made between costs disallowed by an order  
made in the proceedings and costs disallowed on taxation. A party will not be  
entitled to recover costs which are disallowed on taxation, so that 'any costs' and  
'those costs' must be taken to refer to costs which are allowable on taxation  
before consideration of the limitation imposed by s 60(3). This construction of  
b s 60(3) does not, in my view, lead to the conclusion that paying parties may  
receive a windfall. The paying party receives nothing at all. It simply means that  
receiving parties will receive either what is reasonable or the relevant amount  
which they have agreed to pay their own solicitors, whichever is the less. If it  
were otherwise, they themselves would be receiving a windfall at least in the  
sense that they would be recovering costs which for one reason or another had  
been disallowed. Mr Lockey's oft-repeated submission that his clients were not  
c seeking to recover more than an objectively reasonable amount for the work  
done is only correct if you leave out of account in judging what is an objectively  
reasonable amount what the receiving party is obliged to pay to their own  
solicitors. The subsection requires this to be taken into account. It is not  
generally speaking reasonable objectively that a party should receive more than  
d he is obliged to pay his own solicitor for the work for which he is recovering costs  
from another party.

It is suggested that this construction would discourage sensible, simple and  
efficient agreements between solicitors and their clients. I do not find this  
persuasive. On the contrary, I am inclined to think that market forces will  
continue to encourage economic agreements. Agreements to pay hourly rates  
e have a clear advantage of definition, which perceptive clients are unlikely to  
discard in favour of an undefined possibility that they might recover rather more  
on taxation, and which solicitors are unlikely to discard in favour of uncertainty  
which could lead to disagreement with their client. A client's own solicitors'  
account will always have to be paid. Recovery of costs from another party is  
f never assured, let alone in any amount which can be assessed in advance. There  
is no problem in a solicitor explaining to his client that agreed hourly rates will be  
the highest rates which may be recoverable on taxation. Clients should scarcely  
expect a greater recovery and there is always the likelihood that costs will be  
taxed at a lesser amount than the client has to pay his solicitor. That is the nature  
of taxation of costs.

g I would accordingly allow the appeal and dismiss the respondent's notice.

**SIR BRIAN NEILL.** I agree that this appeal should be allowed and that the  
respondent's notice should be dismissed for the reasons set out in the judgment  
of May LJ. I also add a very short judgment of my own because of the increasing  
h frequency and importance of contentious business agreements and because such  
agreements have given rise to some differences of judicial opinion.

Sections 59 and 60 of the Solicitors Act 1974 (which are set out in the judgment  
of May LJ) form part of a group of sections in Pt III of the Act which are included  
under the heading 'Contentious Business'. For the sake of convenience I shall  
j repeat s 60(3):

'A client shall not be entitled to recover from any other person under an  
order for the payment of any costs to which a contentious business  
agreement relates more than the amount payable by him to his solicitor in  
respect of those costs under the agreement.'

This subsection has to be construed in its context and in the light of the practice and procedure which govern the award and taxation of costs. The relevant practice and procedure include: (1) the principle that as between party and party an order for costs is not intended to provide more than an indemnity. The receiving party is not entitled to a bonus: see *Gundry v Sainsbury* [1910] 1 KB 645. (2) The rule that on a party and party taxation the recoverable costs are limited to those which were reasonably incurred and were reasonable in amount—see RSC Ord 62, r 12(1). (3) The practice whereby on a party and party taxation the profit costs in a bill of costs are taxed by reference to chargeable items. The taxing master's certificate sets out a final amount but this amount represents the aggregate of the sums allowed in respect of the items of costs which have been found to have been reasonably incurred: see Ord 62, App 2 Pt II.

It is clear from s 60(2) that a contentious business agreement does not affect the right of any party against whom an order for costs has been made to require those costs to be taxed according to the current taxation rules. Such a taxation will identify the items of costs and the amount in respect of each item which is recoverable against the paying party. One then looks at s 60(3).

The words 'any costs' in the phrase 'an order for the payment of any costs' in s 60(3) appear to me in the context to relate, not to costs at large or to the costs payable by the receiving party to his own solicitor, but to the costs and items of costs to be identified on the party and party taxation as the proper and recoverable costs. The words 'those costs' clearly refer to the same costs.

The operation of the cap then becomes readily intelligible. Where applicable, the figures in the contentious business agreement provide both a measure and a ceiling for each recoverable item of costs.

**HIRST LJ.** I agree with both judgments.

*Appeal allowed. Application for leave to appeal to the House of Lords refused.*

Dilys Tausz Barrister.



a **R v Accrington Youth Court and others,  
ex parte Flood**

QUEEN'S BENCH DIVISION

b SEDLEY AND ASTILL JJ

19, 22 AUGUST 1997

*Children and young persons – Detention – Adult prison – Home Secretary committing female young offender to adult prison pending allocation to young offender institution – Whether policy of committing young offenders to prison pending allocation lawful –*  
c *Criminal Justice Act 1982, s 1C(1)(2).*

The applicant, who was 16 years old, was sentenced to eight months' detention in a young offender institution for a number of offences. She was however sent to Risley prison, no part of which was designated as a young offender institution, under a warrant of commitment in the form appropriate to an adult offender. On her arrival, the prison governor processed her as a young offender and she was placed in a shared cell to await allocation to appropriate accommodation. The applicant applied, inter alia, for a writ of habeas corpus and was granted bail pending the hearing of her application, on the ground that the warrant of commitment issued was ex facie unlawful by virtue of s 1(1)<sup>a</sup> of the Criminal Justice Act 1982. A fresh warrant was subsequently drafted which committed the applicant to a sentence of detention in a young offender institution, but which directed that the governor of Risley remand centre keep her in custody for the entire eight months of her sentence. At the hearing of the application for habeas corpus, both the Home Secretary and the prison governor accepted that the second warrant was unlawful, since it committed the applicant to an adult prison for the entire period of her sentence, but they maintained: (i) that the Home Secretary had power under s 1C(2)<sup>b</sup> of the 1982 Act to derogate from the principle in s 1C(1) that young offenders should be detained in young offender institutions and to detain a young offender in a prison for a temporary purpose; and (ii) that pursuant to that power he had issued directions to prison staff authorising them to detain female young offenders, following sentence, in a remand centre for allocation purposes, provided that in each case the allocation justified the departure from principle. The applicant contended that the Home Secretary had misdirected himself as to where his powers allowed him to direct her to be detained and that her remand to Risley, even temporarily, was unlawful.

h **Held** – Although the Secretary of State had power under s 1C of the 1982 Act to place a young offender temporarily in a prison or remand centre, that section did not authorise him to make a general practice of doing so or to give such a direction in relation to young offenders generally; neither did it authorise him to keep young female offenders in a prison or remand centre for however long it took to make a lawful placement in a young offender institution. It followed that the practice enjoined by the Home Secretary of allowing young offenders to be held routinely in adult prisons for allocation purposes following sentence was both a  
j

a Section 1, so far as material, is set out at p 315 e, post

b Section 1C is set out at p 316 j, post

violation of the principle contained in s 1C(1) of the Act and an excess of the powers contained in s 1C(2). Since, in the instant case, the warrants of committal were ex facie unlawful, the applicant would be entitled to her liberty until a lawful warrant was issued, notwithstanding that the sentences had been pronounced in proper form as sentences of detention in a young offender institution. In those circumstances, it was unnecessary to make an order on the application for a writ of habeas corpus (see p 314 j, p 315 fg, p 318 j to p 319 d and p 320 b to f, post).

### Notes

For sentencing of young offenders, see 5(2) *Halsbury's Laws* (4th edn reissue) para 1314, and for cases on the subject, see 28(4) *Digest* (2nd reissue) 88–89, 4517–4519.

For the Criminal Justice Act 1982, s 1C, see 12 *Halsbury's Statutes* (4th edn) (1992 reissue) 765.

### Cases referred to in judgments

*Carltona Ltd v Comrs of Works* [1943] 2 All ER 560, CA.

*Smith v East Elloe RDC* [1956] 1 All ER 855, [1956] AC 736, [1956] 2 WLR 888, HL.

### Cases also cited or referred to in skeleton arguments

*R v Oldham Justices, ex p Cawley* [1996] 1 All ER 464, [1997] QB 1, DC.

*R v Secretary of State for the Home Dept, ex p Cheblak* [1991] 2 All ER 319, [1991] 1 WLR 890, CA.

### Applications for judicial review and a writ of habeas corpus

By notice dated 12 August 1997 Claire Louise Flood, a 16-year-old young offender, applied by way of judicial review for an order of certiorari to quash the decision of the Accrington Youth Court on 29 July 1997 ordering that she be committed to prison under a warrant of commitment appropriate to an adult offender, contrary to s 1(1) of the Criminal Justice Act 1982. She also applied for a writ of habeas corpus ad subjiciendum directed to the governor of HM Prison Risley into whose custody she had been committed on the ground that the warrant under which she had been committed was ex facie unlawful. The facts are set out in the judgment of Sedley J.

Ian Wise (instructed by *Clyde Chappell & Botham*, Stoke on Trent) for the applicant.

Robin Tam (instructed by the *Treasury Solicitor*) for the governor of Risley Prison and the Home Secretary.

The justices did not appear.

At the conclusion of the argument the court declined to issue a writ of habeas of corpus but quashed the warrant of committal, for reasons to be given later.

22 August 1997. The following judgments were delivered.

**SEDLEY J.** At the conclusion of argument on 19 August 1997 we declined to issue a writ of habeas corpus but quashed the warrant of committal and prohibited the issue of the fresh warrant exhibited to the affidavit of the clerk to the justices, indicating that if, however, a further warrant of committal to Styal were issued in proper form no objection could lawfully be taken. We indicated in very brief form what our grounds were but reserved our full reasons in order to set them out in writing.

a Claire Louise Flood is 16 years old. For a number of offences she was sentenced by a youth court at Accrington to a total of eight months' detention. No notice of appeal has been given against these adjudications.

b She was taken from the court to HM Prison Risley on the day of sentence. On 13 August counsel came before me to seek a writ of habeas corpus and leave to move for judicial review. I gave leave to move for judicial review, and the application for the writ was adjourned to this court for hearing on 19 August. I granted bail until that day, with a condition of surrender at Accrington police station to abide the decision of this court.

c The reason why bail was granted was that the warrant of commitment issued by the justices' clerk is *ex facie* unlawful. It is in the form proper to adult offenders and is captioned 'Warrant of commitment. Sentence of imprisonment'. Opposite the name of the accused her date of birth is given: 14 May 1981. Following other details the decision is recited as being: 'That the accused be imprisoned for 8 months ...' It directs:

d 'You, the Constables of the Lancashire Police Force are hereby required to convey the accused to RISLEY and there deliver the accused to the Governor thereof, together with this warrant; and you, the Governor, to receive into your custody and keep the accused for the said period.'

Section 1(1) of the Criminal Justice Act 1982 provides:

e 'Subject to subsection (2) below [which relates to remands in custody], no court shall pass a sentence of imprisonment on a person under 21 years of age or commit such a person to prison for any reason.'

f In our judgment a warrant of committal to prison of a person shown on the face of the warrant to be under 21 years old is a nullity. In the phrase of Lord Radcliffe in *Smith v East Elloe RDC* [1956] 1 All ER 855 at 871, [1956] AC 736 at 769 it bears the brand of invalidity upon its forehead.

g In these circumstances the quashing of the warrant which was issued on 29 July 1997, coupled with the grant of bail in the meantime, achieves all that habeas corpus could do for the applicant. Unless and until a lawful warrant is issued she is entitled to her liberty, notwithstanding that the contents of the court register show the sentences to have been pronounced in proper form as sentences of detention in a young offender institution.

The fresh warrant of commitment, now captioned: 'Warrant of commitment. Sentence of detention in young offender institution: offence' and backdated to 29 July, while it accurately recites the decision of the court, goes on to direct:

h 'You, the Constables of the Lancashire Police Force are hereby required to convey the accused to RISLEY REMAND CENTRE and there deliver the accused to the Governor thereof, together with this warrant; and you, the Governor, to receive into your custody and keep the accused for the said period.'

i It is this which throws up the issue, of considerable importance, which has occupied the court on the hearing of these applications.

The fresh warrant is on any view bad because of its direction to the governor of Risley remand centre to keep this young offender in his custody for the full eight months of her sentence. Mr Tam, for the second and third respondents (the justices not appearing or being represented), accepts that this cannot properly be done. But Mr Wise, for the applicant, makes the more radical submission that remand to Risley, even temporarily, is unlawful because it is dictated by an unlawful policy of the Home Secretary. By the same token, he submits that the



Home Secretary, from the moment of delivery of the offender into his custody, has misdirected himself as to where his powers allow him to direct the applicant to be detained. a

In the background is a serious concern about conditions in adult prisons such as Risley and their effect on young offenders who are placed there. Before this court are affidavits of Robert Daw, the head of the women's policy section of the prison service; Patrick Nolan, deputy governor at HM Prison Risley; and Frances Elizabeth Russell, the legal and youth policy officer of the Howard League for Penal Reform. We have not been called upon to resolve the issues of fact thrown up by this evidence. We limit ourselves to the remark that a stranger to our society would not believe that this evidence, all of it from knowledgeable and reputable individuals, related to the same prison system. b

What emerges without contest from the evidence is the following. There is no allocation centre for females in the prison system which is designated as a young offender institution. Indeed there is no female young offender institution, as such, in the country. There are five women's prisons of which parts have been designated young offender institutions, and it is to these that girls aged from 15 to 17 are or should be allocated. In 1996, 214 girls in this age group received custodial sentences, between 65 and 80 being in prison custody at any one time. These numbers represent a sharp rise since 1992, until when they had been decreasing. c

There is no fixed time which a young female offender will spend in a prison pending allocation. The initial exercise of assessment is a brief one, but the move to whichever is determined to be the appropriate establishment must then wait until a place becomes available. d

On her arrival at HM Prison Risley, it was realised that the applicant was a young offender and not liable to be imprisoned. Regardless, therefore, of the direction on the face of the warrant, she was processed as a young offender. This was completed the following morning, 30 July, and she was then placed in a shared cell. The deputy governor's evidence is that pressure on places is such that 'an inmate may have to wait a few weeks to be transferred'. e

There is a conflict of evidence about what happened to the applicant between her arrival in Risley and her release on bail some two weeks later. We have not been called upon to resolve it. We simply record our anxiety at the issues it raises about the possibility of close and unsupervised contact between a young offender, who will by definition be in some measure disturbed, and adult women prisoners whose range of possible deviances needs no elaboration; this despite the evidence of the steps taken to prevent abuse. HM Chief Inspector of Prisons has, we understand, expressed similar concern in a report published as recently as May 1997. f

Section 1C of the Criminal Justice Act 1982 provides: g

'(1) Subject to section 22(2)(b) of the Prison Act 1952 (removal to hospital etc), an offender sentenced to detention in a young offender institution or to custody for life shall be detained in a young offender institution unless a direction under this section is in force in relation to him. h

(2) The Secretary of State may from time to time direct that an offender sentenced to detention in a young offender institution or to custody for life shall be detained in a prison or remand centre instead of a young offender institution, but if he is under 18 at the time of the direction, only for a temporary purpose.' i

a It is Mr Tam's contention that the power contained in s 1C(2) is exercised from day to day by the reception staff at Risley as delegates of the Secretary of State under the *Carltona* principle (see *Carltona Ltd v Comrs of Works* [1943] 2 All ER 560 at 563). This will be done against the background of the material circular instruction (to which we will come in a moment) and will inevitably be a decision to detain the young offender in the prison unless there is some reason to send her to hospital.

b When one looks at the relevant circular instruction, 2/91, Mr Tam's brave submission crumbles. It is directed to governors of all female establishments and is captioned 'The allocation of female offenders'. It includes the following passages:

c 'Introduction This Circular Instruction sets out and explains the principles which should govern the allocation of sentenced female adults and young offenders ... Aim 2. The aim of the allocation procedure is to place females in appropriate accommodation as quickly as possible after sentence, taking account in particular of the need to provide a proper level of security for each offender ... Allocation of Young Offenders 15. In the female system there are no establishments which are solely designated as young offender institutions. Instead, 5 establishments have been designated as part prison and part young offender institution ... Statutory Basis for Holding Young Offenders in Prisons 16. Section 123(4) of the Criminal Justice Act 1988 introduced a new Section 1C into the Criminal Justice Act 1982 ... The power under Section 1C(2) above is delegated to those who allocate young female offenders. A full list of the circumstances in which young offenders may be allocated to accommodation designated as a prison is provided at Annex B. 17. Allocators should satisfy themselves that the reason for holding a young offender in prison designated accommodation justifies the departure from the principle in Section 1C(1) above.'

f Annex B is a copy of a letter dated 12 December 1988 from prison service headquarters to all governors of female establishments. It is captioned: 'Allocation of female young offenders' and begins:

g 'This letter draws attention to the revised provision for the allocation of offenders sentenced to detention in young offender institutions in section 1C of the Criminal Justice Act 1982 (as inserted by section 123(4) of the Criminal Justice Act 1988) and sets out its implications for female young offenders sentenced to detention in a young offender institution ... The effect of subsection (1) ... is to restrict the more flexible legislative provision in section h 12(5) of the Criminal Justice Act 1982 (this section has now been repealed) which provided that young female offenders (under the age of 21) who were sentenced to youth custody were to be detained: (a) in a youth custody centre; (b) in a remand centre; or (c) in a prison, as the Secretary of State from time to time directed. The new provision means that offenders sentenced to j detention in a young offender institution should be held in an establishment designated a young offender institution unless a direction has been made which would effectively invoke section 1C(2) above and permit the offender to be held, as an alternative, in either a prison or a remand centre. However, there are a variety of occasions where it may be necessary for a young female offender (aged under 21) to be held in prison designated accommodation. These are: a) occasionally it may be more desirable to hold a more "mature"

young offender or a particularly disruptive young offender with the adults; a  
b) given the changing nature of the population and particularly the ratio of  
young offenders to adults in age-mixed establishments, the Governor may  
need to allocate young offenders to prison designated accommodation  
within that establishment in the interests of good management of the  
establishment. (NB. Young offenders in age-mixed establishments who are  
located in prison designated sleeping accommodation continue to receive a b  
full young offender regime.) c) in order for some young offenders to be  
allocated as close to home as possible they have to be held in prison  
accommodation (usually Holloway or Askham Grange); d) young offenders  
are held in the three mother and baby units two of which (Holloway and  
Askham Grange) are designated as prison; e) sentenced young offenders may  
be held in a remand centre for allocation purposes ... The Secretary of State c  
is content for the exercise of his power under section 1C(2) above to be  
delegated to those who currently allocate young female offenders at  
Headquarters, Regional Office or in establishments. Where the power is  
invoked to hold young female offenders in prison designated  
accommodation those invoking the power should satisfy themselves that the d  
reason for so holding the young offender in prison designated sleeping  
accommodation is one of the eleven listed above and that in each case the  
allocation justifies the departure from the principle inherent in section 1C(1)  
above that young offenders sentenced to detention in the young offender  
institution should be detained in such an institution.' e

There follows in Annex C, captioned 'The female estate', a list of establishments. All five allocation centres are prisons of which no part is designated a young offender institution. Risley is one of them.

In our judgment there is no question but that the opening sentence of the last paragraph quoted from the letter of 12 December 1988 is the formal delegation f  
of the Secretary of State's powers to nominated grades or functions within the prison service. This is what one would expect. It is not for an individual member of a department of State to take upon himself or herself ad hoc the discharge of the Secretary of State's functions; it is for the Secretary of State to ensure that his functions are carried out in his name by suitable officers on his establishment. g  
This, having been duly done in 1988 on the entry into force of the amendment to the 1982 Act, was adopted by annexure as part of the 1991 circular instruction to governors of all female establishments.

This instruction, as can be seen from the passages we have quoted, then directs those who have been authorised to carry out the Secretary of State's new functions to do so according to the listed criteria, provided that in each case 'the allocation justifies the departure from the principle' that young offenders should be in young offender institutions. Among these criteria are more than one which bear little or no relation to the individual—(b), for example, relates to the interests of prison management, not of the young offender. But the important j  
one for present purposes is (e), which in terms permits female young offenders, following sentence, to be held in a remand centre—viz a prison—for allocation purposes. Since there is nowhere else in the prison system where allocation of such young offenders can take place, there is absolutely no choice in the matter so that no discretion whatever is being delegated to the Secretary of State's officers. Is this lawful? h



a In our judgment the terms of s 1C make it plain that it is not. The Secretary of State's power, and therefore that of his designated officers, to depart from the provision for allocation to a young offender institution is limited to permission 'from time to time [to] direct that an offender ... shall be detained in a prison or remand centre ... for a temporary purpose' if under 18. The phraseology makes it plain that Parliament was authorising the Secretary of State on occasion to place a particular offender under the age of 18 temporarily in a prison or remand centre. It did not authorise him to make it a general practice to do so; it did not authorise him to give such a direction in relation to offenders generally; and it did not authorise him to keep them in a prison or remand centre for however long it takes (possibly the whole length of the sentence) to make a lawful placement in a young offender institution. The practice not only permitted but enjoined by the combination of circular instruction 2/91 with its annexures and the total non-availability of any young offender institution to which newly sentenced female young offenders may be sent, is in our judgment a violation of the principle contained in s 1C(1) of the 1982 Act as amended and an excess of the powers contained in sub-s (2) of that enactment.

d We recognise the problems which this conclusion creates for the prison service. But it has to be recognised, too, that the very change which the amendment of the 1982 Act brought about was spelt out in the 1988 letter, which then went on to lay down a regime which meant that there would in practice be no change. This is not easy to comprehend when one bears in mind that the same department of state will have promoted the amending legislation. Mr Wise was also justified in putting before us the United Nations Convention on the Rights of the Child (New York, 20 November 1989; TS 44 (1992); Cm 1976) ratified by this country in 1992 with the following reservation:

f 'Where at any time there is a lack of suitable accommodation or adequate facilities for a particular individual in any institution in which young offenders are detained, or where the mixing of adults and children is deemed to be mutually beneficial, the United Kingdom reserves the right not to apply Article 37(c) insofar as those provisions require children who are detained to be accommodated separately from adults.'

g The reservation was considered necessary because art 37(c) included this provision: '... every child [ie person under 18] deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so ...'

h It is apparent that careful consideration had been given to the purposes of s 1C—and we respectfully agree with the government's view of those purposes—and a reservation made in favour of them. For this reason too it is disturbing to see that as long ago as 1988 a regime had been put in place within the prison system which made it inevitable that those purposes would be exceeded.

j In the few days which had elapsed between the grant of leave and the hearing Mr Tam was able to be furnished with instructions that a place was available for the applicant at Styal young offender institution. We do not know whether this would have been so but for the proceedings, but we have made it clear that there could in our view be no objection to a lawfully drawn warrant naming Styal as the place to which the applicant is to be taken. It is very much to be regretted that a girl as young as this, however unruly, should find herself in and out of custody and uncertain from day to day of her fate. But the convictions and sentences stand and the law has to take its course.

The orders of the court are consequently those set out at the beginning of this judgment, together with the provision for costs made following counsel's submissions at the conclusion of the hearing.

**ASTILL J.** Section 1C(2) of the Criminal Justice Act 1982 gives the Secretary of State power to detain a young offender in prison for a temporary purpose only.

As a matter of policy, all young female offenders sentenced to detention are sent first to a prison before being allocated to a young offender institution. The warrant of commitment commands the governor to receive the offender into prison. Mr Tam submits that the reception officer exercises the powers delegated by the Secretary of State. He submits that that officer makes a decision which is individual to each young offender, thereby satisfying s 1C(2) of the Act.

In order to determine whether that officer is making a decision at all, it is necessary to see what faces him upon reception. He is given, or acts under the authority of, a warrant issued by the court ordering the governor to receive the offender into that prison. Mr Tam concedes that his only choice is whether to place the offender in prison or in hospital. If it is the prison hospital, that is no choice; if it is a hospital outside the prison it is no effective choice. As a result, the officer is not exercising any power under 1C(2) because he is not making any effective decision about an individual offender. The warrant of commitment directs that the offender is to be received into prison and the court draws the warrant in those terms because, and only because, the policy of the Secretary of State is to send *all* female young offenders sentenced to detention in a young offender institution first to a prison. It is the policy that dictates the warrant and not the warrant that dictates the policy.

In those circumstances, there cannot properly be said to be a discrete decision made about each young female offender. This is blanket policy; it is contrary to s 1C(2) of the 1982 Act and it is accordingly unlawful.

It should be made clear that a decision of this court on the matters before us can only be reached by interpreting the meaning of the section and by applying it to the Secretary of State's policy. This court cannot, and has not, come to a conclusion by reference to the general consequences of the policy.

However, when those consequences are seen, the purpose of the legislation is made clear. In prison, young female offenders mix with adult offenders, some of whom have committed grave crimes and many of whom have disturbing personal problems. They often remain there for weeks before a place in a young offenders institution is found. It would be difficult to find any argument which supported that position. For references to the evidence which was placed before us, I rely upon the passages in Sedley J's judgment which deal with this. I accept that there may be unresolved issues of fact.

The decision of this court will give effect to the purpose of the legislation which is to protect often vulnerable young offenders from the possibility of malign influences.

*Orders accordingly.*

Dilys Tausz Barrister.

## Abbey National plc v Frost (Solicitors' Indemnity Fund Ltd intervening)

CHANCERY DIVISION

CARNWATH J

24 FEBRUARY, 12 MARCH 1998

*Practice – Service – Substituted service – Defendant solicitor's whereabouts unknown – Plaintiff granted leave to effect substituted service of writ by serving on Solicitors' Indemnity Fund – Whether power to order substituted service where no likelihood that such service would bring proceedings to notice of defendant – RSC Ord 65, r 4(3).*

The plaintiff building society brought an action against the defendant arising out of a transaction in 1990 in which the defendant had acted as solicitor for the plaintiff and its borrower in connection with the purchase of a flat, alleging that he had failed to report to the plaintiff that the borrower was acquiring the property by means of a sub-sale, involving a substantial price differential. By the time the writ was issued in February 1997, the defendant had been struck off the roll of solicitors and his whereabouts were unknown. An investigation service employed by the plaintiff's solicitors had reason to believe that the defendant was in Thailand, but had no further sources of information. In those circumstances, the plaintiff's solicitors decided that it was impracticable to serve the defendant personally and applied for, and were granted, leave to effect substituted service of the writ by serving the Solicitors' Indemnity Fund Ltd (the SIF). The SIF issued a summons seeking leave to intervene in the proceedings, for the purpose of applying, inter alia, to set aside that leave. The master confirmed the validity of service and the SIF appealed. The issue arose as to whether the court had power to order substituted service on the SIF, where, contrary to the implied requirement in RSC Ord 65, r 4(3)<sup>a</sup>, which provided that the court could effect substituted service by taking such steps as were necessary 'to bring the document to the notice of the person to be served', there was no likelihood that such service would bring the proceedings to the attention of the defendant himself.

**Held** – Having regard to the wording of r 4(3), the court would normally only order substituted service where there was a likelihood that such service would bring the proceedings to the attention of the defendant. Even if there was a limited exception, in respect of personal injury actions arising out of road accidents, which allowed the court to make an order for substituted service on the Motor Insurers' Bureau where the defendant could not be traced, its rationale lay in the special scheme established under the road traffic legislation and the Motor Insurers' Bureau scheme and could not be extended to the Solicitors' Indemnity Fund. Accordingly, since, in the instant case, the objective of drawing the proceedings to the attention of the defendant would not be achieved by substituted service on the SIF, the order for such service was misconceived. The appeal would therefore be allowed and the substituted service set aside (see p 323 a j to p 324 a e, p 330 j to p 331 a and p 332 b, post).

*Porter v Freudenberg* [1914–15] All ER Rep 918 applied.

<sup>a</sup> Rule 4(3) is set out at p 322 j, post



## Notes

For professional indemnity for solicitors; the Solicitors' Indemnity Fund, see *a*  
44(1) *Halsbury's Laws* (4th edn) (1995 reissue) para 486.

## Cases referred to in judgment

*Clarke v Vedel* [1979] RTR 26, CA.

*Gurtner v Circuit* [1968] 1 All ER 328, [1968] 2 QB 587, [1968] 2 WLR 668, CA. *b*

*Harrington Motor Co Ltd, Re, ex p Chaplin* [1928] Ch 105.

*Mortgage Corp v Solicitors Indemnity Fund Ltd* [1998] PLNR 73.

*Murfin v Ashbridge* [1941] 1 All ER 231, CA.

*Porter v Freudenberg* [1915] 1 KB 857, [1914–15] All ER Rep 918, CA.

*Swain v Law Society* [1982] 2 All ER 827, [1983] 1 AC 598, [1982] 3 WLR 261, HL.

*Theophile v Solicitor General* [1950] 1 All ER 405, [1950] AC 186, HL. *c*

*Wilding v Bean* [1891] 1 QB 100, [1886–1890] All ER Rep 1026, CA.

*Windsor v Chalcraft* [1938] 2 All ER 751, [1939] 1 KB 279, CA.

## Cases also cited or referred to in skeleton arguments

*Allen, Re, ex p Shaw* [1915] 1 KB 285, CA.

*Debtor, Re a (No 784 of 1991), ex p the debtor v IRC* [1992] 3 All ER 376, [1992] Ch 544. *d*

## Appeal

The intervener, the Solicitors' Indemnity Fund Ltd (the SIF), appealed from the decision of Master Moncaster made on 8 December 1997 whereby he upheld the validity of an order made by the district judge on 24 June 1997 granting leave to the plaintiffs, Abbey National plc, to effect substituted service of a writ issued against the defendant, Stephen Leonard Frost, by serving it on the SIF. The facts are set out in the judgment. *e*

*Andrew Goodman* (instructed by *Curtis & Parkinson*, Nottingham) for the plaintiffs. *f*  
*Matthew Jackson* (instructed by *Wansbroughs Willey Hargrave*) for the SIF.

*Cur adv vult*

12 March 1998. The following judgment was delivered.

## CARNWATH J. *g*

### Introduction

In this case, the intervener, the Solicitors' Indemnity Fund Ltd (the SIF), raises a novel and important point relating to the principles upon which substituted service is allowed in cases where a defendant solicitor, indemnified by the SIF, has defaulted. *h*

By RSC Ord 10, r 1, a writ must normally be served personally on the defendant. Order 65, r 4 allows for substituted service if 'it appears to the Court that it is impracticable for any reason to serve that document in the manner prescribed'. An application for an order for substituted service has to be supported by an affidavit stating the facts on which the application is founded. By *i*  
Ord 65, r 4(3):

'Substituted service of a document, in relation to which an order is made under this rule, is effected by taking such steps as the Court may direct to bring the document to the notice of the person to be served.'

a The short question is whether substituted service on the SIF can be allowed, in circumstances where there is no likelihood that such service will bring the proceedings to the notice of the defendant.

### *Background*

b The action arises out of a transaction in 1990, in which the defendant acted as solicitor for the plaintiff building society and its borrower in connection with the purchase of a flat. Mr Frost was then in practice as a sole practitioner under the name 'Harold Weston Frost & Co'. The substance of the complaint against Mr Frost is that he failed to report to the plaintiffs that the borrower was acquiring the property by means of a sub-sale, involving a substantial price differential. As the master observed, the transaction appears from the pleaded facts to have been c one of the 'commonplace mortgage frauds with a back-to-back sub-sale at a fictitious or artificially inflated price'. The mortgage advance was £160,000. Following default by the borrower, the plaintiff repossessed the property, and they sold it in October 1992 for £70,500.

d The writ in this action was not issued until 28 February 1997. That was outside the primary limitation period; but the pleadings allege that the plaintiffs only acquired the relevant knowledge in August 1996, and therefore time is to be treated as extended pursuant to s 14A or s 32 of the Limitation Act 1980.

e By the time the writ came to be issued, Mr Frost's whereabouts were unknown. He had in fact been struck off the roll of solicitors on 7 April 1994, following an intervention by the Law Society for a matter unconnected with the present transaction. Information as to his movements since then is very sketchy. In June 1995 the Law Society had what they believed to be his home address, but a letter sent to that address in July of that year was returned, someone having scribbled on it 'left about two years ago'. In August 1995 an investigation service employed by the plaintiff's solicitors reported that inquiries of a Mr Aitcheson, of f Vickers & Co, who had intervened on behalf of the Law Society in 1993, had stated that 'to the best of his knowledge Mr Frost is in Thailand and he cannot assist us in finding or contacting him'. In June 1997 the same investigating service repeated their belief that Mr Frost was in Thailand, but appeared to have no further sources of information. Mr Powell, who swore an affidavit in these proceedings on behalf of the SIF, said it was his understanding that Mr Frost had married a Thai woman; but this information apparently derives from something g which was said at the disciplinary proceedings in 1993, and its source is unknown.

h In these circumstances the plaintiffs' solicitors decided that it was impracticable to serve Mr Frost personally. On 24 June they applied to the district judge for, and were granted, leave to effect substituted service of the writ by serving it upon SIF. SIF then issued a summons seeking leave to intervene in the proceedings, for the purpose of applying, inter alia, to set aside that leave. Master Moncaster on 8 December gave a fully reasoned judgment confirming the validity of the service. Although the district judge also extended the validity of the writ, the extended period was not in the event required. In these circumstances, it is unnecessary to j discuss the submissions made to me about the validity of that extension.

### *The legal issue*

The fundamental issue raised by Mr Jackson, as I have said, is whether there was any power to order substituted service in the circumstances of this case, where, contrary to the implied requirement in r 4(3), there was no likelihood that

service on the SIF would bring the proceedings to the attention of Mr Frost himself. a

That this is a normal requirement for substituted service is not only implicit in the wording of the rule, but is also firmly established by the authorities. In *Porter v Freudenberg* [1915] 1 KB 857, [1914–15] All ER Rep 918 a seven-man Court of Appeal dealt with the problems of service on alien enemies in the First World War. In the judgment of the court the established principles for substituted service were summarised (see [1915] 1 KB 857 at 887ff, [1914–15] All ER Rep 918 at 933ff). Among other matters, the court said: b

‘In order that substituted service may be permitted, it must be clearly shown that the plaintiff is in fact unable to effect personal service and that the writ is likely to reach the defendant or to come to his knowledge if the method of substituted service which is asked for by the plaintiff is adopted.’ (See [1915] 1 KB 857 at 888, [1914–15] All ER Rep 918 at 934.) c

Later the court summarised the matters on which the judge hearing the application must ‘satisfy himself’, one of them being—

‘that the method of substituted service asked for by the plaintiff is one which will in all reasonable probability, if not certainty, be effective to bring knowledge of the writ or the notice of the writ (as the case may be) to the defendant.’ (See [1915] 1 KB 857 at 889, [1914–15] All ER Rep 918 at 935.) d

If the matter rested there, it would be clear that the order for substituted service on the SIF in the present case was misconceived, since on the evidence there was no reason to think that such service would bring the matter to the attention of the defendant. e

The plaintiffs, through Mr Goodman, rely on a supposed exception to that principle, derived by analogy from dicta in the judgments of the Court of Appeal in *Gurtner v Circuit* [1968] 1 All ER 328, [1968] 2 QB 587, concerning substituted service on insurance companies or the Motor Insurers’ Bureau (the MIB) in road accident cases. The supposed effect of those dicta is summarised as follows in *The Supreme Court Practice* 1997 para 65/4/5: f

‘In personal injury actions arising out of road accidents, if the defendant cannot be traced, the affidavit evidence must show that all reasonable efforts have been made to trace him and to effect personal service of the writ or summons on him, and if the Master is so satisfied, then (1) in cases where the defendant is insured and the identity of his insurers is known, the Master may make an order for substituted service on the defendant at the address of the insurers ... and (2) in cases where the Motor Insurers’ Bureau will be liable to pay the damages, if any, awarded to the plaintiff, as where the defendant was not insured against third party risks, or if the identity of his insurers is not known, or if his insurers have repudiated liability under the policy, the Master may make an order for substituted service on the defendant at the address of the Motor Insurers’ Bureau ...’ g

Apart from *Gurtner’s* case, there is also a reference (in respect of (1)) to an observation of Goddard LJ in *Murfin v Ashbridge* [1941] 1 All ER 231. That was another traffic case and there was an issue about the locus standi of the defendant’s insurer. In the course of a judgment dealing with other issues, Goddard LJ said (at 235): h

j



a 'Possibly—I only throw this out in case there is any difficulty hereafter—in an order for substituted service in these cases it may be a proper thing to order substituted service on a defendant by serving his insurers. They are the people who are really interested, and, if they want to defend the action, they can do so.'

b As the passage in *The Supreme Court Practice* 1997 indicates, the particular exception is treated only as relating to personal injury actions arising out of road accidents. It is preceded in the same paragraph by the following statement of the general position:

c 'If the writ is not likely to reach the defendant nor come to his knowledge if service is substituted, then as a general rule substituted service should not be ordered. It is not, however, essential in all cases to show that it will do so, e.g. in actions by a landlord for recovery of land.'

d No authority is given for the second sentence. However, the example of actions by a landlord for recovery of land may be intended as a reference to the specific procedure provided for in Ord 113, r 4. If so, it provides no support for any wider exception to the general rule.

e Unfortunately, *The Supreme Court Practice* 1997 does not refer to more recent Court of Appeal authority also involving the MIB, *Clarke v Vedel* [1979] RTR 26, which throws considerable doubt on the breadth of the supposed exception as there formulated. Nor, as it appears, was the master's attention drawn to that authority. It is necessary, therefore, to re-examine those authorities against the background of the applicable scheme and legislation, and then to consider how far the principles extracted from that analysis can be applied to the SIF scheme.

### *The MIB scheme*

f As is well known, special provision is made as a matter of public policy for liability arising out of motor accidents. By what is now s 151 of the Road Traffic Act 1988, where a certificate of insurance has been delivered, then the insurer is made directly liable to pay amounts found due in such cases (subject to the limitations in the section). This applies even though 'the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy or security ...' (s 151(5) of the 1988 Act).

g In addition to that statutory protection, a scheme (the MIB scheme) has been in place since 1946 to provide compensation in cases where, notwithstanding the provisions relating to compulsory insurance, the victim is deprived of compensation by the absence of effective insurance. The scheme has been embodied in a series of agreements between the relevant minister and the Motor Insurers' Bureau, which was itself constituted in 1945 by agreement between the then minister and companies in the motor insurance industry. By cl 2(1) of the current agreement (dated 21 December 1988), if judgment in respect of a relevant liability is obtained and is not satisfied within seven days from the date upon which it became enforceable then, whether or not the defendant was covered by h a contract of insurance, the MIB will satisfy the claim.

i In *Gurtner v Circuit* [1968] 1 All ER 328 at 333–334, [1968] 2 QB 587 at 587–599 Diplock LJ referred to some of the problems created by the lack of any statutory underpinning for the MIB scheme, in contrast to the direct liability placed on insurers under the road traffic legislation. He noted that the MIB scheme rested on an agreement between the minister and the MIB, with the consequence that,

at least in theory, it was enforceable only by the minister and not by the claimants themselves. He went on to say:

‘Nevertheless, the courts have on a number of occasions entertained actions by unsatisfied judgment creditors brought against the bureau to enforce on their own behalf undertakings given by the bureau to the Minister under the contract. In these actions, in which the Minister was not joined as a party, the bureau has not taken the point that the plaintiff was not privy to the contract on which he has sued. The court for its part has turned a blind eye to this ... This Nelsonian solution, however, cannot be adopted where a party to the litigation does raise the point that there is no privity of contract or where, as in the present case, one party is a litigant in person who does not understand the point but in whose interest it is to take it if it be a valid one.’ (See [1968] 1 All ER 328 at 334, [1968] 2 QB 587 at 599.)

The facts in that case were that the plaintiff had been injured by a motorcycle driven by the defendant. He had given his name and address to the police, and produced a certificate of insurance, but the police records did not include the name of his insurers. By the time the writ was issued he had emigrated to Canada and could not be traced. The MIB were asked to assist. They appointed an insurance company to act on their behalf in tracing the defendant or his insurers, but they were unsuccessful. The plaintiff then obtained an order for substituted service of the writ on the defendant at the offices of that insurance company. The MIB applied to be added as defendants because of their potential liability under the MIB scheme. They also applied to have the order for substituted service on the insurance company set aside.

Before the Court of Appeal, the plaintiff appeared in person. His main purpose was to resist any attempt by the MIB to involve itself in his case, and thereby minimise or defeat his claim (see [1968] 2 QB 587 at 592). Conversely, the main part of the argument of Mr Ralph Gibson for the MIB was directed to establishing the MIB’s interest in being joined as a party, in order to raise any available defences. The MIB was not seeking to avoid liability in principle (see at 590). It was seeking the same right to defend the action in the name of the defendant as the defendant’s own insurers would have had, as recognised by cases such as *Windsor v Chalcraft* [1938] 2 All ER 751, [1939] 1 KB 279 and *Murfin’s case*.

The argument about substituted service was concerned simply with the service on the insurance company, and with the MIB’s wish for—

‘an indication that, in circumstances similar to the present case, it is not desirable that substituted service should be effected by service of the writ on the nearest insurance company.’ (See [1968] 2 QB 587 at 592.)

It is to be remembered that the insurance company in question had been introduced by request of the MIB, and not because they had any involvement with the defendant. There seems to have been no specific discussion as to whether substituted service would have been possible on the defendant’s own insurers if known, or on the MIB.

The Court of Appeal held that the MIB should be added as a defendant, in view of their interest under the scheme. The judgments are mainly directed to that issue. On the question of substituted service on the insurance company, Lord Denning MR held, in accordance with the normal rule, that it should not have been allowed, because there was no evidence that the writ was likely thereby to

a come to the defendant's knowledge. However, he declined to set it aside; he said ([1968] 1 All ER 328 at 333, [1968] 2 QB 587 at 597):

b 'If there were any possibility of tracing the defendant in Canada, substituted service should be ordered by advertisement, but that seems to be a useless procedure here. The practical course is to allow the order for substituted service to stand without incurring any further costs; and to allow the service to stand.'

c Thus, he was adopting a 'practical course' in circumstances where the MIB, who were the effective defendants, were content to allow the matter to proceed. He cannot be taken as having given a considered indorsement to any particular form of substituted service in such circumstances. He did, it is true, observe that substituted service on the defendants' own insurer, if known, would have been effective (see [1968] 1 All ER 328 at 333, [1968] 2 QB 587 at 597); but that was obiter and not based on any specific argument or reasoning.

d The other substantive judgment was given by Diplock LJ. In holding that the MIB had a sufficient interest to be entitled to be added as a party, he emphasised that this conclusion was based on the 'special position of the bureau' and did not have 'any wider application than to this unique legal situation' (see [1968] 1 All ER 328 at 337, [1968] 2 QB 587 at 603). With regard to the question of substituted service on the insurance company, he said this was 'obviously wrong', but he continued:

e 'In a case like this, however, which must be rare, where there is strong prima facie evidence that the defendant is insured but it is not possible to ascertain the identity of his insurers, an order for substituted service might properly be made on the defendant at the address of the Motor Insurers' Bureau.' (See [1968] 1 All ER 328 at 338, [1968] 2 QB 587 at 605.)

f He emphasised that such an order should not be made except on evidence that all reasonable efforts had been made to trace the defendant. In the circumstances of the case, it was clear that there was no real prospect of the defendant being found. Accordingly, he saw no purpose in adding to the costs by setting aside the service in order that a further application could be made for substituted service at the address of the MIB.

g Again, it is significant that Diplock LJ gave no reasons for accepting that service on the MIB was possible. This can only be because it was regarded by him as in effect conceded by Mr Gibson. Such a stance would be understandable in the context of this scheme, since otherwise the whole purpose of the arrangement, namely to provide comprehensive protection for those injured in road accidents, would be defeated in cases where a defendant had disappeared without trace. Although Diplock LJ's comments ([1968] 1 All ER 328 at 337, [1968] 2 QB 587 at 603) on the 'unique' nature of the scheme were directed to another part of the judgment, they can also be regarded as providing the context for his treatment of the question of substituted service.

j In *Clarke v Vedel* [1979] RTR 26 the plaintiff had been injured by a motorcyclist, who gave his name as David Vedel. The motorcycle had in fact been stolen and the owner's insurers repudiated liability. Attempts to trace Mr Vedel were unsuccessful, and indeed it was doubtful whether that was in fact his correct name. The plaintiff commenced an action against him in that name and obtained



an order for substituted service on him at the address of the MIB. That was set aside by the judge on appeal and the Court of Appeal affirmed that decision. a

Behind the arguments in the case, the real issue of substance was which of two MIB agreements should apply to the case. If the substituted service was effective, the action could proceed to judgment, and the MIB would become liable under the 'Uninsured Drivers Agreement' (1972). If not, then the proceedings would fail and the case would be handled under the separate 'Untraced Drivers Agreement' (1972). The choice between them was important for two reasons: first, because under the latter it would be the MIB which would bear the responsibility for payment, whereas under the former (by virtue of an agreement between the MIB and various insurers) it would be Sun Alliance, as the 'insurer concerned', who would be liable; secondly, under the untraced driver's agreement the procedure for settling the claim would be under the control of the MIB, rather than of the court as the plaintiff preferred (see [1979] RTR 26 at 29–31). b  
c

Judgments were given by both members of the Court of Appeal, Stephenson and Roskill LJ. Both affirmed the basic principle that substituted service should be such as is likely to bring the writ to the attention of the defendant. The plaintiffs' counsel had relied on the passages from *The Supreme Court Practice* 1976, relating to the supposed exception in road accident cases, as supported by *Gurtner's* case and *Murfin's* case. Of the latter, Stephenson LJ ([1979] RTR 26 at 33) said that Goddard LJ's observation was 'obiter ... tentatively expressed and ... limited to that state of affairs' and could not be relied on as a 'formulation of a general rule'. The argument therefore turned on an analysis of the reasoning in *Gurtner's* case. d  
e

Both judgments contained a detailed examination of the judgments in that case, as compared to the general rule established by *Porter v Freudenberg*. Stephenson LJ concluded as follows ([1979] RTR at 36):

'... I conclude that this court recognises that there may be cases where a defendant, who cannot be traced and, therefore, is unlikely to be reached by any form of substituted service, can nevertheless be ordered to be served at the address of insurers or the Bureau in a road accident case. The existence of insurers and of the Bureau and of these various agreements does create a special position which enables a plaintiff to avoid the strictness of the general rule and obtain such an order for substituted service in some cases. But I am not satisfied that that exception is as wide as the proposition laid down in the *Supreme Court Practice* 1976, and I am not satisfied that it applies to this case. The distinguishing feature of this case is that it makes a difference, not only to the plaintiff, but also to the Bureau, whether the rule is applied or whether the case is treated as exceptional.' f  
g  
h

Thus he accepted that there was a special exception in road accident cases, but it was more limited than as stated in *The Supreme Court Practice* 1976.

Roskill LJ also dismissed the dicta in *Murfin's* case as obiter. He saw (at 38) the plaintiff's argument as necessarily involving the proposition that *Gurtner's* case established 'an exception to the basic principles upon which the court gives leave to effect substituted service'. As to this he said (at 39): j

'I do not believe that this court in *Gurtner v Circuit* ([1968] 1 All ER 328, [1968] 2 QB 587) intended to lay down any such exception. Like Stephenson LJ, I think that the note in the *Supreme Court Practice* 1976 to RSC, Ord 65, r 4,

a note 6, is, in the relevant respects, too widely stated if it is intended to suggest that it is proper in every case where the Motor Insurers' Bureau may be involved to make an order for substituted service on the intended defendant at the address of the Motor Insurers' Bureau. On the contrary, when one looks at the passage in the judgment of Lord Denning MR ([1968] 1 All ER 328 at 332–333, [1968] 2 QB 587 at 596–597), it is plain that he was insisting that it was still necessary for the selected mode of substituted service (if possible) to bring the proceedings to the knowledge of the intended defendant ... What the court was primarily concerned with in *Gurtner v Circuit* was whether or not the Motor Insurers' Bureau should, in a case in which they were interested, be allowed to be joined as defendants. There were earlier decisions which said that they should not be so allowed. This court took a different view; but it was not primarily concerned with any question of substituted service ... As I read Mr Gibson's argument ... it was never contended on behalf of the Motor Insurers' Bureau that it was not an appropriate case for substituted service on the Motor Insurers' Bureau ...'

d Thus, he seems to have treated *Gurtner's* case as explicable only by what was in effect a concession on the part of the MIB. On that view, it is doubtful whether it can be treated as authoritative, even to the limited extent proposed by Stephenson LJ.

e Two things emerge clearly from those judgments: first, that any such exception is treated as peculiar to the scheme of motor insurance, and cannot be relied on in itself as establishing any more general principle; and secondly that the passage in the notes to *The Supreme Court Practice* 1997 (which has not been changed since the 1976 edition to which the court was referring) must be regarded as too widely stated. Since the present case is not concerned with the MIB or with the same subject matter, it is not an appropriate one in which to examine what (if anything) is left of the exception in that context. For practical purposes, no doubt it is convenient for insurers and the MIB to accept service in such circumstances and in most cases the court may well be able to adopt (in Diplock LJ's words) a 'Nelsonian solution' (see [1968] 1 All ER 328 at 334, [1968] 2 QB 587 at 599).

### g *The Solicitors' Indemnity Scheme*

h Turning to the position of the SIF, the scheme was set up under the provisions of s 37 of the Solicitors Act 1974. This enabled the Law Society to make rules concerning indemnity against loss arising from claims against solicitors. For that purpose it was provided that the rules could authorise the Law Society to establish a fund, to take out insurance with authorised insurers, and to require solicitors to maintain insurance with authorised insurers.

The general purpose of this provision was described by Lord Brightman in *Swain v Law Society* [1982] 2 All ER 827 at 837, [1983] 1 AC 598 at 618:

j 'In exercising its power under s 37 the Law Society is performing a public duty, a duty which was designed to benefit, not only solicitor- principals and their staff, but also solicitors' clients. This scheme is not only for the protection of the premium-paying solicitor against the financial consequences of his own mistakes, the mistakes of his partners and of his staff, but also, and far more importantly, to secure that the solicitor is financially able to compensate his client. Indeed, I think it is clear that the

principal purpose of s 37 was to confer on the Law Society the power to safeguard the lay public and not professional practitioners, since the latter can look after themselves.' a

Under the rules in force from 1975 to 1987, the insurance was effected by the Law Society in the form of master policies and certificates of insurance. From 1 September 1987 compulsory indemnity cover has been given by way of the Solicitors' Indemnity Fund, which is a statutory fund set up under s 37 and administered by the SIF, a company limited by guarantee. The current rules are the Solicitors' Indemnity Rules 1995. The general scheme is described by r 9, which provides that solicitors 'shall be provided with indemnity out of the fund against loss arising from claims in respect of civil liability incurred in private practice ...' By r 15 the indemnity is provided, according to the decision of the SIF, by payment to the claimant or to the person against whom the claim is made or, in respect of costs, to the legal advisers. There is an indemnity limit of £1m for each claim (r 18). There is specific exclusion for claims, 'in respect of any dishonest or fraudulent act or omission ...' (r 14.1(f)); such claims may be covered by a separate fund established under s 36 of the 1974 Act (the Solicitors' Compensation Fund). b  
c  
d

Unlike the road traffic legislation, the 1974 Act does not give the claimant any direct right of claim against the SIF. He may however, be able to take advantage of the Third Parties (Rights Against Insurers) Act 1930. This Act is not specifically directed to claims involving solicitors or the SIF. Indeed, there may be a question whether the SIF is an 'insurer' within the meaning of that Act; but, for the purpose of the appeal before me, Mr Jackson accepted that the Act would in principle apply. e

That Act was designed to deal with the problem that, where a claimant obtained a judgment against an insured defendant, who subsequently became insolvent, the insurance moneys in respect of the claim would become part of his assets in the liquidation rather than being applied directly to meet the claim (see *Re Harrington Motor Co Ltd, ex p Chaplin* [1928] Ch 105). Section 1(1) of the 1930 Act provides that, where under a contract of insurance a person is insured against liabilities to third parties, then in the event of the insurer becoming bankrupt (or in the case of a company in the event of a winding up order), the claimant's rights against the insurer are transferred to the third party to whom the liability was incurred. f  
g

It will be seen that this does not impose an immediate liability on the insurer to meet a judgment against the insured (as in the road accident scheme), but requires an extra step, that is a bankruptcy order or winding up order against the insured. It may be that in practice the SIF does not insist upon a bankruptcy order before accepting liability (see *Mortgage Corp v Solicitors Indemnity Fund* [1998] PLNR 73 at 75), but that does not affect the legal analysis. h

In my view, this additional requirement destroys the analogy with the MIB scheme. It is not merely a formal difference. There may well be procedural problems involved in obtaining such a bankruptcy order, particularly against a defendant out of the jurisdiction. In addition, the basic principle that the action should be brought to the notice of the defendant is reinforced where the effect is not merely that his liability is met by someone else, but that he is made bankrupt in the process. j

I conclude therefore that, even if there is, in respect of road accidents, a limited exception to the general rule established by *Porter's* case, its rationale lies in the



- a special scheme established under the road traffic legislation and the MIB scheme. It cannot be extended to the SIF.

### Other issues

- b Apart from the issue of principle, Mr Jackson, for the SIF, makes some criticisms of the master's exercise of discretion on the facts of the case. In particular he says that the plaintiffs should have been required to do more to trace the defendant, for example by making inquiries of the British Embassy in Thailand. The master took the common sense view that in practice such steps were likely to be a waste of time, and in any event it was improbable that the solicitor, even if traced, would have any assets available to meet a judgment.

- c Furthermore, in two other very similar cases, brought by the same plaintiff against the same defendant, the SIF had not challenged the substituted service. Mr Jackson sought to distinguish this case from the others, in that the pleadings rely on an element of deliberate concealment by the solicitor in the context of the limitation issue. While this may affect the SIF's ultimate liability, it is difficult to see the relevance of that point to the manner in which service is to be effected.

- d If the question was simply one of discretion, I could not fault the master's approach.

- e Mr Jackson made certain additional points based on the fact that, as far as was known, the defendant had been out of the jurisdiction for many years. He referred to *Wilding v Bean* [1891] 1 QB 100, [1886–90] All ER Rep 1026, which shows that in such a case an order for substituted service is not enough, unless accompanied by leave for service out of the jurisdiction. He also drew attention, in the context of the 1930 Act, to the limitations on the jurisdiction of the court to receive a bankruptcy petition in relation to someone who has not been resident nor carried on a business in this country for over three years (Insolvency Act 1986, s 265). He recognised, however, that an extended, and somewhat artificial, meaning has been given to the expression 'carrying on business' in this context (see *Theophile v Solicitor General* [1950] 1 All ER 405, [1950] AC 186).

- f I do not find it necessary to consider these points in detail, because they are incidental to the fundamental principle. That requires substituted service (whether within or outside the jurisdiction) to be directed to drawing the proceedings to the attention of the defendant—an objective which will not be achieved in this case by substituted service on the SIF.

### Conclusion

- h In conclusion I would add this. I remain in some doubt as to the policy reasons for the SIF taking a different view in this case from that in the other two cases against Mr Frost, in which service has been accepted. It may be that in this case there is a stronger likelihood of avoiding liability under the exception for fraud, but that does not seem to be a satisfactory reason for stifling the claim altogether.

- j Mr Powell, in his affidavit on behalf of the SIF, stated that there is a concern that this particular plaintiff may have adopted a regular practice of applying ex parte for orders for substituted service against the SIF, in cases where a defendant cannot be easily located for service. Mr Goodman denies that there is any such practice. In any event that concern is met by the point emphasised in many cases (including *Gurtner's* case) that substituted service should only be allowed as a last resort, where genuine efforts have been made to trace the defendant without

success. It does not appear to provide a ground of distinction between this and the other two cases. a

I would not wish to discourage the SIF from adopting a more flexible policy in practice than the law would permit, in line with the general policy of the legislation to ensure that claimants are not left without a remedy. However, in accordance with ordinary public law principles, such a policy should be operated consistently, and distinctions between apparently similar cases should be capable of reasoned justification. b

However, for the reasons I have given, this appeal is allowed, and the substituted service will be set aside.

*Appeal allowed. Leave to appeal granted.*

Celia Fox   Barrister. c

## a R v Barnet Magistrates' Court, ex parte Cantor

QUEEN'S BENCH DIVISION

PILL LJ AND GARLAND J

b 19, 28 NOVEMBER, 18 DECEMBER 1997

*Criminal law – Costs – Prosecution costs – Order for payment – Enforcement of order – Magistrates' court conducting means inquiry on applicant failing to satisfy costs order made in Crown Court – Applicant committed in default of payment but released following payment into court of money by his mother – Whether justices correct to take into account applicant's beneficial entitlement under discretionary trust when making committal order – Whether applicant entitled to mandamus to recover money.*

In November 1992 the applicant was convicted in the Crown Court of a number of offences of dishonesty and he was sentenced to four years' imprisonment. He was also ordered to pay £30,000 towards the costs of the prosecution. In April 1994 the magistrates' court was appointed as the collecting court for the costs order. The court ordered the applicant to pay £1,000 by 5 June, but he failed to do so, and following an application by the applicant to the Crown Court for time to satisfy the order, the court ordered him to pay £1,750 by 31 December 1995. The applicant again failed to do so, and on 2 September 1996 the court conducted an inquiry into the applicant's means. Evidence was given that the applicant had no regular income but that he received £400 a month from the trustees of two discretionary trusts of which he was a beneficiary and paid his mother £200 for his keep. The justices found that the applicant had culpably neglected to pay the costs order and made a suspended committal order of nine months' imprisonment to take effect if the whole amount was not paid by 9.45 am on 9 December 1996. On 9 December after further evidence was given regarding the discretionary nature of the trust, the justices held there had been no change in circumstances since September and since no payments had been made they issued a committal warrant. However, later that day £30,000 which the applicant's mother had deposited with solicitors to avoid the threat of his being committed to prison was telegraphically transferred to the court, and the applicant was released. The applicant applied to the Divisional Court for an order of certiorari quashing the justices' orders of 2 September and 9 December, and for an order of mandamus directing the clerk to the justices to repay the sum of £30,000 to his mother on the basis that he held the money as trustee for her. Alternatively, the applicant sought appropriate declarations.

**Held** – (1) It was unlawful for justices to impose a fine which a defendant had no realistic prospect of paying, or in the hope or expectation that it would be paid by a third party. That principle applied also to an order for costs. Since the sum to be paid was clearly beyond the applicant's means, it followed that the orders of 2 September and 9 December had been made on an incorrect basis. Moreover, the justices had erred in concluding that the applicant would be able to pay the £30,000 by resorting to the discretionary trust, since they should only have taken into account such sums as he had actually received. Accordingly, the orders would be quashed (see p 340 a b, p 341 c d and p 344 e, post); *R v Curtis* (1984) 6 Cr App R (S) 250 and *R v Charalambous* (1984) 6 Cr App R (S) 389 applied.



(2) Although the applicant had a sufficient interest under RSC Ord 53, r 3(7) to seek an order of mandamus, there was no authority for the use of mandamus to enforce a civil duty to make restitution to a third party even though the duty arose from the quashing of an order. Nor was there a public law obligation requiring a justices' clerk to make a repayment to a third party. Moreover, while the applicant's mother might have a civil claim against the justices' clerk for restitution, such a claim would be both novel and not free from difficulty, and the court should be cautious in supplying a remedy by way of judicial review where a claim by a writ would be anything other than obvious and certain. The court would therefore in the circumstances dismiss the application for mandamus. However, it would grant a declaration that the sum of £30,000 had been transferred in consequence of an unlawful committal order (see p 341 *fhj*, p 342 *g* to *j* and p 343 *j* to p 344 *bfgj*, post).

### Notes

For award of costs against accused, see 11(2) *Halsbury's Laws* (4th edn reissue) para 1529.

### Cases referred to in judgments

*Colfox v Dorset CC* (10 December 1996, unreported), DC.

*Munro's Settlement Trusts, Re* [1963] 1 All ER 209, [1963] 1 WLR 145.

*R v Burke* (30 November 1982, unreported), CA.

*R v Charalambous* (1984) 6 Cr App R (S) 389, CA.

*R v Crown Court at Truro, ex p Adair* (12 February 1997, unreported), DC.

*R v Curtis* (1984) 6 Cr App R (S) 250, CA.

*Smith, Re, Public Trustee v Aspinall* [1928] Ch 915, [1928] All ER Rep 520.

*Tower Hamlets London BC v Chetnik Developments Ltd* [1988] 1 All ER 961, [1988] AC 858, [1988] 2 WLR 654, HL.

*Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] 2 All ER 961, [1996] AC 699, [1996] 2 WLR 802, HL.

*Woolwich Equitable Building Society v IRC* [1991] 4 All ER 577, [1993] AC 70, [1991] 3 WLR 790, HL.

### Application for judicial review

Stephen Cantor applied for judicial review of a suspended committal order made by the Barnet Magistrates' Court on 2 September 1996 and the further order made by the court on 9 December 1996 committing him to prison for nine months for default in payment of an order for costs of £30,000, seeking (1) an order of certiorari to quash those orders, (2) an order of mandamus directing the clerk to the justices to repay to his mother, Mrs Eve Cantor, the sum of £30,000 and accrued interest, being the amount paid into court on her behalf by his solicitors on 9 December 1996 following the committal order, alternatively declarations (i) that the £30,000 paid into the court was transferred in consequence of an unlawful committal order, (ii) that the money so credited was held by the clerk to the justices on trust for Mrs Eve Cantor, and (iii) that it was not permissible for magistrates inquiring into an offender's means to take into account the fact that he was one of a number of beneficiaries of a discretionary trust. The facts are set out in the judgment of Garland J.

*Peter McGrail* (instructed by *Rowe & Cohen*, Manchester) for the applicant.

*Katie Astaniotis* (instructed by the *Crown Prosecution Service*) for the prosecution.

18 December 1997. The following judgments were delivered.

**GARLAND J** (giving the first judgment at the invitation of Pill LJ). The applicant seeks an order of certiorari quashing a suspended committal order made by the magistrates for the Petty Sessional Division of Barnet on 2 September 1996 and a further order on 9 December 1996 whereby the applicant was committed to prison for nine months for default in payment of an order for costs in the sum of £30,000; in addition, he seeks an order of mandamus directing the clerk to the justices to repay to his mother, Eve Cantor, the sum of £30,000 plus accrued interest, representing the amount paid into court on her behalf by solicitors acting upon her instructions on 9 December 1996. When this matter came before the court on 19 November, the respondent was not represented or present. After hearing argument, directions were given for further evidence to be filed and the hearing adjourned. On 28 November the Crown Prosecution Service appeared by counsel and, although further information had been made available by the clerk to the justices to the Crown Office, the respondent was not represented or present. By reamendment, the applicant also seeks declarations to which reference will be made later in this judgment. There are accordingly two issues for the court: (1) the validity of the committal order and (2) repayment of the £30,000.

It is necessary to set out the history of events before turning to matters of law and argument. On 7 September 1973 the applicant's father, Cyril Cantor, created a discretionary trust in contemplation of the applicant's marriage for the benefit of the applicant and any of his children. In fact he has two children. The terms of the trust provided that the distribution of income and the application of the capital were in the absolute discretion of the trustees.

Cyril Cantor had established a large retail furniture chain, Cantors plc, in which the applicant was employed until 1982 when he left to set up in business on his own. On 15 August 1983 Cyril Cantor created a further similar discretionary trust for the benefit of the applicant and the applicant's sister. The applicant's business was at first successful but then ran into difficulties. In order to overcome them he resorted to dishonesty. In 1987 Cantors plc issued six million non-voting shares to existing shareholders. The applicant used forged share certificates bearing the numbers of genuine share certificates forming part of this issue to deposit with various banks as security. He succeeded obtaining facilities exceeding £2m all of which was lost. On 21 December 1990 he was adjudicated bankrupt. Following criminal investigations he was on 24 November 1992 convicted after a trial at the Crown Court at Knightsbridge of 13 counts of using a false instrument with intent to defraud; four counts of obtaining a pecuniary advantage by deception and two counts of obtaining property by deception. On 7 December he was sentenced to four years' imprisonment, disqualified for ten years pursuant to the Company Directors Disqualification Act 1986 and ordered to pay £30,000 towards the costs of the prosecution. That order was made under s 18(1)(c) of the Prosecution of Offences Act 1985. No order was made allowing time for payment or permitting payment by instalments.

On 30 April 1993 the applicant applied for leave to appeal against sentence. The grounds upon which the application was made related solely to the term of imprisonment. Leave to appeal was not granted until 6 August. On 9 November the applicant was released on licence. His release after 11 months is explained by his having spent a substantial period on remand in custody before he was sentenced. On 21 December he was automatically discharged from bankruptcy.

On 13 January 1994 his appeal against sentence was heard and dismissed. On 12 April a transfer order was made appointing Barnet Magistrates' Court as the collecting court for the costs order. On 19 April he appeared before the court which made an order for the payment of £1,000 by 5 June. No payment was made. On 5 June the applicant applied to the Crown Court at Knightsbridge, it is assumed under s 34 of the Powers of Criminal Courts Act 1973, for time in which to satisfy the order. He was ordered to pay £1,750 by 31 December 1995 after which the matter was to be reviewed. Shortly before that date, on 12 December, the applicant's mother, Mrs Eve Cantor, swore an affidavit deposing to his lack of means, the fact that she was providing him with support and that she alone in the family was prepared to do so. No payment was in fact made by 31 December 1995 nor for many months thereafter and on 23 July 1996 the applicant attempted to appeal to the Court of Appeal Criminal Division against the costs order. His application was refused by the registrar on the grounds that the applicant had exhausted his rights of appeal.

No payment having been made, Barnet Magistrates' Court embarked on an inquiry into the applicant's means.

#### *The law*

Section 41(1) of the Administration of Justice Act 1970 provides:

'In the cases specified in Part I of Schedule 9 to this Act (being cases where, in criminal proceedings, a court makes an order against the accused for the payment of costs, compensation, etc.) any sum required to be paid by such an order as is there mentioned shall be treated, for the purposes of collection and enforcement, as if it had been adjudged to be paid on a conviction by a magistrates' court, being ... (b) ... such magistrates' court as may be specified in the order.'

Schedule 9 is headed 'Cases where payment enforceable as on summary conviction'. These include by para 4: 'Where a person is prosecuted or tried on indictment ... before [the Crown Court] and is convicted, and the court [makes an order as to costs to be paid by him]'. The powers of collection and enforcement in a magistrates' court are contained in Pt III of the Magistrates' Courts Act 1980. Section 75(1) permits the court to allow time for payment or order payment by instalments; s 76(1) provides:

'... where default is made in paying a sum adjudged to be paid by a conviction or order of a magistrates' court, the court may issue a warrant of distress for the purpose of levying the sum or issue a warrant committing the defaulter to prison.'

Section 77(2) provides:

'Where a magistrates' court has power to issue a warrant of commitment under this Part of this Act, it may if it thinks it expedient to do so, fix a term of imprisonment ... and postpone the issue of the warrant until such time and on such conditions, if any, as the court thinks just.'

Section 82(3) provides:

'Where on the occasion of the offender's conviction a magistrates' court does not issue a warrant of commitment for a default in paying any such sum as aforesaid or fix a term of imprisonment under the said section 77(2) which



a is to be served by him in the event of any such default, it shall not thereafter issue a warrant of commitment for any such default ... unless ... (b) the court has since the conviction inquired into his means in his presence on at least one occasion.'

b By virtue of s 41 of the Administration of Justice Act 1970, the order for costs fell to be treated as if it had been adjudged to be paid on a conviction. Section 82(4) provides:

c 'Where a magistrates' court is required by subsection (3) above to inquire into a person's means, the court may not on the occasion of the inquiry or at any time thereafter issue a warrant of commitment for a default in paying any such sum unless ... (b) the court—(i) is satisfied that the default is due to the offender's wilful refusal or culpable neglect; and (ii) has considered or tried all other methods of enforcing payment of the sum and it appears to the court that they are inappropriate or unsuccessful.'

d The methods of enforcing payment for the purposes of the preceding subsection are set out in the following sub-s 4(A) and are: (a) a warrant of distress under s 76; (b) an application to the High Court or county court for enforcement under s 87; (c) a money payment supervision order under s 88; and (d) an attachment of earnings order.

#### *The proceedings*

e On 2 September 1996 the applicant appeared before justices at Barnet for the inquiry into his means. The applicant was represented by counsel. The justices had before them the two trust deeds and the affidavit of Mrs Eve Cantor. There was evidence that the applicant received £400 per month from the trustees and paid his mother £200 per month for his keep. She provided him with living accommodation, did not charge him rent and also provided him with the use of  
f a car. He earned some modest sums by way of commissions but had no regular income. The justices also had before them a pre-sentence report dated 4 December 1992 in which the writer reported the applicant as asserting that he had £300,000 to £500,000 which might be used to recompense the losers from his financial activities. At that time he was, of course, bankrupt and any assets would  
g have vested in his trustee in bankruptcy. The justices may have thought that this was a reference to the discretionary trusts, since it appears from counsel's brief note that they in fact found that the applicant had 'no assets nor any work' and, in considering s 84(4A) of the 1980 Act declined to make a money payment supervision order; to take High Court or county court proceedings, or to make  
h an attachment of earnings order. The justices found that the applicant had culpably neglected to pay the costs order and made a suspended committal order of nine months' imprisonment to take effect if he did not pay the whole amount due by 9.45 am on 9 December 1996. They did not state the basis upon which the order was made. The applicant requested them to state a case but this was refused as being frivolous. This court has before it an affidavit of the clerk to the  
j justices sworn on 18 November of this year in which he deposes that the justices found culpable neglect and made the order for the following reasons:

'(a) The pre-sentence report ... indicated that Mr Cantor had assets of upwards of £300,000; (b) Mr Cantor had not satisfactorily explained why the costs order could not be settled from those assets; (c) The justices had on two occasions given Mr Cantor the opportunity to pay nominal sums towards

the costs but no payments whatsoever had been received in over a year; (d) Mr Cantor continued to have the benefit of a flat in the better part of the borough and the use of a car; (e) Mr Cantor gave evidence of expenditure on restaurant bills, mobile phones and trips abroad all paid for out of a discretionary trust, over which he has no control, but the trustees are all close family members.'

At the beginning of December, the applicant, still having made no payment, applied for judicial review of the magistrates' order. On 5 December leave was refused on a paper application but the following day it was renewed before this court which took the view that the application was premature because the magistrates' court was due to deal with the matter three days later on the 9th. On that day, the applicant produced a letter from a solicitor who was a trustee of both the discretionary trusts. He stated:

'I understand that the Barnet Magistrates' Court expect that assets of either or both of these settlements are used to pay costs owed by Stephen Cantor. Both settlements are discretionary and no beneficiary has any right to capital or income.

I have consulted my co-trustees regarding this matter and we consider that the request is beyond the current ambit of the trusts to satisfy and, accordingly, we are unable to recommend any payment.'

The wording of the second paragraph is somewhat opaque but it is a permissible comment that even assuming there were sufficient funds available, settlement of the applicant's liability would have been very much to the disadvantage of the other beneficiaries. There was evidence that the applicant had commenced employment in November: he offered £200 per month from his salary. The justices decided that there had been no change of circumstances since September and since no payment had been made, they issued the committal warrant. Their clerk, in para 13 of his affidavit, deposes:

'The justices were correct in taking into account the existence of the discretionary trust as Mr Cantor received income from that source and had a wide and unfettered choice concerning the spending of that income but chose not to utilise it for payment of the costs order.'

#### *Mrs Eve Cantor*

Mrs Cantor was greatly concerned at the prospect of her son going to prison again. She therefore deposited £30,000 of her own money with the applicant's solicitors with instructions that it should only be paid over to the court if it became absolutely necessary, and in particular to avoid the necessity of her son going to prison. Miss Nichola Evans, the applicant's solicitor, has sworn affidavits dated 25 February and 19 November 1997 deposing to her instructions and the events of 9 December 1996. It became clear to her as the result of telephone conversations during the morning of 9 December 1996 that there was a real likelihood that the applicant could be committed to prison. She was instructed by Mrs Cantor to inform the court that £30,000 would be paid to the court that evening. Accordingly, a letter was sent by facsimile transmission to the court at 11.14 am in the following terms:

'Re: Stephen Cantor hearing 9th December 1996.

a We refer to the above-named, particularly with regard to the Costs Order made against him in the sum of £30,000 for prosecution costs. We can advise that we are currently holding £30,000 cleared funds in Client Account. We are authorised by the Donor and our Client to release these funds and confirm that a cheque will be forwarded to you tonight to discharge the Costs Order. We would be obliged if you would place this matter before the  
b Magistrates accordingly.'

The court was apparently unwilling to act on the undertaking contained in the letter and Miss Evans enquired whether it would accept a telegraphic transfer. By this stage, the committal order had been made and the applicant taken to the cells. After further telephone conversations the money was telegraphically  
c transferred in the afternoon. The applicant was released. The additional evidence of Miss Evans and of Mrs Cantor make it abundantly clear that the money was deposited with the solicitors and paid over by them to avoid the threat of the applicant being committed to prison, not to discharge his obligation in any event. Mrs Cantor deposes that in the absence of such a threat the money would not have been made available. It is her belief that she should not have had  
d to pay it and she now wishes to recover it. The applicant has deposed that as between him and his mother, he makes no claim to it.

#### *Certiorari*

There were three strands to the applicant's argument: (1) the justices must  
e have assumed, and assumed wrongly, that the applicant was in a position to draw on the discretionary trusts to discharge the entire liability notwithstanding the solicitor trustee's letter; (2) it is unlawful to make an order which it is beyond the applicant's means to pay; and (3) it is unlawful to make an order in the expectation that it will be paid by a third party.

f Mr McGrail referred the court to *Re Smith, Public Trustee v Aspinall* [1928] Ch 915, [1928] All ER Rep 520 for the proposition that a beneficiary under a discretionary trust had only a hope not an entitlement. Romer J said ([1928] Ch 915 at 919–920, [1928] All ER Rep 520 at 522):

'Where there is a trust to apply the whole or such part of a fund as trustees think fit to or for the benefit of A., and A. has assigned his interest under the  
g trust, or become bankrupt, although his assignee or his trustee in bankruptcy stand in no better position than he does and cannot demand that the fund shall be handed to them, yet they are in a position to say to A.: "Any money which the trustees do in the exercise of their discretion pay to you, passes by the assignment or under the bankruptcy." But they cannot say that in  
h respect of any money which the trustees have not paid to A. or invested in purchasing goods or other things for A., but which they apply for the benefit of A. in such a way that no money or goods ever gets into the hands of A.'

Mr McGrail also referred to Wilberforce J's approval of a passage in *Snell's Principles of Equity* (25th edn, 1960) in *Re Munro's Settlement Trusts* [1963] 1 All ER  
j 209 at 211, [1963] 1 WLR 145 at 148:

'A discretionary trust is one which gives a beneficiary no right to any part of the income of the trust property, but vests in the trustees a discretionary power to pay him, or apply for his benefit, such part of the income as they think fit. The trustees must exercise their discretion as and when the income becomes available, for they have no power to bind themselves for the future.'



The beneficiary thus has no more than a hope that the discretion will be exercised in his favour ...'

In my judgment, the justices could only have concluded that the applicant would be able to pay £30,000 by resorting to the discretionary trust. This was an error. They should in the circumstances only have taken into account such sums as he had actually received. Consequently, on this ground alone, the order of 2 September and the committal order should never have been made.

Mr McGrail further submitted on authority that it is unlawful for justices to impose a fine which a defendant has no realistic prospect of paying, a fortiori if it is imposed in the hope or expectation that it will be paid by a third party. The principle, he submitted, is equally applicable to a costs order. We were referred to *R v Curtis* (1984) 6 Cr App R (S) 250: the driver of a lorry carrying half a ton of contraband tobacco was sentenced to six months' imprisonment suspended for two years and fined £10,000 to be paid within three months with 12 months' imprisonment in default. In imposing the fine the sentencer indicated that he was imposing it to see if those who had put the appellant up to the offence would pay; it was accepted that the appellant did not have the means to pay. The court having determined that the appellant was not in a position to pay a fine of any substance at all let alone £10,000, quashed that part of his sentence and also considered the hope of payment by a third party. Boreham J, giving the judgment of the court, said (at 252):

'Secondly, says Mr. O'Sullivan, it is wrong in principle that a fine should be imposed on the footing that it will be paid by others: perhaps others who ought to pay. In support of that he refers us to a recent decision of another Division of this Court in the case of *BURKE* (30 November 1982, unreported), in which Lord Justice Robert Goff, who gave the judgment of the Court, had this to say: "In our judgment, it is wrong in principle to impose a fine on an assumption that others will pay the fine (the others in this case being those who were operating this particular distribution of cannabis) and to impose a prison sentence in default of payment of the fine, which will really have the effect of the appellant having to serve another year in prison if others do not pay the fine." Those words, which we respectfully endorse, apply in full to this case, as Mr. O'Sullivan contends. There was no evidence here that anyone else would certainly pay the fine. It was hoped that that is what might happen. One can understand the feelings of the learned Judge, but one has to say that what he did was wrong in principle.'

In *R v Charalambous* (1984) 6 Cr App R (S) 389 the court had to consider the means of a married woman who helped her husband run his newspaper kiosk but whose personal earnings appeared to be of the order of £15 per week. Macpherson J, giving the judgment of the court, said (at 390):

'However, it does appear that the total of that income represents the income from the kiosk and was therefore the whole income available to Mrs. Charalambous and her husband, who was the owner of the kiosk. She worked there and there is some evidence that her own personal income from the takings was about £15 a week ... In the judgment of this court, a £300 fine in respect of £10 of goods from a shop, in the circumstances of this case, was too high. It is important that fines are not so high that a person really

a cannot pay them from his or her own money. It seems to this Court unjust that a family should be fined, which may have been the decision in this case.'

The fine was substantially reduced.

b Our attention has been drawn to two recent unreported cases to the same effect. In *Colfox v Dorset CC* (10 December 1996, unreported) the Divisional Court held that a fine which the defendant, on the evidence of his means, would only be able to pay over a period of ten years, was plainly unlawful. If it was imposed in the belief or expectation that his wealthy family would pay it for him, that too was unlawful. *R v Charalambous* was referred to and approved. In *R v Crown Court at Truro, ex p Adair* (12 February 1997, unreported), a further decision of this court (Lord Bingham of Cornhill CJ and Moses J), a fine and costs order imposed by the c Crown Court on appeal from justices which were quite clearly beyond the means of the defendant to pay were held to be unlawful and were quashed.

d In my judgment, there is no distinction to be drawn between a fine and an order for costs: both the suspended committal order and the order actually committing the applicant to prison were made on an incorrect basis in law; the sum to be paid was plainly beyond the applicant's means and if there was an expectation that it would be paid by a third party that too was unlawful.

For these reasons I would quash the orders.

#### Recovery

e Mr McGrail submitted that since the orders made on 2 September and 9 December were unlawful and must be quashed, the status quo ante must be restored by the repayment of the £30,000 plus interest to Mrs Eve Cantor. He submitted that the clerk to the justices held the money as trustee for Mrs Cantor and that the applicant had a sufficient interest under Ord 53, r 3(7) to seek an order of mandamus. Alternatively, he seeks the declarations added by way of f reamendment. In my judgment, the applicant plainly has a sufficient interest to seek mandamus or a declaration. It was his obligation that was discharged, and granted that Mrs Cantor was not making a gift, she would have an arguable case against the applicant for the recovery of the money paid.

g It appeared to the court in the course of argument that there were difficulties in ordering mandamus in that: (1) the money had been paid over by the clerk to the justices to the Crown Prosecution Service so that there was no identifiable or traceable fund of which he could be trustee or for which he might be liable to account to Mrs Cantor. However, the court was informed by counsel for the Crown Prosecution Service that it was accepted that the order should be quashed and that there was no objection to Mrs Cantor being reimbursed by the clerk to h the justices out of future receipts from costs orders. However, no admissions were made as to the lawfulness of any such reimbursement. (2) There is no authority for the use of mandamus to enforce a civil duty to make restitution to a third party even though the duty arises from the quashing of an order. (3) There was no public law obligation to be found in any of the relevant Acts or j rules requiring a justices clerk to make a repayment to a third party.

Mr McGrail, while not asking the court to make any order under Ord 53, r 9(5), accepted that Mrs Eve Cantor could bring a civil action against the clerk to the justices for restitution but it would be a novel one and not free from difficulty. He therefore applied for leave to reamend his grounds in order to ask for the declarations which would serve as a strong indication to the justices of what ought to be done, or as a last resort, the basis of a civil action.

His principal argument was that if the payment was made as the result of an unlawful order, the justices' clerk would hold the money as trustee and be liable to account to Mrs Cantor for it. Apart from the fact that the money has long since been paid over to the Crown Prosecution Service, I would have entertained considerable doubt whether this was the correct legal categorisation of the consequences of the payment. Liability to account is an extremely limited concept which is summarised in *Chitty on Contracts* (27th edn, 1994) vol 1, pp 1477–1483. a  
b

Money paid by mistake as a result of an actual or perceived threat falls to be recovered in accordance with the principles of restitution or quasi contract. Unfortunately, the law lacks clarity and is bedevilled with distinctions such as the different consequences flowing from mistakes of fact and law and, if the latter, whether public law or private rights. The present state of the law is summarised by Lord Goff in *Woolwich Building Society v IRC* [1992] 3 All ER 737 at 752–755, [1993] AC 70 at 163–166. It has also been considered by the Law Commission in *Restitution of Payments Made Under a Mistake of Law* (Law Com No 120). Lord Goff, observing that he did not think it right to regard the categories of money paid under compulsion as closed, nevertheless went on to enumerate the instances where money not paid under a mistake of fact or compulsion was not recoverable (see [1992] 3 All ER 737 at 753–754, [1993] AC 70 at 165). In the event the building society succeeded in recovering interest on tax paid under protest, the House of Lords holding, by a majority, that the nature of a demand for tax or a similar impost on the citizen by the state with the perceived consequences to the citizen of non-payment, and the unjust enrichment of the state where the citizen paid an unlawful demand to avoid those consequences, warranted the provision of a remedy as the claim fell outside the statutory framework governing the repayment of overpaid tax. More recently, in *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] 2 All ER 961, [1996] AC 669 Lord Goff, in a dissenting speech, considered whether the equitable jurisdiction to award compound interest in the case of a personal claim for restitution should be exercised in a commercial claim. He expressed the view that there should be such an extension and that the law should be allowed to grow. He said ([1996] 2 All ER 961 at 980–981, [1996] AC 669 at 697): 'No genetic engineering is required, only that the warm sun of judicial creativity should exercise its benign influence rather than remain hidden behind the dark clouds of legal history.' c  
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In my judgment, a claim by Mrs Cantor to recover her £30,000, although meritorious and receiving some support from the *Woolwich* case and encouragement from the *Westdeutsche* case, would be, as Mr McGrail conceded, both novel and not free from difficulty. h

It would, of course, be convenient if all matters consequent upon the quashing of an unlawful order could be dealt with at the same time by the same court, but ordering mandamus to enforce a civil claim by a third party would be an extension of the jurisdiction of the court substantially beyond Ord 53 r 9(5); in addition the court should be cautious in supplying a remedy by way of judicial review where a claim by writ would be anything other than obvious and certain. j

Turning to the third matter, there is no provision, whether by statute or secondary legislation, for the repayment to a third party of money received in satisfaction of a fine or order for compensation or costs. Reference was made to s 142 of the Magistrates' Courts Act 1980. That section gives a magistrates' court power to reopen cases in order to rectify mistakes. Subsection (1) provides:



a '... a magistrates' court may vary or rescind a sentence or other order imposed or made by it when dealing with an offender; if it appears to the court to be in the interests of justice to do so; and it is hereby declared that this power extends to replacing a sentence or order which for any reason appears to be invalid by another which the court has power to impose or make.'

b Subsection (1A) sets out a number of exceptions and sub-s (2), again subject to a number of exceptions, provides:

c 'Where a person is convicted by a magistrates' court ... and it subsequently appears to the court that it would be in the interests of justice that the case should be heard again by different justices, the court may so direct.'

d Plainly, these provisions offer no assistance in the present case. Had the justices appreciated that they were in error they could have rescinded the committal order and made a different order; or they could have ordered a rehearing before a differently constituted bench. The issue therefore turns on whether this court should provide a direct or indirect means of enforcing such right as Mrs Cantor may have in private law to restitution.

#### *The declarations*

e By reamendment dated 28 November 1997, the applicant seeks further or in the alternative to mandamus three declarations in the following terms:

f '(i) A declaration that the sum of £30,000, transferred into the bank account of the clerk to the Barnet justices on 9th December 1996, by Messrs Rowe and Cohen, solicitors, on the instructions of Mrs Eve Cantor, was so transferred in consequence of a committal order which was itself unlawful. (ii) A declaration that in the circumstances, the credit received by the clerk to the Barnet justices on 9th December represents trust moneys, held by him for the benefit of Mrs Eve Cantor. (iii) A declaration that it is not permissible for Magistrates enquiring into an offender's means to take into account the fact that he is one of a number of beneficiaries of a discretionary trust.'

g In my judgment (ii) and (iii) do not greatly assist the applicant for reasons already expressed. As to (ii) the clerk does not hold an identifiable or traceable fund in circumstances where the law imposes a liability to account. As to (iii) the answer is that in this case the court should not have taken into account the capital or hope of future payments of income, but could take account of past payments. As to (i), h it has been stated that the evidence of Miss Evans and Mrs Cantor made it clear that the money was deposited and paid in order to avoid the applicant being committed to prison. The committal order was unlawful. The court would be minded to make a Declaration subject to redrafting it to read in the last line: j 'Transferred in consequence of an unlawful committal order.'

#### *Conclusion*

In my judgment, the court, even if it felt able to do so, should not give effect to a private claim for restitution, however meritorious, when the cause of action is other than obvious and certain. The court would, however, be minded to grant a declaration in the form of (i) above as amended.

The order of 2 September 1996 will accordingly be quashed, together with the committal order of 9 December 1996. There will be no order in respect of the £30,000, but the court will grant a declaration in the following terms:

‘That the sum of £30,000 transferred into the bank account of the clerk to the Barnet justices on 9th December 1996 by Messrs Rowe and Cohen, solicitors, on the instructions of Mrs Eve Cantor was so transferred in consequence of an unlawful committal order.’

**PILL LJ.** Mrs Cantor was most anxious that her son should not be committed to prison. She placed £30,000 in the client account of her solicitor with instructions that it was to be paid to Barnet Magistrates’ Court if that became necessary to prevent his committal. In the event, the sum could not be paid to the court, in a manner acceptable to the court, until after he had been committed. Payment secured his release. There is no affidavit from the justices or from their clerk dealing with the precise sequence of events but it appears from the affidavit of Miss Evans and her faxed letter of 9 December 1996 that, upon receipt, the court was aware of the source of the £30,000 and the circumstances in which it was paid.

The committal to prison was unlawful for the reasons given by Garland J and is quashed. I am not surprised that Mrs Cantor wants her money back. Little, if anything, can be said in favour of the applicant having regard to his previous lack of co-operation with the court. If the money were to be repaid to Mrs Cantor, the applicant faces the possibility of a further committal in that he is liable to committal upon a procedure properly followed. Mrs Cantor’s position is however understandable. She paid the money only because of the order and the order was unlawful.

The court has power to require a public body to perform its duty by an order of mandamus. The existence of a duty to Mrs Cantor with respect to the money and the extent of that duty, if it exists, is far from clear. The duty does not obviously extend to require repayment to a third party of money received by the court in consequence of an unlawful order. The position is not so plain as to permit the court to make an order of mandamus in this case. There is no claim for damages.

There remains the possibility of a declaration. Bearing in mind the magistrates’ court’s knowledge of the circumstances, I have considered whether it could be declared that the court ought not to have received the money from Mrs Cantor. However, it was received consequent upon an apparently valid order of the court made following a valid money order. Such a declaration would impute to court staff a duty to consider the lawfulness of orders made and would not be appropriate in the present case.

Whether the money should be retained by the court depends upon the resolution of the difficult questions identified by Garland J by reference to Lord Goff’s speeches in *Woolwich Equitable Building Society v IRC* [1991] 4 All ER 577, [1993] AC 70 and in *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] 2 All ER 961, [1996] AC 699. Lord Bridge considered a situation with some similarities in *Tower Hamlets London BC v Chetnik Developments Ltd* [1988] 1 All ER 961 at 969–971, [1988] AC 858 at 876 and 877. It would be inappropriate to resolve the question upon the present application. The most which can properly be declared is that proposed by Garland J.

*a* I reach that conclusion with some reluctance because Mrs Cantor should not have been put by the court in a position of parting with a substantial sum of money to obtain her son's release. Permitting the court or the Crown Prosecution Service to retain the money may be an encouragement to unlawful committals. Neither the justices' clerk nor the Crown Prosecution Service have shown any appetite for retaining money paid pursuant to an unlawful order but

*b* the £30,000 is at present to be regarded as public money and the justices, understandably would, before releasing the money, require a plain statement from the court that it is lawful to do so.

Nothing I have said casts doubt upon the extent of the justices power to commit in an appropriate case. The statutory procedure must be followed however and that includes an inquiry into the means of the defendant. The

*c* requirement to pay £30,000 by 9 December 1996 was plainly based upon a misapprehension of the applicant's financial position.

*Order accordingly.*

Dilys Tausz Barrister.



# Petrotrade Inc and others v Smith and others

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

THOMAS J

28 NOVEMBER, 19 DECEMBER 1997

*Conflict of laws – Jurisdiction – Challenge to jurisdiction – Fraud – Plaintiffs claiming jurisdiction of English court over defendant domiciled in Switzerland – Plaintiff applying to join additional defendants domiciled in Belgium to proceedings – First defendant visiting England but prevented from returning to Switzerland by conditions of bail following arrest – Whether time for establishing jurisdiction for joinder of further defendants being date of issue of writ or date of joinder – Whether first defendant domiciled in England at relevant date – Civil Jurisdiction and Judgments Act 1982, s 41(3)(a)(b), Sch 1, art 6(1).*

On 24 September 1993 the plaintiffs, a group of associated companies, served proceedings for fraud on the first defendant, S, who was domiciled in Switzerland and had arrived in England on a visit. Four days after his arrival in the country, he was arrested by the police on criminal charges and at the time the writ was served, 17 days later, had been released on police bail on condition that he remain in the United Kingdom. On 17 June 1997 the plaintiffs issued a summons to join two Belgian companies (the Alpina companies) as second and third defendants to the proceedings, claiming that they had been involved with S in a further fraud. The plaintiffs relied on art 6(1)<sup>a</sup> of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (which had force of law in the United Kingdom by virtue of s 2(1) of the Civil Jurisdiction and Judgments Act 1982 and was set out in Sch 1 thereto) as giving the English court jurisdiction over the Alpina companies on the grounds that S was domiciled in the United Kingdom both at the date of service of the original writ and at the date of joinder. The Alpina companies applied under RSC Ord 12, r 8 to set aside the writ and service of the writ upon them, contending that S was not domiciled in England at the date of issue of the writ and that therefore they could not be joined to the proceedings by virtue of art 6(1).

**Held** – Where a plaintiff sought to join a defendant to a cause of action, the relevant time for determining whether the English court had jurisdiction in respect of the additional defendant for the purposes of art 6(1) of the convention was the date when writ was originally issued. The question in such a case was whether the original defendant was domiciled in the United Kingdom at the time at which the proceedings were originally issued and not the time at which it was sought to join the additional defendants, or the time at which they were actually joined, whether by reissue of the writ or by service of the amended writ on them. On the facts, S would have returned to Switzerland after a few days had it not been for the condition imposed as a term of his bail that he remain in the United Kingdom. Given the very short period of time between S's arrest and the imposition of that condition and the commencement of proceedings, there was no good arguable case that, by 24 September 1993, he was domiciled in the

<sup>a</sup> Article 6(1) is set out at p 348 c, post

- a** United Kingdom for the purposes of the convention. Moreover, the circumstances in which he came to England and his enforced presence did not indicate the 'substantial connection' with the country required to establish domicile under s 41(3)(b)<sup>b</sup> of the 1982 Act, even if he could be said to be resident by 24 September for the purposes of sub-s (3)(a). Accordingly, service of the writ on the Alpina companies would be set aside (see p 350 j to p 351 b g to j, p 352 j to p 353 h and p 355 a b, post).

**b** *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 All ER 318 applied.

### Notes

- c** For jurisdiction of the courts under the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, see 8(1) *Halsbury's Laws* (4th edn reissue) paras 618–623, and for cases on the subject, see 11(2) *Digest* (2nd reissue) 235–237, 1417–1421.

For the Civil Jurisdiction and Judgments Act 1982, Sch 1, art 6, see 11 *Halsbury's Statutes* (4th edn) (1991 reissue) 1138.

### **d** Cases referred to in judgment

*Canada Trust Co v Stolzenberg (No 2)* [1998] 1 All ER 318, [1998] 1 WLR 547, CA.

*Kalfelis v Bankhaus Schröder Münchmeyer Hengst & Co* Case 189/87 [1988] ECR 5565.

- e** *Ketteman v Hansel Properties Ltd* [1988] 1 All ER 38, [1987] AC 189, [1987] 2 WLR 312, HL.

*Mulox IBC Ltd v Geels* Case 125/92 [1993] ECR I-4075.

*Shah v Barnet London BC* [1983] 1 All ER 226, [1983] 2 AC 309, [1983] 2 WLR 16, HL.

- f** *Seabridge v H Cox & Sons (Plant Hire) Ltd, Barclay v H Cox & Sons (Plant Hire) Ltd* [1968] 1 All ER 570, [1968] 2 QB 46, [1968] 2 WLR 629, CA.

### Application

- g** The second and third defendants, SRN Shipping NV (formerly Alpina Transport and Affretements NV) and Cisalpina NV (the Alpina companies), applied under RSC Ord 12, r 8 to set aside service of a writ on them in Belgium, which had been issued by the plaintiffs, Petrotrade Inc, International Maritime Services Co Ltd and EP Services SA, and served originally on the first defendant, Clive Stafford Smith, at a time when he was domiciled in Switzerland and only in England to fulfil a condition of his bail following arrest. The application was heard and judgment was given in chambers. The case is reported by permission of Thomas J. The facts are set out in the judgment.

- j** *Julia Dias* (instructed by *Holman Fenwick & Willan*) for the Alpina companies.  
*George Leggatt QC* (instructed by *Davies Arnold Cooper*) for the plaintiffs.

*Cur adv vult*

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**b** Section 41(3), so far as material, is set out at p 349 j, post

19 December 1997. The following judgment was delivered.

## THOMAS J.

### *Introduction*

There is before the court an application under RSC Ord 12, r 8 to set aside service of proceedings made in Belgium on the second and third defendants (the Alpina companies). The Alpina companies are Belgian companies domiciled in Belgium. Under the provisions of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, incorporated into our law by the Civil Jurisdiction and Judgments Act 1982 (s 2(1) and Sch 1), which the parties agree is the applicable convention, they should ordinarily be sued in Belgium. They were served with the proceedings on the grounds that this court had jurisdiction under art 6 of the convention. This provides: 'A person domiciled in a Contracting State may also be sued: (1) where he is one of a number of defendants, in the courts of a place where any one of them is domiciled ...' The Alpina companies were joined to these proceedings in 1997, although the proceedings had originally been begun in 1993 against the first defendant (Mr Smith). It is the contention of the Alpina companies that in 1993 Mr Smith was not domiciled in England and therefore they cannot be joined to the proceedings by virtue of art 6(1), though by the time they were joined in 1997, Mr Smith was domiciled in England. Before considering the short issues as to where Mr Smith was domiciled in 1993 and the scope of art 6(1) (if he was not then domiciled in England in 1993), it is necessary to describe briefly the nature of the plaintiffs' claim and how the claim came originally to be made against Mr Smith and subsequently against the Alpina companies.

### *The plaintiffs' claim*

The plaintiffs are associated companies beneficially owned by Mr Bruce Rappaport. Mr Smith was employed from 1988 by the second and then the third plaintiff, first as chartering manager and then head of operations of their oil trading division. He worked and lived in Geneva.

In September 1993 the plaintiffs claimed that they discovered that Mr Smith was defrauding them. The first plaintiffs are large charterers; customarily charterparties provide that owners will pay address commission to charterers. Often this is netted against the freight or hire payable by charterers, but in the way in which the plaintiffs conducted their operation, the address commission was not netted against the freight payable, but paid by the owners of the vessels to the chartering brokers who had negotiated the charterparty. The brokers were then instructed to pay the amounts in cash to the order of Mr Rappaport. It is the plaintiffs' contention that Mr Smith diverted this cash into his own account.

The plaintiffs said that they discovered this fraud on 3 September 1993. Very shortly thereafter, the defendant made a visit for a few days to England and on 7 September 1993 he was arrested by the City of London Police. A condition of his bail granted by the City of London Magistrates required to him to remain in the United Kingdom. He remained subject to this condition until the criminal proceedings were discontinued against him in 1995.

On 24 September 1993 the plaintiffs commenced these proceedings by the issue of a writ against Mr Smith as the sole defendant. On the writ the plaintiffs gave as his address his home in Switzerland. At the same time, a worldwide Mareva injunction was granted against him. Proceedings were also begun against him in Switzerland, but those proceedings were limited to obtaining



a documentation from his home. The allegations set out in points of claim indorsed on the writ related solely to the address commissions.

b Shortly thereafter, the plaintiffs claimed that they discovered another fraud involving Mr Smith. The plaintiffs used to appoint the Alpina companies as agents on calls of vessels to Antwerp. The agents agreed to pay rebates known as 'port agent rebates', which were paid to a Jersey company called Independent Maritime Services Ltd. It was the plaintiffs' case that these were payments to Mr Smith. They said they received at the time, from inquiries they made, a firm denial that those at the Alpina companies had any knowledge of Mr Smith's involvement and the Alpina companies assumed that the payment to Independent Maritime Services was payment to the plaintiff group. In those circumstances, the writ and points of claim indorsed on the writ were amended c in November 1993 to include a claim only against Mr Smith in respect of the port agent rebates.

d Thereafter, the plaintiffs commenced proceedings in Jersey to obtain the documents of Independent Maritime Services Ltd. These proceedings were somewhat protracted; when the documents of that company were obtained in early 1997, the plaintiffs claimed that they showed that not only was Mr Smith receiving moneys from Independent Maritime Services derived from the port agent rebates, but that substantial sums were also being paid to the employees of the Alpina companies.

*The application to join the Alpina companies to the 1993 proceedings*

e On 17 June 1997 the plaintiffs issued a summons to join the Alpina companies as the second and third defendants to the proceedings begun in September 1993. They sent a copy of the summons together with the draft reamended writ and points of claim to the Alpina companies.

f That summons was heard on 17 July 1997 before Clarke J. The Alpina companies did not attend. Clarke J was told that the jurisdiction over the Alpina companies was derived from art 6(1) as Mr Smith was by this time domiciled in England. Clarke J made an order joining the Alpina companies as second and third defendants, permitting the reamendment but giving the Alpina companies liberty to discharge the order. The writ was then reissued under the provisions of Ord 20 on 5 August 1997 with the Alpina companies joined as second and third g defendants. The reamended writ was then served on the Alpina companies in Belgium. On 23 September 1997 they applied to set aside the writ and service of the writ upon them.

h When the matter came on for hearing, the plaintiffs relied not only on their original contention that joinder was permissible as Mr Smith was domiciled in England at the date of joinder in 1997, but also on the basis that, at the time the original proceedings were issued in 1993, Mr Smith was domiciled in England. If Mr Smith was domiciled in England at the time the proceedings were originally issued in 1993, then it was accepted by the Alpina companies that it was permissible to join them as additional defendants. It is therefore convenient first j to consider whether Mr Smith was domiciled in England in September 1993.

*Mr Smith's domicile on 24 September 1993*

For the purposes of the convention, s 41(3) of the Civil Jurisdiction and Judgments Act 1982 provides that an individual is domiciled in the United Kingdom if '(a) he is resident in that part; and (b) the nature and circumstances of his residence indicate that he has a substantial connection with that part'. Section

41(6) provides that if a person has been resident for the last three months or more in the United Kingdom, then the condition in (b) is to be presumed to be satisfied unless the contrary is proved. a

The question of Mr Smith's domicile is a question of fact. I was referred to the decision of the House of Lords in *Shah v Barnet London BC* [1983] 1 All ER 226, [1983] 2 AC 309, where the meaning of 'ordinarily resident' was considered; the House held that the words must be given their natural and ordinary meaning as words in common usage in the English language. Lord Scarman referred to the relevance of the mind of the person. He concluded that voluntary presence is an important factor, but is not conclusive. b

'The residence must be voluntarily adopted. Enforced presence by reason of kidnapping or imprisonment, or a Robinson Crusoe existence on a desert island with no opportunity of escape, may be so overwhelming a factor as to negative the will to be where one is.' (See [1983] 1 All ER 226 at 235, [1983] 2 AC 309 at 344.) c

In determining this question of fact, the Court of Appeal held in *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 All ER 318, [1998] 1 WLR 547, a plaintiff must show a good arguable case that a defendant is domiciled in the jurisdiction. d

The evidence as to Mr Smith's circumstances on 24 September 1993 can be summarised as follows. He had English nationality. He was born in Leigh-on-Sea in 1952. He owned a house in Surrey, but it was not his home. He had bank accounts in Kingston and London. He had moved to Switzerland in 1985 and married a Swiss national; in September 1993 he was living and working in Switzerland and he had his home there. It is accepted that on 3 September 1993 he was not domiciled in England for the purposes of the convention; he was domiciled in Switzerland. He came to England for a very brief visit (intended to be about four days) shortly after 3 September 1993; he was prevented from returning to Switzerland by the conditions of his bail following his arrest. His employment in Geneva was terminated summarily on 13 September 1993. He had not gone to Switzerland to work for the plaintiffs as he had been living there prior to his employment with the plaintiffs. Thus the summary determination of his employment did not mean he no longer had a reason to reside there. The criminal proceedings against him were discontinued in 1995 and he decided to remain in England. e  
f  
g

The plaintiffs accepted that a visit of the few days in September 1993, which was all Mr Smith intended when he came to England in early September, did not amount to residence, but claimed that the position changed once he was granted bail on condition that he remained in England. By the time proceedings were issued on 24 September 1993, they contended that he was living in England and likely to remain there for an indefinite time until the criminal proceedings were resolved; he was therefore domiciled in England for the purposes of the convention, or at least there was a good arguable case to that effect. h

The evidence before me is that at the time that the proceedings commenced, Mr Smith intended to remain living in Switzerland; he was prevented from doing so by the conditions of his bail. He lived with his sister in Cheshire for a while before moving to rented accommodation in London to study. There is also evidence before me from a Swiss lawyer that, under Swiss law, he would have been regarded as domiciled in Switzerland on 24 September 1993. j

In my view, the evidence before me shows that had it not been for the condition imposed as a term of his bail that he remain in the United Kingdom, he

a would have returned to Switzerland after a few days. The only reason he stayed in England, on the evidence before me, was the condition of his bail. Given the very short period of time between his arrest and the imposition of that condition and the commencement of these proceedings, I do not think that there is a good arguable case that he was domiciled by 24 September 1993 in the United Kingdom for the purpose of the convention; the circumstances in which he came and his enforced presence did not indicate a substantial connection with England, even if by 24 September he could be said to be resident. Plainly his stay in England was involuntary, but that is only one factor which, together with the other evidence before me, I have taken into account in concluding that the plaintiffs have not made out a good arguable case.

c *The scope of art 6(1)*

It follows therefore from this conclusion, that I consider that these proceedings can only be maintained against the Alpina companies on the basis that the relevant time for determining the place where any one of the defendants is domiciled is not the time at which the action is originally brought, but at the time d that the suit is brought against the other defendants.

Although this point has not, as far as the researches of counsel have shown, been the subject of any previous decision, there are two decisions that provide guidance. First, it is clear from the decision of the European Court of Justice in *Kalfelis v Bankhaus Schröder Münchmeyer Hengst & Co* Case 189/87 [1988] ECR 5565 at 5585 (para 19) that—

e ‘the “special jurisdictions” enumerated in Articles 5 and 6 of the Convention constitute derogations from the principles that jurisdiction is vested in the courts of the State where the defendant is domiciled and as such must be interpreted restrictively.’

f Secondly, it was determined by the Court of Appeal in *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 All ER 318, [1998] 1 WLR 547, in relation to art 6(1), that the relevant time for determining domicile was at the time the writ was issued and not when it was served. In that case the writ had named all the defendants when issued and the question before the court was whether the time for determining the domicile of the person whose domicile determined the jurisdiction was either the time the writ was issued or the time that the writ was served on that person. The issue before me in this application is different because the relevant distinction is not between issue and service, but between original issue when one person was the defendant, and reissue or reservice when it is sought to join other defendants. In summarising the conclusion reached in h *Stolzenberg’s* case [1998] 1 All ER 318 at 338, [1998] 1 WLR 547 at 568, Waller LJ said:

i ‘The correct date for determining whether or not a defendant is domiciled in England for the purpose of determining whether the court has jurisdiction under art 6, is the date of the issue of the proceedings against the defendant domiciled in England.’

It was argued by the Alpina companies that this summary of the decision showed that the determination of the issue in this case had been determined by the Court of Appeal in *Stolzenberg’s* case. I do not agree, though the reasoning of the court in that decision points, in my view, very clearly to the resolution of the issue in this case.



Although no express guidance on this issue is given in the Jenard Report (see OJ 1979 C59 p 1) or the Schlosser Report (see OJ 1979 C59 p 71), it is made clear in Mr Jenard's report that the purpose of this provision was to prevent multiplicity of proceedings resulting in irreconcilable judgments (p 27):

'Jurisdiction derived from the domicile of one of the defendants was adopted by the Committee because it makes possible to obviate the handing down in Contracting States of judgments which are irreconcilable with one another.'

This principle was affirmed by the Court of Justice of the European Communities in *Kalfelis v Bankhaus Schröder Münchmeyer Hengst & Co* Case 189/87 [1988] ECR 5565. Mr Jenard's report refers to the provisions in the law of other jurisdictions within the regime covered by the convention adopting in their internal law the principle of allowing the court of one defendant's domicile to have jurisdiction over other defendants. In *Kaye Civil Jurisdiction and Enforcement of Foreign Judgments* (1987) pp 269–270 a short observation is made:

'Accordingly, if a court possesses jurisdiction on the ground, say, of situation of the defendant's domicile is the Contracting State of the forum at the date of the institution of proceedings, its jurisdiction should remain unaffected by a subsequent change of domicile by the defendant in the course of proceedings, under the said principle of *perpetuatio fori* [Fortdauer der internationalen Zuständigkeit]. The alternative would lead to uncertainty and abuse.'

The objective of this article of the convention is accordingly clear; however that objective on its own cannot provide a solution for the issue in this case. Anomalies could arise whichever view was taken. In this case, for example, if the relevant time is the time at which the writ was issued originally, there may be multiplicity of proceedings if the plaintiffs are obliged to commence their proceedings against the Alpina companies in Belgium. However, on other facts, if a defendant moved from the jurisdiction where the claim had been brought originally on the basis of his domicile, and it was sought subsequently to add parties to that action, then although the action would continue in the place where the person had been domiciled at the date of the issue of the writ, the further defendants could not be added to those proceedings if the determinative time was the date of the issue of proceedings for joinder.

On the facts of this particular case, the Alpina companies rightly point out that if the proceedings had been brought in Switzerland in 1993—which was at that stage a party to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano, 16 September 1988, TS 53 (1992); Cmd 2009) and, on the unchallenged evidence of Swiss law, was the place of Mr Smith's domicile at that time—then, if the relevant time was the time at which the proceedings were originally issued, there would not have been multiplicity of proceedings as a consequence of the defendant moving his domicile.

In my view, however, the considerations set out in the judgment of the Court of Appeal in *Stolzenberg's* case point clearly to the relevant time being the time at which the proceedings were issued. Waller LJ said ([1998] 1 All ER 318 at 334, [1998] 1 WLR 547 at 564):

a 'It furthermore seems to me that since the issue of proceedings is a step that  
the plaintiff is bound to take and incur cost in taking, it is important that a  
plaintiff can identify easily the court before which he can bring his action  
before he launches it. Support for this being the plaintiff's right is provided  
b by a passage in the judgment of the European court in *Mulox IBC Ltd v Geels*  
Case 125/92 [1993] ECR I-4075 at 4102, where it is said as follows: "It is  
settled case-law that, as far as possible, the Court of Justice will interpret the  
terms of the Convention autonomously so as to ensure that it is fully  
effective having regard to the objectives of Article 220 of the EEC Treaty, for  
c the implementation of which it was adopted. That autonomous  
interpretation alone is capable of ensuring uniform application of the  
Convention, the objectives of which include unification of the rules on  
jurisdiction of the Contracting States, so as to avoid as far as possible the  
multiplication of the bases of jurisdiction in relation to one and the same  
legal relationship and to reinforce the legal protection available to persons  
established in the Community by, at the same time, *allowing the plaintiff easily*  
d *to identify the court before which he may bring an action* and the defendant  
reasonably to foresee the court before which he may be sued.'" (Waller LJ's  
emphasis.)

Waller LJ also said ([1998] 1 All ER 318 at 336, [1998] 1 WLR 547 at 566):

e 'The relevant date must be the same for art 6 as for art 2. A plaintiff faced  
with wishing to sue defendants in proceedings connected in the sense  
required for art 6 purposes has to take the same decisions as a plaintiff  
seeking to sue one defendant in the courts of his domicile under art 2. What  
in fact art 6 allows him to do is to comply with art 2 so far as one or more  
defendants are concerned, and join others who are domiciled in other  
f contracting states. It is art 6 that provides the power to issue the process in  
the court of the domicile of one defendant, and that court then allows service  
on the defendants so joined. It must once again be as at the date when the  
writ is issued that the relevant domicile must be tested for all the reasons  
already given in relation to art 2.'

g In my view, the solution to the question before me is one based on domicile at  
the time of the original issue of the writ; it is the one that coincides with the rule  
established in *Stolzenberg's* case and with the purposes of the convention. It settles  
the jurisdictional question at the date of the original proceedings and fixes them  
in that court from that time onwards. It enables a plaintiff to identify the court  
before which he wishes to bring the action and a defendant reasonably to foresee  
h the court before which he may be sued.

The plaintiffs say that this result cannot be achieved on the language of the  
convention. As the Court of Appeal pointed out in *Stolzenberg's* case, the process  
is one of construction although the court must not be confined slavishly to the  
language. The plaintiffs argue that arts 2 and 6 both use the present tense. They  
j therefore say that as a matter of language, the relevant time must be at the time  
at which it is proposed to sue the additional defendant because at that time he 'is'  
one of a number of defendants in the courts at the place where any one of them  
'is' domiciled.

I do not think that this literalist interpretation governs. In the ordinary case,  
either the defendants are all parties to the writ at the same time, or the defendant  
whose domicile is chosen will not change his domicile; the very short text of the

convention is plainly directed at that. The facts of this case have produced an unusual situation, and one which is not contemplated in the text of the convention. The fact that the present tense is used is therefore not of great significance, and cannot override the considerations to which I have referred. a

Reliance was also placed by the plaintiffs on the procedure under English law by which additional defendants are joined. In *Ketteman v Hansel Properties Ltd* [1988] 1 All ER 38, [1987] AC 189 the House of Lords decided that at common law b there was no relation back when an additional defendant was joined. The principle was expressed by Lord Keith of Kinkel in the following terms:

‘A cause of action is necessarily a cause of action against a particular defendant, and the bringing of the action which is referred to must be the bringing of the action against that defendant in respect of that cause of c action. The causes of action here against the local authority and the architects were separate and distinct from the cause of action against Hansel. In my opinion there are no good grounds in principle or in reason for the view that an action is brought against an additional defendant at any earlier time than the date on which that defendant is joined as a party in accordance d with the rules of court.’ (See [1988] 1 All ER 38 at 47, [1987] AC 189 at 200.)

The plaintiffs argued that to the extent local law was relevant to the determination as to when a defendant was to be regarded as joined to the proceedings, the decision made clear that at English common law it was the time of joinder that mattered. They contended that the relation back for the purposes e of limitation should not be imported into the convention. I agree.

However, it is also clear from that decision that the defendants who are added do not become parties when the order is made nor when the writ is reissued but only on service on them. The House of Lords overruled the decision in *Seabridge v H Cox & Sons (Plant Hire) Ltd*, *Barclay v H Cox & Sons (Plant Hire) Ltd* [1968] 1 All ER 570, [1968] 2 QB 46 and held that the additional defendant does not become f party until the writ has been served upon him. Lord Keith said ([1988] 1 All ER 38 at 45–46, [1987] AC 189 at 198–199):

‘The natural meaning of Ord 15, r 8(4)(a), according to the ordinary use of language, would appear to be that a person added as a defendant does not become party until not only has the writ been amended but also the g amended writ has been served on him.’

He then considered the decision of the Court of Appeal in *Seabridge’s* case which decided that the amended writ took effect as against the added defendant on reissue and held: ‘In my opinion the plain language of the rule must prevail, and *Seabridge’s* case should be overruled as wrongly decided.’ Thus under the rules h of court, the Alpina companies would not have become parties to the action until they were actually served; it might follow therefore the time at which the defendant would have to be domiciled, on the plaintiffs’ case, is not the time when the writ is reissued, but on service. This is a technical consideration and is not in my view determinative in any way; a decision on the meaning of art 6(1) j must have regard to the international purpose which the convention was designed to achieve and is not determined by the perspective of such a technical domestic rule (see *Stolzenberg’s* case). The issue under art 6(1) raised in this case is an issue of general applicability in all convention countries and should not turn on detailed points of local procedure which may well differ from state to state, but on the broader considerations to which I have referred.



*Conclusion*

*a* In my view, therefore, the relevant time under art 6(1) is the time at which the proceedings were originally issued, and not the time at which it is sought to join the additional defendants or the time at which they are actually joined, whether by reissue of the writ or by service of that amended writ on them.

*b* It follows, therefore, that as the plaintiffs do not have a good arguable case that Mr Smith was domiciled in England in September 1993, that the service of the writ on these defendants must be set aside.

I should add that if new proceedings could be brought against Mr Smith in this jurisdiction in respect of the port agent's commission, then it would be possible to serve those proceedings upon the defendants in Belgium. There could be no objection to that course, provided that proceedings could properly be brought against Mr Smith. It would then, of course, be open to the plaintiffs to apply to consolidate those proceedings with the existing action. I have not taken this factor into account for two reasons. First, there are difficulties in the way of the plaintiffs adopting that procedure because, as I have said, they have already brought the claim in respect of port agent's commission against Mr Smith.

*d* Secondly, proceeding in that way may deprive them of the benefit of being able to avoid the limitation defence that might be open to Alpina, although on facts of this case limitation may not be a very material issue.

However, considerations particular to a given case, are, as the Court of Appeal observed, not determinative of what is in the end a short point on the interpretation of the convention.

*e* Order accordingly.

L I Zysman Esq Barrister.

# Figgett v Davies

COURT OF APPEAL, CIVIL DIVISION

HOBHOUSE, BROOKE LJ AND SIR JOHN VINELOTT

30 JANUARY 1998

*County court – Practice – Striking out – Automatic directions prescribing timetable for action – District judge striking out form N9 defence – Whether automatic directions running again without further direction from judge – CCR Ord 17, r 11.*

There is no scope within the automatic directions scheme of CCR Ord 17, r 11 for a district judge to create a situation where automatic directions which have once run should be automatically cancelled out by the effect of an order striking out a defence in form N9 which had been served some months earlier. In such circumstances there is no provision under the rule for the automatic directions to reappear and therefore the effect of the order is to leave the action directionless (see p 359 j to p 360 a c, post).

## Notes

For automatic directions, see Supplement to 10 *Halsbury's Laws* (4th edn) para 257A.

## Cases referred to in judgments

*Bannister v SGB plc* [1997] 4 All ER 129, CA.

*Greig Middleton & Co Ltd v Denderowicz* [1997] 4 All ER 181, CA.

## Case also cited or referred to in skeleton arguments

*Whitehead v Avon CC* (1997) Times, 17 March, CA.

## Appeal

The plaintiff, Christine Figgett, appealed from the decision of Judge Davies sitting at Kingston upon Hull County Court on 16 July 1997, allowing an appeal by the defendant, David Charles Edwin Davies, from the decision of Deputy District Judge Wise on 24 February 1997 dismissing his application for a direction that the plaintiff's claim against him for negligent dental treatment had been automatically struck out in accordance with the provisions of CCR Ord 17, r 11 on 4 August 1996, and refusing to exercise her discretion to reinstate the action. The facts are set out in the judgment of Brooke LJ.

*Martin Spencer* (instructed by *Nigel Walshe & Co*, Drifffield) for the plaintiff.

*Mary O'Rourke* (instructed by *Hempsons*, Manchester) for the defendant.

**BROOKE LJ** (delivering the first judgment at the invitation of Hobhouse LJ). This is an appeal by the plaintiff from a judgment of Judge Davies in the Kingston upon Hull County Court on 16 July 1997, declaring that the plaintiff's action was struck out in accordance with the provisions of CCR Ord 17, r 11, on 4 August 1996, and refusing to exercise her discretion to reinstate the action. Her decision not to reinstate the action is not challenged and the only issue on this appeal is whether the judge was right to declare that the action was automatically struck out.

a The case raises a novel point, which was not expressly decided in the leading cases of *Bannister v SGB plc* [1997] 4 All ER 129 or *Greig Middleton & Co Ltd v Denderowicz* [1997] 4 All ER 181 or any of the earlier authorities on the rule.

In short, the question is if a district judge strikes out a defence in form N9, as inadequately pleaded, do automatic directions start to run again if his order is silent on the subject?

b This was a dental negligence action arising out of a course of dental treatment between October 1982 and February 1991. Particulars of claim were issued on 17 August 1993, and on 16 September 1993 form N9 was returned to the court stating that a fully pleaded defence would follow as soon as possible. On 21 September 1993 automatic directions were issued in form N450. It was common ground that the trigger date based on the delivery of the form N9 was 30 September 1993 and the guillotine date 30 December 1994.

c There followed a lot of correspondence between the parties concerning general extensions of time for a fully pleaded defence, and before the guillotine date the plaintiff's solicitors wrote to the defendant's solicitors on 5 December 1994 in these terms:

d 'We enclose now by way of service sealed copy Notice of Application returnable on Wednesday 21st December 1994 at 12.30 p.m. Clearly, the timetable could not properly be expected to run at all until such time, if any, that there is filed a fully pleaded Defence and it may be that this is a case where such a Defence will be unnecessary. In the circumstances we presume  
e that you will agree to our application. We merely apprehend that the District Judge may want to provide for some date for the filing of the fully pleaded Defence so that there is some certainty as to when the timetable should effectively begin to run. We would suggest that to concentrate our minds on the possibility of a settlement we specify that the fully pleaded Defence be filed within, say, two months and the timetable begin to run  
f thereafter. We can of course, between ourselves, agree to extend that time for the filing of the fully pleaded Defence. We might mention that we recently had a case before the District Judge at the Kingston upon Hull County Court where he directed inter alia that the form of "holding defence" which you filed on 16th September 1993 is not a defence at all and  
g consequently time should never begin to run under Order 17 Rule 11 until there is a fully pleaded Defence in any event.'

The application which was before the court was an application by the plaintiff for—

h 'an Order that the time for the making of the request to fix the trial date herein be extended to such time as appears fit to this Honourable Court and that the timetable be altered accordingly. The grounds on which this application are made are that with the Plaintiff's consent the Defendant has not yet filed a fully pleaded Defence because of the attempts made between  
j the parties to reach a settlement.'

On 20 December 1994 the defendant's solicitors replied quite briefly:

'We consent to your application returnable on 21 December. On the basis of our experience in other County Courts it is only necessary to seek an Order to extend the time for setting down by say 6 months and there is no requirement to set out a formal timetable with steps to setting down. We



hope that this is of some assistance and return your duly endorsed application in any event.'

On the following day the defendant was unrepresented. The solicitor for the plaintiff appeared before District Judge Hill, and he made an order not in the terms of the consent order put in front of him, but that:

'1. The defence dated 16 September 1993 be struck out as an inadequately pleaded defence. 2. The defendant do file and serve a fully pleaded defence within 2 months. 3. Costs in cause.'

He gave no manual directions as to the future timetable and he said nothing in the order about the possible applicability of automatic directions. The plaintiff by agreement extended the time for service of the defence to 21 April 1995, and on 19 April 1995 a defence was delivered. It contained a series of denials, admissions and non-admissions, and no complaint was made about the adequacy of this pleading until very much later.

There were continuing without prejudice discussions concerning the settlement of the action, and it is clear that the plaintiff was waiting for a prognosis from a consultant in dentistry.

On 2 November 1995 the plaintiff's solicitors delivered amended particulars of claim amending the particulars of negligence. They sent the defendant's solicitors an up-to-date expert's report and a second psychological report, warned that there would be an amendment to the schedule of special damages and asked them to confirm that they would consent to an amendment of the particulars of claim. The without prejudice correspondence continued. On 8 July 1996 an order was made granting leave to amend the particulars of claim, and on 6 September 1996 amended particulars of claim were served. The plaintiff's solicitors asked the defendant's solicitors whether the case was to proceed to trial or whether the defendant would settle the claim, but by this time if the automatic directions had started to run again even though no notice in form N450 was ever sent out by the county court after the fully pleaded defence was served and delivered on 9 April 1995, the guillotine date would have passed, and on 21 October 1996 the defendant's solicitors took the view that the claim had now been automatically struck out pursuant to Ord 17, r 11 and applied to the court for a direction to that effect.

On 24 February 1997 Deputy District Judge Wise dismissed the defendant's application. He gave directions for trial. He regarded the defence as still inadequately pleaded and made an unless order. The defendant appealed, and on 16 July 1997 Judge Davies allowed his appeal. By this time *Bannister v SGB plc* [1997] 4 All ER 129 had been decided, which clarified the status of a defence in form N9, but she interpreted District Judge Hill's order as meaning that his intention was to give the plaintiff the benefit of retimetabling, and she said that this was clear from the correspondence passing between the parties before this application was made. She compared the situation with a situation mentioned in *Bannister v SGB plc* at 158 (para 16.6) when a judgment in default of defence is set aside. She said that in those circumstances, since no defence has ever been delivered, automatic directions run once the first defence in an action is delivered. She therefore declared that the action was automatically struck out. She refused to reinstate it and, as I have said, the plaintiff makes no appeal against the second part of that order.

a Mr Spencer on behalf of the plaintiff has referred us to *Bannister v SGB plc* (at 156 (para 14.5), which reads as follows:

b 'If a new order simply grants an extension of time for fulfilling one of the obligations referred to in r 11(3)(a), (b) or (c), that is not of itself going to disapply the automatic directions (including the obligation to request a hearing date with the draconian consequences for failure). However, if a direction of the court makes compliance impossible, or if an order of the court is simply inconsistent with the automatic directions continuing to apply, the approach of the Court of Appeal has not been to attempt to remould or suspend their implementation for a period of time, or something of that nature, but to declare that they do not apply. Where directions are given which might impinge on the automatic directions, it is preferable for c the order to deal expressly with the operation of the automatic directions, so that people's minds can be concentrated on the question whether they are to be disapplied or not. This is a practice which we believe is now happening, and is greatly to be encouraged.'

d In fairness to District Judge Hill, the judgment in *Bannister v SGB plc* was not of course available to him in December 1994.

e Mr Spencer submits that automatic directions were ousted by the order of 21 December 1994, and he referred us to *Bannister v SGB plc* [1997] 4 All ER 129 at 160 (para 18), which shows that the effect of the ouster of automatic directions where no manual directions are given is to leave the action directionless. He submits that this was the true effect of the district judge's order in December 1994. He argued that the judge was wrong to operate on the assumption that in every case there must be a trigger date to which automatic directions apply, and that she was wrong to have difficulty in contemplating that a case might be left directionless. He submitted that the judge's remarks about the intention of the district judge on 21 December 1994 with the help of a reconstruction from the earlier correspondence were irrelevant. Whatever the district judge may have intended, Mr Spencer submitted that it is the effect in law of what he did that matters. He ousted the automatic directions and left the case directionless. There is no scope in the scheme of Ord 17, r 11, he said, for automatic directions to reappear after they have run for one period of time following the delivery of a defence, and it was necessary for the district judge to give manual directions in order to set out a timetable for the action. He reminded us in this context that if the district judge had done that, he could not have imposed an automatic strike out.

h Miss O'Rourke, for her part, submitted that the district judge could have made a number of orders on 21 December 1994, but the effect of the order he made was that he struck out the defence in form N9 as if it had never been a defence at all and that, as a matter of law, it should therefore be treated as if it had never existed so that the automatic directions, which it is common ground ran from the original trigger date of 30 September 1993, did not exist either. When we asked j her for authority for this submission, she was unable to provide one, and she accepted that this was a most unusual situation, but she fell back on the argument that both the parties and the district judge all believed in December 1994 that this was the effect of the order the district judge had made.

In my judgment there is no scope within the scheme of Ord 17, r 11 for a district judge to create a situation where automatic directions which have once run should be automatically cancelled out by the effect of an order striking out a

defence in form N9 which had been served some months before, and in those circumstances there is no provision under the rule for the automatic directions to reappear.

It follows, therefore, although I have considerable sympathy with the judge, who was dealing with a quite novel point which had not been decided by this court in *Bannister v SGB plc* [1997] 4 All ER 129, the effect of the order of 21 December 1994 was to leave the action directionless, apart from the direction that a fully pleaded defence should be served within two months. It follows that the judge was wrong in declaring that the action had been automatically struck out and the appeal should be allowed. If Hobhouse LJ and Sir John Vinelott agree with this judgment, it will be desirable for a further application for new directions for the action to be made to the district judge as soon as possible and that an effective timetable is then set out for the further progress of the action.

**SIR JOHN VINELOTT.** I agree.

**HOBHOUSE LJ.** I also agree.

*Appeal allowed.*

Dilys Tausz Barrister.



## Oksuzoglu v Kay and another

COURT OF APPEAL, CIVIL DIVISION

HIRST, MILLETT AND BROOKE LJJ

15, 16 JANUARY, 12 FEBRUARY 1998

*Costs – Order for costs – Discretion – Claim for professional medical negligence – Delayed diagnosis – Plaintiff's leg subsequently amputated following diagnosis of tumour in advanced condition – Separate trials on issues of liability and quantum – Judge finding that defendants negligent but that negligence not causative of amputation – Judge ordering defendants to pay all plaintiff's costs of action on ground they had failed to protect themselves by making a written offer accepting a specified proportion of liability – Whether judge right to do so – RSC Ord 33, r 4A.*

In 1992 the plaintiff, a minor, brought proceedings against the defendants, who were medical practitioners, claiming damages for negligence in failing to refer him to hospital when he first consulted them from 1988 onwards about the pain in his right leg, alleging that as a result of the delay in treatment his leg had to be amputated when a malignant tumour in an advanced condition was thereafter diagnosed. The question of liability was determined as a preliminary issue before the question of quantum. The judge found that both defendants had been negligent in not referring the plaintiff to hospital earlier but that amputation would have been inevitable in any event. He therefore directed judgment to be entered against both defendants for damages to be assessed but limited the inquiry into damages to the plaintiff's pain, discomfort and distress. No medical report and statement of the special damages claimed had been served with the statement of claim as required by RSC Ord 18, r 12(1A)<sup>a</sup> apart from a 1990 report which contained no hint of any psychiatric disturbance, but, following the trial on liability, the judge granted the plaintiff leave to reamend his statement of claim to include specific allegations of psychiatric damage. After damages had been assessed, in which the plaintiff was awarded, inter alia, £3,000 damages for pain and suffering and special damages of £1,818.07 in respect of his mother's care and £183.57 laundry expenses until the referral to hospital, the judge directed that the defendants should pay all the plaintiff's costs of the action on the ground, inter alia, that they had failed to protect their position as to costs by availing themselves of Ord 33, r 4A<sup>b</sup> by making a written offer accepting a specified proportion of liability. The defendants appealed.

**Held** – Order 33, r 4A was available as a device for limiting the incidence of costs where the proportion of a defendant's liability might be in issue. It was therefore inapplicable in the instant case where the defendants were willing to accept 100% liability for up to 18 months' loss for a delayed diagnosis but not for the claim that their failure caused the plaintiff to lose his leg and there was no suggestion of contributory negligence. It followed that the judge had been wrong to criticise the defendants for failing to avail themselves of that provision. Moreover, he had also been wrong to lump the trials as to liability/causation and quantum together, and in not making a separate order as to the costs of the issues on

a Rule 12(1A) is set out at p 373 b, post

b Rule 4A is set out at p 374 j to p 375 a, post

liability/causation on which the defendants had essentially won. The appeal against the costs order would therefore be allowed, as would the appeal against the special damages award, since the plaintiff's mother would have been even more heavily involved in his care and the expenses would have been incurred even if the defendants had not been negligent. In the circumstances, since it had been open to the defendants to make an admission of facts under Ord 27, r 1<sup>c</sup>, the appropriate order, ignoring the payment into court, was that the defendants should recover only 90% of their costs of the action up to the date of judgment on the issues of liability and causation; thereafter they should pay the plaintiff his costs, except those incidental to the application to reamend the statement of claim (see p 366 f to j, p 374 h to p 375 c, p 378 e to p 379 b d to h and p 380 g to j, post).

Per curiam. A plaintiff is not relieved of his obligations under Ord 18, r 12(1A) to serve an up-to-date medical report with his statement of claim substantiating all the personal injuries alleged unless he obtains an order of the court under r 12(1B) dispensing with the requirements or by agreement with the defendant (see p 373 e and p 380 j, post).

General guidance as to costs in medical negligence cases where there is an order for a split trial (see p 380 a to g j, post).

## Notes

For exercise of the court's discretion to award costs, see 37 *Halsbury's Laws* (4th edn) para 714.

## Cases referred to in judgments

*Alltrans Express Ltd v CVA Holdings Ltd* [1984] 1 All ER 685, [1984] 1 WLR 394, CA.  
*Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd* [1951] 1 All ER 873.  
*Beoco Ltd v Alfa Laval Co Ltd* [1994] 4 All ER 464, [1995] QB 137, [1994] 3 WLR 1179, CA.

*Calderbank v Calderbank* [1975] 3 All ER 333, [1976] Fam 93, [1975] 3 WLR 333, CA.  
*Elgindata Ltd, Re (No 2)* [1993] 1 All ER 232, [1992] 1 WLR 1207, CA.

*Lipkin Gorman (a firm) v Karpnale Ltd* (1988) [1992] 4 All ER 409, [1989] 1 WLR 1340, CA; *rvsd in part* [1992] 4 All ER 512, [1991] AC 548, [1991] 3 WLR 10, HL.  
*Owen v Grimsby and Cleethorpes Transport* (1991) Times, 14 February, [1991] CA Transcript 71.

*Wilsher v Essex Area Health Authority* [1988] 1 All ER 871, [1988] AC 1074, [1988] 2 WLR 557, HL.

## Cases also cited or referred to in skeleton arguments

*Cheeseman v Bowaters UK Paper Mills Ltd* [1971] 3 All ER 513, [1971] 1 WLR 1773, CA.

*Gallon v Swan Hunter Shipbuilders Ltd* [1996] PIQR P93, CA.

*Hawkins v New Mendip Engineering Ltd* [1966] 3 All ER 228, [1966] 1 WLR 1341, CA.

*Hunt v R M Douglas (Roofing) Ltd* [1988] 3 All ER 823, [1990] 1 AC 398, [1988] 3 WLR 975, HL.

*McGillicuddy v Plymouth and Torbay Health Authority* [1995] CA Transcript 1858.

*Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1998] 1 All ER 305, [1997] 1 WLR 1627, HL.

<sup>c</sup> Rule 1 provides: '... a party to a cause or matter may give notice, by his pleading or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.'

**Appeal**

**a** The defendants, Stewart Kay and Kenneth Leslie Oldenshaw, general medical practitioners, appealed with leave of Beldam LJ given on 9 May 1997 from (i) the order of Judge Rivlin QC sitting as a deputy judge of the High Court on 16 October 1996 whereby he granted the plaintiff, Burac Oksuzoglu, a minor suing by Alev Ahmet his mother and next friend, leave to reamend his statement of claim to include specific allegations of psychiatric damage in his claim against the defendants for damages for personal injuries caused by their negligence; (ii) the quantum of damages assessed by Douglas Brown J on 16 December 1996 and his order for costs following a trial on issues of quantum; and (iii) the order for costs made by Judge Rivlin on 11 February 1997. The facts are set out in the judgment of Brooke LJ.

**c** *Terence Coghlan QC* and *Mary O'Rourke* (instructed by *Le Brasseur J Tickle*) for the first defendant and (instructed by *Hempsons*) for the second defendant.

*Peter Andrews QC* and *Elizabeth Gumbel* (instructed by *Taylor Johnson Garrett*) for the plaintiff.

**d** *Cur adv vult*

12 February 1998. The following judgments were delivered.

**BROOKE LJ** (giving the first judgment at the invitation of Hirst LJ).

**e** 1. Burac Oksuzoglu, the plaintiff, is now 13 years old. He was born in this country in December 1984 of Turkish immigrant parents. His parents separated when he was three months old and he has had no contact with his father, who does not maintain him. His mother speaks little English and has had few resources on which to live and bring up Burac and his sister, who is two years older. When he was nearly five years old his right leg was amputated and disarticulated at the hip, to save him from certain death. In this action he sought damages from two general practitioners for failing to refer him to hospital earlier, which would, it was claimed, have saved his leg.

**f** 2. On this appeal we have had the benefit of the judgments of two experienced judges, Judge Rivlin QC (sitting as a deputy judge of the High Court) and Douglas Brown J, on the facts. The former conducted a nine-day trial on issues of liability in December 1994. The latter conducted a four-day hearing on issues of quantum in December 1996. Judge Rivlin recused himself from the assessment of quantum after he had been made aware that there had been a payment into court, although he did not know the amount. He remained responsible for giving interlocutory directions, and one of the three appeals before us is a challenge by the defendants to an order he made on 16 October 1996 granting the plaintiff leave to reamend his statement of claim to widen the scope of his damages claim. Another of the appeals relates to the order for costs he made when he returned to the action to determine costs issues on 11 February 1997. The third appeal relates to the quantum of damages assessed by Douglas Brown J and one aspect of the order for costs he made at the end of the assessment hearing.

**h** 3. The effect of the findings of fact made by these two judges was along these lines.

**j** 4. Ewing's sarcoma is a rare, extremely malignant, cancerous tumour. Unless it is treated promptly, it is liable to spread quickly and is potentially fatal. When Burac was three and a half years old he started experiencing pain and discomfort in his right leg. The two defendants are busy doctors in general practice in



Peckham. Burac's mother took her son to see them from time to time from July 1988 onwards because he was suffering pain in his leg. Judge Rivlin found that the second defendant was negligent because he should have referred Burac to hospital following a consultation on 11 October 1988. He found that the first defendant was negligent because he failed to refer Burac to hospital following a consultation three and a half months later, at the end of January 1989. Burac was in fact referred to hospital on 26 June 1989, and his sarcoma was first diagnosed on an X-ray taken on 17 July 1989. By this time the tumour was in an advanced condition. It did not respond favourably to treatment with chemotherapy, and the doctors at St Bartholomew's Hospital, where he was being treated, considered that treatment with radiotherapy would have no prospect of success and might seriously prejudice the child's growth. His right leg was therefore amputated and disarticulated at the hip on 16 November 1989. He was subsequently fitted with a prosthesis which has to be renewed as he grows.

5. Despite his findings of negligence against both defendants Judge Rivlin found that even if the tumour had been discovered by October 1988, there would have been no difference to the course of treatment Burac had to undergo, because the tumour would by then have been so large, and Burac's age and his relative resistance to chemotherapy were such, that amputation would have been regarded as the only safe and sensible option. He therefore directed that judgment be entered against both defendants for damages to be assessed, and that the inquiry into damages should be limited to Burac's pain, discomfort and distress from 11 October 1988 and late January 1989 respectively. At the end of the trial on liability, over five years after Burac's leg had been amputated, his claim in this respect appeared to relate to general damages in respect of untreated Ewing's sarcoma and, possibly, to special damage in respect of the extra care and attendance provided by his mother and family between October 1988 and June 1989 in respect of his pain, disability and other consequential needs.

6. On the assessment of damages Douglas Brown J said that for an additional eight and a half months Burac had suffered increasing pain and disability. The pain was intermittent, but towards the end the intervals between bouts of pain became shorter, and from about March 1989 there was an increasing number of occasions when the pain was sufficiently bad for his mother to have to carry him. The pain was of increasing severity. In addition, he suffered distress and discomfort associated with enuresis, which happened more than once during the night on some occasions. The judge awarded him £3,000 under this head.

7. He also suffered from a psychiatric illness which was amenable to treatment. Douglas Brown J held that Burac would probably have had in any event a behavioural disorder brought about by the amputation itself and the associated problems any child will have when a limb is removed. He found, however, that this problem would have been relatively short-lived but for the delay in diagnosis. What had led to his condition being in December 1996 in the moderately severe category of psychiatric damage was the delay in diagnosis. His mother became a chronic depressive, because she was preoccupied with what she saw as the injustice done to her son by reason of the defendants' poor treatment (a view, the judge observed, she was reasonably entitled to hold until December 1994), and she communicated these concerns to her intelligent son, so that by December 1996 he was in urgent need of therapy. The judge found that with therapy the prognosis was reasonable, although there was a recognisable risk he could still have problems in adolescence and early adulthood. The award of general damages under this head was £8,000.

a 8. The judge held that psychiatric treatment was now essential, and that it would not have been necessary at all but for the defendants' negligence. The judge awarded an additional agreed figure of £1,510 for the cost of psychotherapy treatment, plus £210 for a claim for travel costs.

b 9. Finally, the judge awarded care costs of £1,818.07 in respect of the increasing amount of time Burac's mother spent caring for him at night (20 hours per week from 12 October 1988 to the end of February 1989 and 25 hours per week from 1 March to 26 June 1989), together with miscellaneous other minor expenses amounting to just over £500.

c 10. It will be convenient to consider first the defendants' appeal against certain of the ingredients of the damages award. In the event, for reasons which will become apparent, Mr Coghlan QC restricted his challenge to the award of £3,000 general damages for pain and suffering during the eight and a half month period of avoidable pain between the time when the second defendant ought to have referred Burac to a hospital for investigation and the time when he was in fact referred, and to the award of special damages which related to this period.

d 11. On this aspect of the case the judge accepted the evidence of Burac's mother and her two sisters, and the evidence of Dr Ann Kilby, a consultant paediatric oncologist, who said that the symptoms those witnesses described were typical of the symptoms caused by bone sarcomas. In her report Dr Kilby summarised the position in these terms:

e 'Reviewing the evidence it is clear that between October 1988 and June 1989 Burac was suffering considerable pain in his right leg, the family also noticed swelling of the right thigh. In the later months of 1988 the pain was intermittent but severe causing Burac to cry for up to an hour at a time and sometimes scream with pain. He was also limping intermittently. By the early months of 1989 Burac's pain was increasing in frequency and severity  
f and his limp was more noticeable. By April or May 1989 Burac was finding it very difficult to put weight on his right leg because of severe pain and was crying for long periods every day and night. Throughout the time in question, Burac was wetting the bed regularly, every night, although before his symptoms started he had been dry at night ... Burac's sleep was disturbed by pain and distress. He also could not easily get out of bed and walk to the  
g toilet in the months before diagnosis.'

h 12. Mr Coghlan attacked the judge's award of £3,000 general damages on the ground that it was manifestly too high, alternatively because the judge ought to have made an allowance for the fact that during the period in question he did have a leg which would already have been amputated but for the defendants' negligence. I reject both these arguments. The judge was in a better position  
j than this court to assess the severity of the pain this boy was suffering, and the award for this increasingly severe pain, together with the distress and discomfort associated with the enuresis, was within the range of awards open to the judge. On the second point the judge, in disagreeing with the submission made by the doctors' counsel, said: 'True it is that he had a leg but it was not much of a leg; it contained a tumour and gave him a great deal of pain.' I can find no fault in the judge's approach.

13. On the second issue, the judge made his findings in the following terms:

'That leaves the special damages. I accept the mother's assessment that she spends an increasing amount of time caring for Burac, mainly at night. Twenty hours a week from 12 October 1988 to the end of February and 25

hours from 1 March to 26 June seem to me to be entirely reasonable estimates. The rate allowed again seems to me to be reasonable, as is the deduction of 25% from the commercial rate proposed by the plaintiff. However, Miss O'Rourke submits that there is no recoverable loss under this head. If the referral had been made in October, the mother during the following period would have provided in any event much more care and attendance as from about February he would have had the amputation. This submission has a superficial attraction. However, the plaintiff has to be compensated, as has his mother, for that which actually befell them for eight and a half months; and I do not take into account the possible scenario of events which never happened. The costs and the laundry costs are in my judgment recoverable in full.

14. The evidence that Burac's mother gave to the judge was that after her son's leg was amputated he wet his bed most nights until about 18 months before the hearing (ie until about June 1995, when he was ten and a half). When he woke up at night he could not balance on one leg without his prosthesis, so that she had to help him go to the toilet. She also had to help him on and off with his prosthesis during the day, and help him with dressing (putting on his socks and trousers, tying up his shoe laces and so on) and undressing.

15. She said she could not remember what happened before he had his amputation, although she said that he could not go to the toilet by himself on the occasions when he had such pain that he could not put weight on his leg, and she had to help him. When he cried in the night she used to get up and go to him, but when he did not have any pain in the night there was no need for her to get up.

16. It follows from this evidence that if the defendants had not been negligent Burac's mother would have been even more heavily involved in his care from the time of an amputation which would, on this hypothesis, have taken place eight and a half months earlier than it did. Whether her heavy involvement would have ended eight and a half months earlier than June 1995 appears to be a matter for speculation. This matter does not appear to have been explored in evidence, and if it had, it might have turned out that the time when the boy gave up bed wetting was linked with his actual chronological age rather than the length of time which followed the amputation. In any event, the mother's evidence seems hardly adequate to justify the judge's findings as to the amount of extra care required up to the time of actual referral, and she understandably had difficulty in remembering what happened at that stage.

17. In my judgment, therefore, the judge was wrong in making an award for the mother's care since if the negligence had not occurred she would have been even more heavily involved in her son's care during the same period. I would therefore disallow the judge's awards of £1,818.07 past gratuitous care, and £183.57 laundry expenses until the referral to hospital, and the interest on those special damages, since all these expenses and demands would have been incurred and made in any event if the defendants had not been negligent and the boy's leg had been amputated eight and a half months earlier. I see no reason why the rest of the special damages award, which amounts to £100 for attendances on a private Turkish doctor whom Burac's mother consulted, and medication for the pain, should not stand, together with interest.

18. I turn now to the main issue we have to decide. This relates to the order for costs made by Judge Rivlin for the whole of the period from the issue of the writ on 10 June 1992 until he granted the plaintiff leave to reamend his statement



a of claim on 14 October 1996. For this purpose it is necessary to examine the history of the litigation rather more closely.

b 19. Until Dr Oldershaw was joined as a party to the action in July 1993, the plaintiff's solicitors were pursuing the claim against Dr Kay alone. They wrote their first letter alleging negligence against him on 24 July 1990, and the following month they commissioned the only medical report they had in their possession  
c until the completion of the trial on liability four and a half years later. This was a two-page report by Dr Judith Kingston, an honorary consultant in paediatric oncology at St Bartholomew's Hospital where Burac had been treated from August 1989 onwards. Most of this report was concerned with the identification and attempted treatment of the sarcoma, the subsequent amputation and the post-operative recovery. The only references to the boy's general health and, in particular, to his psychological state before and after the operation, were in the following short passages:

d 'He had presented with an 18 month history of intermittent aching pain in his right leg. The pain was exacerbated by exercise and associated with a limp ... [On admission to my unit in August 1989 his] general health was good and apart from the problems with his right leg there was no other systemic upset ... Burac made an excellent post-operative recovery and mobilised well ... Since [March 1990] Burac has remained well with no evidence of recurrence. He has a prosthetic leg to which he has shown an excellent adaptation and he is now fully mobile and even able to run, Plans  
e are being made for his school placement.'

20. There was no hint in this report of any psychiatric disturbance of any kind.

f 21. In the original statement of claim against Dr Kay, dated 15 June 1992, it was said that he had negligently failed to refer Burac in October 1988 for the necessary and appropriate X-ray investigation, and that he failed thereafter to refer him for such investigation until the end of June 1989. The only part of the short particulars of injury which referred to the period before the amputation read: 'Untreated Ewing's Sarcoma ...' The particulars of loss and expense read, so far as is relevant:

g 'Care and attendance provided by the Plaintiff's mother and family. This has varied, care being provided at varying levels both before and after the amputation. The Plaintiff contends that a fair average is 4 hours per day/night.

October 1988–June 1992

h = 190 weeks × 28 × £3.00 per hour                      £15,960.00  
and continuing At £4,369.00 pa ...'

j 22. No medical report was served with the statement of claim as required by RSC Ord 18, r 12(1A). The plaintiff's solicitors appear to have decided unilaterally that they were not obliged to serve one, and they suggested to Dr Kay on 12 June 1992 that liability ought to be dealt with as a preliminary issue. When they wrote to his solicitors on this subject a fortnight later they said that they were enclosing Dr Kingston's report (which was by now nearly two years old) without prejudice to the contention that they were not obliged to serve it. They went on to ask if the defendant's solicitors were agreeable to an order for a separate trial on the issues of liability and damages. They pointed out that there was clearly a considerable amount of uncertainty regarding their client's future

and that it would be some time yet before the real effects of the loss of his leg would be known in terms of prognosis/damages. a

23. Dr Kay's defence, dated 3 August 1992, was fully pleaded. After five paragraphs relating to the facts, which included an assertion that no complaint was made to him about the condition of the plaintiff's right leg until April 1989, there was a non-admission as to the alleged pain, suffering, loss and expense pleaded (save for the admitted amputation of the leg) and an express denial of causation. Paragraph 7 of the defence reads: b

'Without prejudice to the generality of the denial of causation the Defendant will contend at the trial herein that such pain, suffering, loss and expense as the Plaintiff has sustained has been entirely caused by the development of a tumour and not by any delay in diagnosis (which is in any event denied), and that amputation would in any event have resulted by reason of the Plaintiff's age and size, the nature of the tumour, the risks of radiotherapy for the Plaintiff and the Plaintiff's failure to respond to chemotherapy.' c

24. The particulars of loss and expense (and specifically those relating to care) were then expressly denied. d

25. On 11 August 1992 Dr Kay's solicitors told the plaintiff's solicitors that they were prepared in principle to agree to a split trial.

26. In July 1993 the plaintiff answered a request for further and better particulars of the statement of claim on 8 July and obtained leave to join the second defendant on 20 July, and the amended statement of claim, which pleaded additional allegations of negligence against Dr Kay, and alleged comparable acts of negligence against Dr Oldershaw dating back to July and October 1988, was served on 23 July. This widened the allegations of negligence against the first defendant and included allegations of negligence against the second defendant, but made no material alteration to the particulars of injury, loss and expense. e  
f

27. Further and better particulars of the latter had been afforded a fortnight earlier, and it is necessary to set out the whole of the request and the whole of the answer:

*Request* For the avoidance of doubt and again so that the Defendant might understand the case to be met, please state whether it is hereby contended that the Plaintiff has required additional care by reason of his condition and if so, please state: (a) the nature of such care and how it is alleged to arise out of the alleged delay in diagnosis as opposed to the fact of development of a tumour and the consequent need for treatment of such tumour; (b) the extent of such care and all facts and matters relied upon in support of the claim that four additional hours per day are spent on care (identifying also the times during which such care is provided). g  
h

*Reply* (a) It goes without saying that the Plaintiff's loss of his right lower limb has resulted in the need for increased care. The Plaintiff's case is that the loss of his limb was occasioned by the delayed diagnosis. (b) In the early days, the Plaintiff's mother had to help the Plaintiff mobilise—both before the amputation, when he was in pain and undergoing chemotherapy, and afterwards. When he was supplied with the artificial prosthesis, she had to help him put it on and take it off. He now does this on his own. In addition, because the Plaintiff does not sleep in his prosthesis, he needs help to go to the toilet during the night. The Plaintiff's mother gets him up twice during i  
j

a the night. Extra care is provided from 7.30 am to 9.00 am; 3.30 pm to 4.00 pm; 7.30 pm to 9 pm and for about  $\frac{1}{2}$  hour during the night.'

b 28. It is quite clear that the first defendant, who had expressly pleaded that the amputation was inevitable, was seeking to obtain particulars of the nature of the claim for care that arose out of the alleged delay in diagnosis. Mr Andrews QC very fairly conceded that it was difficult to spell out of the answer any particulars of the care necessary for an untreated sarcoma whose diagnosis was delayed.

c 29. On 11 October 1993 a consent order was made pursuant to Ord 33 that the question or issue of the liability of the first and second defendants to the plaintiff be tried as a preliminary issue before the question or issue of damages (if any). This order did not refer to causation, although it is clear from the directions for the exchange of witness statements and medical records that the parties intended the preliminary issue to cover 'liability issues of negligence and causation of injury'.

d 30. With the benefit of hindsight it would have been very much better if this order had been more carefully drafted. In a complex medical negligence case of this type the critical issue may well be not whether the defendants were negligent but whether their negligence caused the catastrophic injuries of which the plaintiff complains. The leading case of *Wilsher v Essex Area Health Authority* [1988] 1 All ER 871, [1988] AC 1074 was a case of this type, where the premature baby's blindness might have been caused by one of seven different causes, including the fact of premature birth itself. To find the defendants liable tout seul (which is the only inquiry the order directed) would not take matters much further forward, since all that a finding of liability in negligence would show would be that there had been negligence and some resulting loss. The real issues the master ought to have directed were as follows. (1) Was the first defendant negligent in failing to refer Burac to a hospital at any time before 26 June 1989 and if so when was the first occasion on which he was so negligent? (2) Was the second defendant negligent in failing to refer Burac to a hospital at any time before 26 June 1989 and if so when was the first occasion on which he was so negligent? (3) If the answer to question (1) and/or (2) is Yes, did the relevant act of negligent omission cause the plaintiff to lose his leg in the sense that it would have been saved but for the delay in diagnosis? (4) If the answer to question (3) is No, did the proved negligence cause the plaintiff some loss and damage?

e 31. I am not saying that in every medical negligence case the preliminary issues need to be identified with this degree of refinement, but in a case like the present, where the plaintiff is claiming very large damages as a result of the defendants' negligence, and the defendants would probably be willing to concede that their negligence, if proved, caused some minor damage (but not such as to warrant a major High Court action) difficulties are likely to occur over costs if attention is not paid to the way the preliminary issues are framed. In the present case causation (of the need to amputate) was not even mentioned as one of the preliminary issues directed to be tried, although that was the intention of the order. If the order had been framed in the way I suggest, it would have been very much easier for the defendants to make qualified admissions which would have made any later dispute about costs much easier to resolve.

f 32. I return to the history. Dr Oldershaw's interests were protected by different mutual insurers who instructed different solicitors and counsel. In his defence, served on 14 October 1993, it was pleaded that complaints about the condition of Burac's leg were only made to him on two occasions, in July and October 1988, and negligence was denied. His defence adopted a similar



approach to issues of damage and causation as that of the first defendant. A request for the service of a medical report substantiating any alleged injuries which complied with Ord 18, r 12(1A)(a) elicited only the 1990 report of Dr Judith Kingston.

33. The order for exchange of witness statements followed by the exchange of ex parte reports four months later allowed plenty of time for both sides to re-assess the merits of their case on liability and causation before that trial took place. In the event, the exchange of witness statements was delayed by delays in obtaining the medical records of the Turkish doctor who saw Burac as a private patient from time to time during the relevant period. They were eventually exchanged in early July 1994, six months later than provided for in the master's order. This delay led in turn to a delay in the exchange of expert reports, which were exchanged on 10 November 1994, only 26 days before the trial on issues on liability and causation was due to start. On 14 November £3,500 was paid into court on behalf of both defendants, a matter to which I will return in due course. That the real issue between the parties related to the claim that, but for the defendants' negligence, Burac's leg might have been saved, was reinforced by the contents of an exchange of correspondence 'without prejudice save as to costs' between solicitors during the three weeks before the trial started. The plaintiff's solicitors maintained adamantly right up to the trial that an earlier referral would have saved Burac's leg, and they spurned the contents of a very careful letter written by Dr Kay's solicitor dated 29 November. This letter had ended in the following terms:

'We will draw this letter to the attention of the Judge at the conclusion of any trial on liability and if his findings should be:—a. our client was in breach of his duty to the Plaintiff only in respect of a consultation of 24th April 1989 or thereafter; and b. the only loss suffered by that breach of duty is additional pain and suffering until the Plaintiff was, in fact, referred to hospital; then we will ask the Judge to award the costs of the trial on liability to our client (despite the adverse finding) and disallow any claim for costs made by your client by reason of the fact of the payment into court and the contents of this letter and our earlier letter of 16th November 1994. For the avoidance of doubt, although we believe the monies in court reflect the additional pain and suffering element due even to an 18 month delay in diagnosis, we are prepared to discuss the quantum of such a claim with you without the need to proceed to an expensive trial. Therefore, if you proceed to trial in respect only of a claim for additional pain and suffering due only to delay in diagnosis (or if you succeed at trial on such limited basis only and Professor Craft's evidence is preferred to that of Professor Sikora) when we have accepted that we would make payment to your client on the basis that findings at (a) and (b) might be made, we will produce this letter to the Judge on any costs application in support of our contention that a trial was unnecessary and the costs have been incurred by your refusal to discuss the same. Given the imminence of the trial we invite your immediate consideration of this letter and ask you to re-consider with Professor Sikora whether he really maintains his views on causation in the light of Professor Craft's knowledge and expertise in this field. We trust when you have considered the matter with Counsel and your expert you will be able to indicate that no trial against our client need proceed.'

a 34. On 20 December 1994 Judge Rivlin QC delivered his reserved judgment on issues of liability and causation. It is a model of clarity and reasoning, and nobody sought to challenge any of his findings. He held, as I have already said, that Dr Oldershaw was negligent in the way he acted towards Burac on 11 October 1988. In particular the judge held that the doctor should have conducted a visual examination of Burac's leg, and he rejected his evidence that he did in fact refer Burac to the casualty department of the local hospital at the end of his visit to his surgery that day. So far as Dr Kay was concerned, the judge held that he saw Burac on an occasion towards the end of January 1989 when his attitude was very dismissive and when he did not carry out a full examination of his leg. In making this finding the judge preferred Burac's mother's evidence to the evidence of Dr Kay, who had made no note of any such visit and denied that it had taken place, and he held that Dr Kay was negligent in not referring Burac to hospital on that occasion.

d 35. The last quarter of the judgment were substantially devoted to what the judge called the remaining and very important question of causation. On this issue the defendants called Professor Alan Craft, who is professor of paediatric oncology and acting head of the department of child health at Newcastle University. The plaintiff called Professor Sikora, who is professor of clinical oncology at the post-graduate medical school attached to Hammersmith hospital. The judge said of him that he was a witness of very considerable distinction in his field which was, in the main, that of adult oncology. He described Professor Craft, on the other hand, as having unrivalled experience and eminence in this country as a paediatric oncologist with, indeed, a worldwide eminence in this field. Professor Craft was of the opinion that this tumour must have grown to a considerable size by October 1988 and that amputation of the limb would have been inevitable if the tumour had been identified then. Professor Sikora initially expressed the view that six months prior to the first f X-ray examination (in July 1989) was the shortest time within which he would have been able to save the leg. By the end of his evidence he had conceded that it would probably only have been possible to save Burac's leg if it had been X-rayed and the tumour discovered in October 1988. On this issue the judge preferred Professor Craft's clear evidence, and in those circumstances he directed that the inquiry into damages should be limited in each case to the pain, discomfort and distress suffered by Burac as from the date of each doctor's negligent failure to refer him to hospital. The judge reserved the costs of the trial on liability and causation until after the end of the assessment of damages, and said that he would only be willing to assess damages if both parties agreed, since he had been told there had been a payment into court (although not the amount). g h For completeness I should add that the defendants made a slightly enlarged offer during the trial which lapsed very soon after it was made.

j 36. Following the trial on liability the plaintiff's solicitors started to suggest that the quantum of the plaintiff's damages might be greater than they could reasonably have understood from anything previously pleaded or disclosed. The first hint was given in a notice to admit facts in March 1995 which suggested that Burac's pain was very much more serious than had ever been suggested before, and that the bed wetting was a psychological side effect of the stress of illness and leg pain. This was followed by the service in August 1996 of a report by Dr Dora Black, a consultant child and adolescent psychiatrist, dated 9 January 1996, which formed the basis of Douglas Brown J's award of £8,000 for psychiatric injury and £1,720 for future psychotherapy.

37. The matter was restored before Judge Rivlin for directions four times during 1995 and 1996. On 1 August 1995 he gave timetabling directions for the assessment of damages, which was to be conducted by Master Prebble, since the defendants objected to him conducting it himself. On 8 November 1995 he declined a renewed invitation by the defendants to make an order for the costs of the liability trial. On 15 January 1996 Master Prebble made a consent order directing that the assessment be made by a judge. On 30 August 1996 Judge Rivlin made a further order for directions, and on 16 October 1996 he made the first order which is challenged in these proceedings, when he granted the plaintiff leave to reamend the statement of claim to plead his damages claim in the way it was now sought to put it. He did not put the plaintiff on any terms as to costs, and made no order as to the costs of the application.

38. The action then proceeded to the assessment before Douglas Brown J. By this time the action was really all about costs, and because of the disastrous implications to their client if things went wrong, the plaintiff's solicitors obtained authority to instruct leading counsel on the assessment. Although Douglas Brown J reserved the costs of the assessment to Judge Rivlin, he granted the plaintiff a certificate for two counsel. In most ordinary circumstances this would have been an assessment fit for a master or for a judge at a county court, since nobody was suggesting that the plaintiff could recover more than £20,000. These circumstances were, however, the very reverse of ordinary, and although the defendants have challenged this part of the order, I do not consider that this court should interfere with the way Douglas Brown J exercised his discretion on a costs issue.

39. There remained the battle over the costs of the action before Judge Rivlin on 11 February 1997. The plaintiff sought an award of costs in respect of the whole of the action. The defendants contended that as they had paid £3,500 into court on 14 November 1994 and as they had been successful on the important issue of causation, and as the award in respect of pain and suffering until referral to hospital was only £3,000, the plaintiff should be ordered to pay all the costs of the action: alternatively, that in the exercise of the judge's discretion he should grant the plaintiff only a proportion of his costs. The chasm that divided the parties was as great as it possibly could be, and very large sums of costs, in relation to an action which took up 13 days of High Court time, were at stake.

40. The judge rejected all the defendants' contentions and directed that they should pay all the plaintiff's costs of the action. He was critical of the way the defendants had conducted the case, and he said that they had two quite separate opportunities to protect their position as to costs. The first was by a payment in or a Calderbank letter (see *Calderbank v Calderbank* [1975] 3 All ER 333, [1976] Fam 93). The second was by means of a written acceptance of liability under Ord 33, r 4A. He did not consider that the defendants' efforts in the first respect had served to protect their position, and he had no doubt that the defendants could have availed themselves of Ord 33, r 4A if they had wished to do so. Earlier in his judgment the judge said that he had no doubt that by the time he granted the plaintiff leave to reamend his claim, the defendants were well aware and always had been that the claim included an element for psychiatric, or psychological, injury and that in a split trial, as this was, this was a matter which the court would be required to investigate. I will refer to this judgment in rather greater detail in para 59 below.

41. At the start of his submissions Mr Andrews told us that this appeal raised issues of very great importance to personal injury practitioners in relation to the



a conduct of actions in which there is an order for a split trial. In these circumstances it is necessary to set out the relevant rules and principles with some care.

42. First, Ord 18, r 12(1A). This is in uncompromising terms:

b ‘Subject to paragraph (1B), a plaintiff in an action for personal injuries shall serve with his statement of claim—(a) a medical report, and (b) a statement of the special damages claimed.’

43. The definitions of these two expressions are also in uncompromising terms (see r 12(1C)):

c ‘For the purposes of this rule,—“medical report” means a report substantiating all the personal injuries alleged in the statement of claim which the plaintiff proposes to adduce in evidence as part of his case at the trial; “a statement of the special damages claimed” means a statement giving full particulars of the special damages claimed for expenses and losses already incurred and an estimate of any future expenses and losses (including loss of earnings and of pension rights).’

d 44. The only circumstances in which a plaintiff may be relieved of his obligations under r 12(1A) is if the court makes an order under r 12(1B), which may include an order dispensing with the requirements of (1A). Needless to say if the parties reach a clear agreement that there is no need to serve a medical report or a statement of the special damages for the time being, the plaintiff will not suffer any detriment from relying on such an agreement and the court is unlikely to be invited to make an order for their service contrary to the parties’ wishes.

e 45. There was, however, no such agreement in this case, and the plaintiff’s solicitors were not free to proceed unilaterally to ignore the provisions of the rule without seeking an order under r 12(1B). It follows that the defendants were entitled to rely on the 1990 medical report of Dr Kingston and the particulars of loss and expense in the statement of claim as fulfilling the requirements of r 12(1A).

f 46. In cases where the final prognosis is uncertain at the time the statement of claim is served, the medical report(s) served with the statement of claim must make this clear, and care must be taken to include in the statement of special damages all the expenses and losses already incurred, even if for understandable reasons any future expenses and losses can only be estimated. The obligation to serve a medical report with the statement of claim is quite different from the obligation to comply with the requirements of the order for directions in relation to expert medical evidence to be called at the trial, particularly in a case where the final medical picture is not yet known at the start of the proceedings. In the same way, the statement of special damages which must be served with the statement of claim may have to be extended in due course, in a case in which the prognosis is uncertain or where there is a claim for future loss, to include updated figures for actual expenses and losses and a revised estimate of future losses when a schedule is served prior to trial in compliance with the practice direction (damages: personal injuries) (see [1984] 3 All ER 165, [1984] 1 WLR 1127).

j 47. The mischief which the introduction of paras (1A) to (1C) into Ord 18, r 12 was enacted to prevent is set out vividly in the *Report of the Review Body on Civil Justice* (Cm 394, (1988)). Delay in litigation causes personal stress, anxiety and financial hardship to ordinary people and their families (para 68), and the cost of

litigation is often quite disproportionate to the amount involved in the claim (para 69). Personal injuries litigation is the branch of civil litigation which has aroused most concern on the score of cost and delay (para 390(iii)). A general principle of 'cards on the table' as a means of reducing cost and delay in personal injury cases met with widespread approval during the course of the review (paras 439 and 446), and the idea that rules of court should be introduced of the type now enacted was identified as a means of facilitating evaluation of claims by defendants, encouraging early settlements and shortening trials (para 449 and r 60(iii)).

48. The rule-change makes it easier for defendants to evaluate claims from the outset, although they may well have to be put on notice that because the plaintiff's medical condition has not yet settled there is still an element of uncertainty about the general damages claim and the future loss claim. This should be made apparent from a combination of the statement of claim and the two documents required to be served with it, which should represent between them the true amount and evaluation of the plaintiff's claim, so far as this is practicable, at the time the statement of claim is settled. It is improper for plaintiff's solicitors to recuse themselves unilaterally from performing this obligation, so far as the service of an up-to-date medical report is concerned, although this may be quite a short document if the expense of preparing a full report at that stage is not justified, and if the continuing uncertainties are properly explained in the statement of claim and the statement of the special damages. Alternatively, they may be relieved of this obligation completely by agreement or by obtaining a direction of the court under r 12(1B).

49. I have observed that the new rules were introduced to facilitate the evaluation of claims by defendants and encourage early settlements. Another device identified by the Civil Justice Review body as a means of reducing cost and delay in personal injury cases was the use of split trials on liability and quantum (para 435(vii)). The review body reported (para 397) that the great majority of tort claims concern injury suffered on the road or at work:

'Disputes about liability mainly arise over the cause of the accident. They also relate to the extent, if any, to which the conduct of the claimant himself contributed to the accident; and the extent to which the alleged injuries were caused by the particular accident.'

50. Payment into court (see Ord 22) has always been the way open to a defendant to protect his position as to costs in response to a money claim. In 1980 Ord 33, r 4A was introduced on a recommendation contained in the *Report of the Personal Injuries Litigation Procedure Working Party* (Cmnd 7476 (1979)), which was concerned that there was at that time no rule which expressly allowed a defendant to make an offer to accept a specified proportion of responsibility when a split trial was ordered (see para 101). The rule provides:

(1) This rule applies where an order is made under rule 4(2) for the issue of liability to be tried before any issue or question concerning the amount of damages to be awarded if liability is established.

(2) After the making of an order to which paragraph (1) applies, any party against whom a finding of liability is sought may (without prejudice to his defence) make a written offer to the other party to accept liability up to a specified proportion.

a (3) Any offer made under the preceding paragraph may be brought to the attention of the judge after the issue of liability has been decided, but not before.'

b 51. This rule means what it says, and it allows a defendant to make a written offer to a plaintiff to accept liability up to 25% or 50% or 75%, or as the case may be. In my judgment the rule was wholly inapplicable in the present case where it is clear from the correspondence 'without prejudice save as to costs' that the defendants were willing to accept 100% liability of a claim for up to 18 months of 'loss' due to a delayed diagnosis (which I will call 'the tiny claim'), but no liability at all for a claim that their failure to make a referral was the cause of the boy losing his leg (which I will call 'the big claim'). Contributory negligence was never suggested or pleaded, and what was very seriously in issue was the causation of the loss of the leg. In my judgment Ord 33, r 4A was never intended to apply to a situation like this, and Judge Rivlin was plainly wrong to think that it was when he came to exercise his discretion on costs.

c 52. Putting on one side for a moment the effect, if any, of the payment into court, the most substantial issue Judge Rivlin had to determine was who should pay the costs of the issues on liability and causation. The governing rule is Ord 62, r 3(3), which provides:

d 'If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.'

e 53. Matters to be taken into account in exercising this discretion are expressly provided for by Ord 62, r 9(1), which refers, so far as is material to:

f '... (b) any payment of money into court and the amount of such payment; (c) any written offer made under Order 33, rule 4A(2); and (d) any written offer made under Order 22, rule 14, provided that ... the Court shall not take such an offer into account if, at the time it is made, the party making it could have protected his position as to costs by means of a payment into court under Order 22.'

g 54. Mr Andrews was at pains to argue that the rules as to payment in were not really appropriate for determining the costs of a preliminary issue on liability and causation where the court's order for directions had limited the exchange of medical reports to those issues. If that submission was well founded, then the court determining where the costs of a preliminary issue should fall would be entitled pursuant to Ord 62, r 9(1)(d) to take into account any written offer made under Ord 22, r 14 (a 'Calderbank letter' served 'without prejudice save as to costs').

h 55. If one puts on one side both the payment into court and the Calderbank letter, there is still no doubt that the defendants essentially won the trial on liability and causation. All the plaintiff got out of it was a decision which reduced the potential value of his claim, as then put forward, by 99%, from about £300,000, inclusive of interest, to about £3,000. In a situation like this, where on the trial of preliminary issues the plaintiff wholly failed on the big claim (that the defendants' negligence caused the amputation) and only succeeded on the tiny claim (that the defendants ought to have referred the child earlier and are liable in damages for the effects of the delayed diagnosis) the decision of this court in *Re*



*Elgindata Ltd (No 2)* [1993] 1 All ER 232, [1992] 1 WLR 1207 should be applied with appropriate caution. In that case the court was concerned with the costs of a 43-day action in which numerous issues and sub-issues had been canvassed, and Nourse LJ's third principle is in these terms ([1993] 1 All ER 232 at 237, [1992] 1 WLR 1207 at 1214):

'(3) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs.'

56. In my judgment, there are parts of the judgment of Stuart-Smith LJ, with which Balcombe and Peter Gibson LJJs agreed, in *Beoco Ltd v Alfa Laval Co Ltd* [1994] 4 All ER 464, [1995] QB 137, to which Judge Rivlin was also referred, which were of much more moment in the present context. In that case the value of the plaintiff's claim, inclusive of interest, was about £1m (see [1994] 4 All ER 464 at 469, [1995] QB 137 at 145), and the effect of the judge's judgment, at the end of an expensive trial, was that the only damages the plaintiff was entitled to recover were likely to be no more than the £21,574.28 claimed for one item and might well be less (see [1994] 4 All ER 464 at 479, [1995] QB 137 at 156). Although this judgment was mainly concerned with the appropriate order for costs on a very late reamendment, this court also accepted the third submission made by Mr Stow QC, to the effect that the first defendant was substantially the successful party because the plaintiff was aiming at recovering a sum in the order of £1m, whereas all that it succeeded in getting was judgment for damages to be assessed, which on any basis were likely to be more modest (see [1994] 4 All ER 464 at 477, 478, [1995] QB 137 at 153, 155).

57. In his judgment Stuart-Smith LJ referred to such earlier authorities as *Anglo-Cyprian Trade Agencies v Paphos Wine Industries Ltd* [1951] 1 All ER 873 (Devlin J: plaintiff claimed £2,000 and recovered £50 on a late amendment: defendants awarded the costs of the action); *Alltrans Express Ltd v CVA Holdings Ltd* [1984] 1 All ER 685, [1984] 1 WLR 394 (CA: plaintiff claimed £82,500 and recovered £2 nominal damages: defendants awarded the costs of the action); and *Lipkin Gorman v Karpnale Ltd* (1988) [1992] 4 All ER 409, [1989] 1 WLR 1340 (CA: plaintiff claimed £250,000, including £3,375 on a late amendment, and recovered £3,375: defendants awarded the costs of the action down to the date of the amendment and 80% thereafter). Stuart-Smith LJ then continued ([1994] 4 All ER 464 at 479-480, [1995] QB 137 at 156):

'What then should be the result in this case? I can see no reason to deprive the first defendant of the costs down to the date of the amendment. Thereafter, they were essentially the winners, since the primary contest related to the damage caused by the explosion. Even on the basis of the judge's conclusion that the defendant would be liable for the hypothetical loss of production, it was a case in which the first defendant should have been awarded a proportion of their costs thereafter, for the reasons I have already given. As it is, in the light of our decision that the only damages that the plaintiff is entitled to recover is the cost of replacing the casing of the heat exchanger and such loss of production that occurred on 24 August as a result of the defect discovered on that day, this is likely to be no more than £21,574.28 now claimed in the Scott Schedule and it may well be less. Although this sum cannot by itself be described as trivial, in the context of a claim for £1m and the enormous expense of this action, it is trivial. It makes

a no commercial sense to incur costs of this sum to recover such a small sum. And it seems to me very probable that if the first defendant had a proper opportunity to make a payment into court on the basis that its liability on the alternative claim was limited in the way we have held it to be, it would have done so. A payment in of £21,574 plus interest would obviously not have been accepted and it would have made sound commercial sense to have made it. But, for the reasons I have indicated, the first defendant had no chance to do so. Accordingly, in my judgment, although some discount should be made to reflect the very modest degree of success that the plaintiff achieved, it should not be a large one. I would award the first defendant 85% of its costs after 24 February 1992.'

c 58. In this line of cases, where the plaintiff only recovers between 1% and 3% of his original claim (sometimes, but not always, after a late amendment) the court is entitled to ask itself: 'Who was essentially the winning party?' It will not be distracted from making a just order as to costs by the absence of a payment into court which the plaintiff obviously would not have accepted (see *Alltrans Express Ltd v CVA Holdings Ltd* [1984] 1 All ER 685 at 692, 693, [1984] 1 WLR 394 at 403, 404 per Stephenson and Griffiths LJ), or where the defendants did not have a proper opportunity to make a payment into court which obviously would not have been accepted (see *Beoco Ltd v Alfa Laval Co Ltd* [1994] 4 All ER 464 at 479-480, [1995] QB 137 at 156). Although all these cases are different, in the present case the substantive lis between the parties on the trial of the preliminary issues related to the big claim on which the plaintiff wholly failed.

e 59. Judge Rivlin was influenced in the exercise of his discretion as to costs by the following considerations: (1) that the main reason why the trial of the preliminary issues lasted nine days was that seven and a half days were taken up with issues of negligence; (2) that although the full value of the plaintiff's claim, if proved, would have been in the region of, or in excess of, £250,000, the plaintiff was at the end of the day awarded a significant sum of damages; (3) that the plaintiff's decision not to accept the very modest payment into court, or the small increased offer, could not possibly be said to be unreasonable, given that in the judge's view the offers made to him were on any view parsimonious; (4) given that the plaintiff was awarded £17,500, and applying the *Elgindata* principles, there was a strong case that he should be awarded all his costs of both trials and of all the intermediate proceedings; (5) that the late amendment of the plaintiff's case to include specific allegations of psychiatric damage did not mean that this order would create injustice to the defendant; (6) that the defendants could have protected, and did not succeed in protecting, their position by a payment in or a Calderbank letter, or by means of a written acceptance of liability in accordance with Ord 33, r 4A. (I have already expressed my view that rule had no application in this case.)

h 60 In the result, the judge was satisfied that the defendants should pay all the plaintiff's costs of the action. These were divided up so that there were separate orders for two trials and five interlocutory hearings, with interest on costs running for the most part from the date of the relevant hearing. He refused leave to appeal, but leave was granted by Beldam LJ at the same time as he granted the defendants leave to appeal against Judge Rivlin's order granting the plaintiff leave to reamend.

j 61. I should say at once that I regard that order as properly made, subject to its costs implications. The plaintiff was entitled to plead his case as he sought provided that the defendants could be substantially protected in costs from any

injustice arising from the reamendment (see *Beoco Ltd v Alfa Laval Co Ltd* [1994] 4 All ER 464, [1995] QB 137). Once the reamendment was granted, there was no reason why the plaintiff should not recover his costs of the assessment of damages from the date of the reamendment, since the defendants did not protect themselves against the enlarged claim by an appropriate payment in.

62. The problems that bedevilled this action during 1996 arose from the fact that the plaintiff's solicitors had not paid any proper attention until early 1995 to the way their tiny claim (in which there was no hint of continuing damage until the psychiatric element was introduced) was pleaded or quantified. They had been given an express opportunity to particularise this claim more fully which they did not take. There was also no hint (even in the plaintiff's mother's witness statement, served before the trial on liability) of the continuing frequency of severe extreme pain which induced Douglas Brown J to award £3,000 damages, and no mention of any psychiatric damage at all.

63. In my judgment the sum of £3,500 which the defendants paid into court in November 1994 could not reasonably be described as a parsimonious evaluation of what they had by then been told about the tiny claim. If it was necessary to do so, I personally would have held that was a payment in which adequately protected them against costs until the reamendment of the plaintiff's claim two years later. I prefer, however, to adopt a different approach in the very unusual circumstances of this case, for the reasons I give in para 67 below.

64. I am satisfied that on any showing Judge Rivlin's approach to the exercise of his discretion as to costs was plainly wrong and that it cannot stand. My reasons are these.

(1) The defendants only put up a stubborn resistance on liability because on Professor Sikora's evidence the plaintiff's solicitors were contending that any finding of negligence which antedated January 1989 rendered the defendants liable for the big claim, and they were persisting with the big claim against the first defendant despite his solicitors pointing out that even if what Professor Sikora said was accepted by the judge they would not succeed on the big claim as against him. In their Calderbank letter they made it clear that they would be happy to negotiate a settlement of the tiny claim, notwithstanding the payment into court.

(2) The judge was quite wrong to lump the trials as to liability/causation and quantum together. If he had kept them separate in his mind and remembered that until the reamendment was permitted the plaintiff's tiny claim was indeed a tiny claim, he would never have linked what he called a 'significant sum of damages' with his decision on the costs of the trial of the preliminary issues, which the plaintiff essentially lost. He was also wrong to say that the defendants had always been well aware that the plaintiff's claim included an element for psychiatric or psychological injury. There was no clear evidence of such a claim until Dr Black's report (see para 36 above) was served in August 1996: it was hinted at for the first time in March 1995.

(3) Like the judge I do not consider the plaintiff's conduct in the action to be unreasonable, in the sense that word is used in connection with discretionary decisions on costs, although I differ from him as to the adequacy of the amount paid into court in relation to the size of the tiny claim, as it was then reasonably evaluated by the defendants' solicitors on the information then placed before them.

(4) The judge was wrong, when applying the third principle in *Re Elgindata Ltd (No 2)* [1993] 1 All ER 232 at 237, [1992] 1 WLR 1207 at 1214 not to make a



a separate order as to the costs of the issues on liability/causation on which the defendants were essentially the winners.

(5) The late amendment of the plaintiff's case to include specific allegations of psychiatric damage completely transformed it as compared with his case on the tiny claim at the end of 1994.

b (6) The judge's reference to the applicability of Ord 33, r 4A was wrong. In my judgment the defendants did protect themselves adequately by the payment in and (if the payment in should be treated as inapplicable for the reasons suggested by Mr Andrews) they protected themselves to a considerable extent by the terms of the Calderbank letter.

c 65. I have great sympathy with the judge. He was being invited to exercise his discretion in a most unusual situation, and no doubt he was also influenced by a very humane desire to protect Burac's award of damages from the incidence of the legal aid charge or from a set-off for costs asserted by the defendants. In this context Mr Andrews told us that Burac desperately needs the course of psychotherapy treatment for which Douglas Brown J awarded him £1,720, and that such a course cannot be funded by the national health service.

d 66. Since Judge Rivlin's order cannot stand, it is for this court to decide in the exercise of its discretion how the costs of the action should fall. In my judgment the appropriate order would be that the defendants should pay the plaintiff his costs of the action up to 20 December 1994, save that the plaintiff should pay the defendants 90% of their costs arising out of the trial of the issues on liability and causation. The defendants should pay the plaintiff his costs thereafter, except for  
e the costs of and incidental to the application to reamend which the plaintiff should pay the defendants. The defendants are to be entitled to set off any costs the plaintiff may be liable to pay them under this order against any liability they may have to pay damages and costs to the plaintiff.

f 67. I would make the order in this form because, in the absence of guidance from this court, the plaintiff's solicitors might be forgiven for not having incurred expense (for which they would have required legal aid authority) in ascertaining the likely eventual dimensions of what I have called the tiny claim between the time the statement of claim was served and the time the preliminary issues were decided. In those circumstances it would be much fairer to ignore the payment  
g into court, and instead to treat the defendants as essentially the winners in relation to the preliminary issues. I would limit their recovery of costs to 90% because it would always have been open to them to have made an admission of facts under Ord 27, r 1, and this could have reduced the length and costs of that trial. The second defendant did not write a Calderbank letter, and the first  
h defendant's solicitors were not willing to accept the possibility of a finding of negligence prior to April 1989 in the letter they wrote. However that may be, so long as the plaintiff was asserting that Dr Kay's alleged negligence in January 1989 was causative of the need to amputate the leg this assertion would have been bound to be resisted, and the plaintiff lost on that major issue.

i 68. After the end of the trial of the preliminary issue the defendants were put on notice that the quantum of the plaintiff's tiny claim might be larger than hitherto suggested. This court has said that so long as notice is given (particularly in the form of medical reports) it is not necessary to go through the formal process of amending the pleadings each time the medical position changes (see *Owen v Grimsby and Cleethorpes Transport* (1991) Times, 14 February) and the defendants then did nothing to protect their position by way of an enlarged payment into court. On taxation of the plaintiff's costs over this period, however,

the taxing authorities should bear in mind that this was at best a £20,000 claim from December 1994 onwards. a

69. In response to Mr Andrews' request for general guidance, the moral of this history seems to be:

(1) Order 18, r 12(1A) is there to be obeyed. Defendants should be able to evaluate a claim and make a payment into court soon after a statement of claim is served, if they wish. The statement of the special damage claim must be fully stated as at the date of the statement of claim. If for any reason a plaintiff's solicitors wish to be relieved of their obligation of commissioning an up-to-date medical report at the time when proceedings are served, they should obtain agreement from the defendants' solicitors about this course, or an order from the court. In any event, if the plaintiff's prognosis is still uncertain at the time the statement of claim is served, this should be made clear in the statement of claim in the medical report served with it. b  
c

(2) If from a defendant's defence it is clear that he is suggesting that even if the plaintiff wins on liability he may lose on causation to a very substantial extent, his solicitors must furnish particulars to the defendant's solicitors of their client's claim on the alternative hypothesis (negligence but not much resulting damage) if these are requested. Otherwise, if a payment into court is made, they may find themselves in difficulties if they lose on their principal causation allegations in a trial of a preliminary issue. d

(3) On a trial of a preliminary issue a court may ask itself 'Who essentially was the winner?' and make an order as to costs to follow that event in a case like the present, in which it may be prudent to take much more care in formulating the preliminary issues to be tried, in order to make it easier for a defendant to limit them by admissions. e

(4) If for any reason a payment into court is not an available option in a personal injuries action, defendants' solicitors should bear in mind that a notice admitting facts may be a more effective device for limiting their clients' liability for costs than a Calderbank letter. f

(5) Order 33, r 4A is available as a device for limiting the incidence of costs where the proportion of a defendant's liability may be in issue. It is not available in a case like the present, where there was no suggestion of any contributory negligence. g

70. For the reasons I have given, I would dismiss the defendants' appeal from the order granting leave to reamend, allow their appeal from the judgment of Douglas Brown J to the limited extent set out in para 17 above, and allow their appeal from Judge Rivlin's order for costs, substituting the order I have suggested in para 66 of this judgment. I hope that counsel will be able to agree draft minutes of the order of this court which will reflect the effect of this judgment. h

MILLETT LJ. I agree.

HIRST LJ. I also agree. j

*Appeal allowed in part. Leave to appeal to the House of Lords refused.*

Mary Rose Plummer Barrister.

## Reeves v Commissioner of Police of the Metropolis

COURT OF APPEAL, CIVIL DIVISION

LORD BINGHAM OF CORNHILL CJ, MORRITT AND BUXTON LJ

20 OCTOBER, 10 NOVEMBER 1997

*Police – Negligence – Duty to take care – Person in custody – Suicide risk – Police taking person with suicidal tendencies into custody – Police having knowledge of prisoner’s suicidal tendencies – Prisoner committing suicide by hanging himself using shirt tied through spyhole on outside of cell door – Administratrix on behalf of deceased estate bringing action for negligence against police – Whether police failing to take reasonable steps to prevent prisoner committing suicide – Whether defences of volenti non fit injuria, novus actus interveniens or ex turpi causa non oritur actio available.*

The plaintiff sued as administratrix of L, who had committed suicide while in police custody. The police had known that L was a suicide risk because of incidents on earlier occasions when he had been in custody; and because the police surgeon who had examined L on the day in question had considered that he was a suicide risk and that he should be kept under observation, although she had found no evidence of specific mental disturbance. L had hanged himself shortly after the examination, by tying his shirt through the spyhole on the outside of his cell door; he had been able to do that because the flap in the cell door had been left down. The plaintiff claimed damages against the commissioner of police for negligence. The judge found that L was of sound mind at the time of his suicide; that the officers owed L a particular duty to take care to prevent him from committing suicide because they knew he was a suicide risk; that they were negligent in failing to shut the door flap after putting L in the cell because it might reasonably have been foreseen that that would give him the opportunity to strangle himself; and that there was a causative link between the negligent act and L’s death. The judge held, however, that the defendant could rely, inter alia, on the defences of volenti non fit injuria and novus actus interveniens. He would also have upheld the defence based on the maxim ex turpi causa non oritur actio had it been necessary to do so. The plaintiff appealed.

**Held** – (Morritt LJ dissenting) (1) The defence of volenti non fit injuria was not appropriate in a case such as the instant one where the act of the deceased relied upon to establish that defence was the very act which the defendant was under a duty to prevent. Moreover, there was no distinction in an action involving suicide between a case where the deceased had been of unsound mind and one where he had been of sound mind (see p 387 c to g, p 388 c to g, p 396 b and p 404 d to g, post); *Kirkham v Chief Constable of the Greater Manchester Police* [1990] 3 All ER 246 considered.

(2) The defence of novus actus interveniens had to be based on an act which obliterated the defendant’s wrongdoing, and it could not be said that L’s suicide was such an act, because the defendant’s act or failure was characterised as wrongdoing in the context of, and by reason of a duty to prevent, that very suicide. Further, it could not be said to be an intervening cause or a new act, because the main reason for placing the defendant under a duty to L was the fact that he was



known to be a suicide risk (see p 389 *b* to *e h j*, p 396 *b* and p 403 *j* to p 404 *a*, post); *P Perl (Exporters) Ltd v Camden London BC* [1983] 3 All ER 161 applied. a

(3) The case of a claim arising out of suicide was quite different from the usual case in which the defence of *ex turpi causa non oritur actio* might be pleaded, the alleged turpitudinous act being the very thing the defendant had a duty to try to prevent, imposed by a law of negligence which itself appealed to public conscience or notions of reasonableness. To grant relief in such a case would not assist or encourage others in the same situation as *L* to continue in their disapproved conduct; nor could it be said that a citizen who was taken to be fully informed of the circumstances of the case would react with shock or affront to an award of damages in respect of the suicide of a man known to be a suicide risk while he was involuntarily in police custody. It followed that the appeal would be allowed (see p 393 *j* to p 394 *fh*, p 396 *b* and p 404 *j* to p 405 *b h*, post); *Kirkham v Chief Constable of the Greater Manchester Police* [1990] 3 All ER 246 considered. b  
c

### Notes

For the duty of care generally, see 33 *Halsbury's Laws* (4th edn reissue) paras 601–602, 608, 610, and for cases on the subject, see 36(1) *Digest* (2nd reissue) 21–42, 132–204. d

For the defence of *volenti non fit injuria*, see 33 *Halsbury's Laws* (4th edn reissue) paras 669–670, and for cases on the subject, see 36(1) *Digest* (2nd reissue) 381–385, 3054–3073.

For the defence of *novus actus interveniens*, see 12 *Halsbury's Laws* (4th edn) paras 1142, 1192. e

For the application of the maxim *ex turpi causa non oritur actio*, see *ibid* para 1136.

### Cases referred to in judgments

*Anglo-Newfoundland Development Co Ltd v Pacific Steam Navigation Co* [1924] AC 406, HL. f

*Cutler v United Dairies (London) Ltd* [1933] 2 KB 297, [1933] All ER Rep 594, CA.

*Euro-Diam Ltd v Bathurst* [1988] 2 All ER 23, [1990] 1 QB 1, [1988] 2 WLR 517, CA.

*Grant v Sun Shipping Co Ltd* [1948] 2 All ER 238, [1948] AC 549, HL.

*Hutchinson v London and North Eastern Ry Co* [1942] 1 All ER 330, [1942] 1 KB 481, CA. g

*Hyde v Tameside Area Health Authority* (1981) Times, 16 April, [1981] CA Transcript 130.

*Jayes v IMI (Kynoch) Ltd* [1985] ICR 155, CA.

*Kirkham v Chief Constable of the Greater Manchester Police* [1990] 3 All ER 246, [1990] 2 QB 283, [1990] 2 WLR 987, CA; *affg* [1989] 3 All ER 882. h

*Lynch v Nurdin* (1841) 1 QB 30, [1835–42] All ER Rep 167, 113 ER 1041.

*Mackonochie v Lord Penzance* (1881) 6 App Cas 424, HL.

*Mitchell v W S Westin Ltd* [1965] 1 All ER 657, [1965] 1 WLR 297, CA.

*Morris v Murray* [1990] 3 All ER 801, [1991] 2 QB 6, [1991] 2 WLR 195, CA.

*National Coal Board v England* [1954] 1 All ER 546, [1954] AC 403, [1954] 2 WLR 400, HL. j

*Nettleship v Weston* [1971] 3 All ER 581, [1971] 2 QB 691, [1971] 3 WLR 370, CA.

*Perl (P) (Exporters) Ltd v Camden London BC* [1983] 3 All ER 161, [1984] QB 342, [1983] 3 WLR 769, CA.

*Pigney v Pointers Transport Services Ltd* [1957] 2 All ER 807, [1957] 1 WLR 1121, Assizes.

*Pitts v Hunt* [1990] 3 All ER 344, [1991] 1 QB 24, [1990] 3 WLR 542, CA.

- Saunders v Edwards* [1987] 2 All ER 651, [1987] 1 WLR 1116, CA.
- a* *Smith v Baker & Sons* [1891] AC 325, [1891–4] All ER Rep 69, HL.
- South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1996] 3 All ER 365, [1997] AC 191, [1996] 3 WLR 87, HL.
- Stansbie v Troman* [1948] 1 All ER 599, [1948] 2 KB 48, CA.
- b* *Staveley Iron and Chemical Co Ltd v Jones* [1956] 1 All ER 403, [1956] AC 627, [1956] 2 WLR 479, HL.
- Tinsley v Milligan* [1993] 3 All ER 65, [1994] 1 AC 340, [1993] 3 WLR 126, HL.
- Weld-Blundell v Stephens* [1920] AC 956, [1920] All ER Rep 32, HL.
- Wooldridge v Sumner* [1962] 2 All ER 978, [1963] 2 QB 43, [1962] 3 WLR 616, CA.
- Yachuk v Oliver Blais Co Ltd* [1949] 2 All ER 150, [1949] AC 386, PC.

*c* **Cases also cited or referred to in skeleton arguments**

- Bennett v Tugwell (an infant)* [1971] 2 All ER 248, [1971] 2 QB 267.
- Bowater v Rowley Regis Corp* [1944] 1 All ER 465, [1944] KB 476, CA.
- Butterfield v Forrester* (1809) 11 East 60, 103 ER 926.
- d* *Cope v Nickel Electro* [1980] CLY 1268.
- Dann v Hamilton* [1939] 1 All ER 59, [1939] 1 KB 509.
- Funk v Clapp* (1986) 68 DLR (4th) 229, BC CA.
- Gerstel v City of Penticton Corp* [1995] 9 WWR 206, BC SC.
- Hall v Brooklands Auto Racing Club* [1933] 1 KB 205, [1932] All ER Rep 208, CA.
- Hugh v National Coal Board* 1972 SC 252, Ct of Sess.
- e* *Imperial Chemical Industries Ltd v Shatwell* [1964] 2 All ER 999, [1965] AC 656, HL.
- Insurance Comr v Joyce* (1948) 77 CLR 39, Aust HC.
- McMullen v National Coal Board* [1982] ICR 148.
- Pretty On Top v City of Hardin* (1979) 597 P 2d 58, Mont SC.
- Robson v Ashworth* (1987) 40 CCLT 164, Ont CA.
- f* *Slater v Clay Cross Co Ltd* [1956] 2 All ER 625, [1956] 2 QB 264, CA.

**Appeal**

- The plaintiff, Sheila Reeves, as joint administratrix of the estate of Martin Lynch, appealed from the decision of Judge Sir Frank White sitting at the Central London County Court given on 19 June 1996, whereby he (i) dismissed the plaintiff's claim
- g* for damages against the Commissioner of Police of the Metropolis for negligence caused or contributed by his officers in failing to take reasonable steps to prevent Mr Lynch from committing suicide whilst in their custody and (ii) upheld the defences of *volenti non fit injuria* and *novus actus interveniens* and indicated that, had it been necessary, he would also have upheld the defence based on the maxim
- h* *ex turpi causa non oritur actio*. The facts are set out in the judgment of Buxton LJ.

*Tim Owen* (instructed by *Christian Fisher*) for the plaintiff.

*Simon Freeland* (instructed by the *Solicitor, Metropolitan Police*) for the commissioner.

*Cur adv vult*

*j*

10 November 1997. The following judgments were delivered.

**BUXTON LJ** (giving the first judgment at the invitation of Lord Bingham of Cornhill CJ). The basic facts relevant to this appeal can be stated in short compass; are not in dispute; and are set out very clearly in the judgment of Judge Sir Frank White.

The plaintiff sues as the administratrix of Martin Lynch deceased. Mr Lynch died in hospital on 1 April 1990, as a direct result of a suicide attack upon himself committed on 23 March 1990 when he was in custody on remand at the Kentish Town police station. On 23 March 1990 the officers responsible for Mr Lynch's custody already knew that he was a suicide risk, because of incidents on earlier occasions when he had been in police custody. On the morning of that day, while Mr Lynch was at the magistrates' court, a further incident occurred which may or may not have been a serious suicide attempt by Mr Lynch. He was however produced to the magistrates and further remanded in custody by them. On his return to the Kentish Town police station he saw the police surgeon. She thought him to be a suicide risk and said that he should be kept under observation, but could find no evidence of specific mental disturbance. I interpose to say that on the basis of that and other evidence the judge found that at the time of his suicide Mr Lynch was of sound mind and not suffering from any marked medical or psychiatric condition.

Shortly after that examination Mr Lynch hanged himself. He was able to do that because the wicket gate or flap in the cell door had been left down, and that enabled him to tie his shirt through the spy hole on the outside of his cell door, and hang himself with it. On the basis of those primary facts the judge made a number of holdings that are not challenged before us. (1) The defendant's officers owed a duty of care to Mr Lynch, because they knew he was a suicide risk. The content of the duty was to take reasonable care to prevent such a person who was being held by them from committing suicide. (2) It was negligent of those officers not to shut the wicket gate after Mr Lynch had been placed in the cell, because it might reasonably have been foreseen that that gave Mr Lynch an opportunity to strangle himself in the way that in fact occurred. (3) Leaving aside at that stage the important question of whether Mr Lynch's own act was a novus actus interveniens, there was a causative link between the negligent act and Mr Lynch's death.

#### *The decision in the court below*

On that basis, and save for the defences raised by the commissioner, the plaintiff should have succeeded. The judge however held that the commissioner could avoid liability by relying on the defences both of *volenti non fit injuria* and of contributory fault; and further, without deciding the point, he was attracted to the view that the plaintiff's claim was defeated also by the operation of the maxim or principle *ex turpi causa non oritur actio*. The commissioner maintains all those defences before us, and in addition argues that Mr Lynch's suicide was a novus actus interveniens, thus defeating the plaintiff's claim on grounds of causation. Although logically that issue should come first, involving as it does an alleged failure on the part of the plaintiff to establish his claim rather than a defence to that claim once *prima facie* established, for reasons of convenience which will become apparent I deal with it at a later stage of this judgment.

#### *Volenti non fit injuria*

The judge described this defence as amounting to a claim by the commissioner that, both on the facts and on the law, the whole blame for Mr Lynch's death must rest on Mr Lynch's shoulders. He held that that claim was made out. This issue was dominated before the judge by very careful analysis of the decision in this court in *Kirkham v Chief Constable of the Greater Manchester Police* [1990] 3 All ER 246, [1990] 2 QB 283, a case that also involved a suicide in police custody, and which has equally and properly been the subject of careful analysis before us. Before turning



a to *Kirkham's* case, however, it is important to remind ourselves first of the nature and basis of the defence of volenti. Mr Owen, for the plaintiff, took us to paras 3-43 and 3-44 of *Clerk and Lindsell on Torts* (17th edn, 1995), where the editor draws attention to two possible theoretical bases for the defence: that the plaintiff is to be taken to have agreed to waive any claim for injury (see *Nettleship v Weston* [1971] 3 All ER 581 at 587, [1971] 2 QB 691 at 701 per Lord Denning MR); or on the other  
b hand that evidence that the plaintiff was volens simply operates to define the scope of the duty owed to him by the defendant (see most clearly for that view the judgment of Diplock LJ in *Wooldridge v Sumner* [1962] 2 All ER 978 at 989, [1963] 2 QB 43 at 67). In *Morris v Murray* [1990] 3 All ER 801 at 807, [1991] 2 QB 6 at 15 Fox LJ held that there was probably not much difference between the two positions, a view strongly indorsed in *Clerk and Lindsell*, and continued, in respect  
c of the application of the defence of volenti to a case of negligence:

‘In general, I think that the volenti doctrine can apply to the tort of negligence, though it must depend on the extent of the risk, the [plaintiff’s] knowledge of it and what can be inferred as to his acceptance of it.’

d I would respectfully agree that this broadly pragmatic approach is to be found in the majority of the cases. I would however note in passing that if the theory of the defence of volenti is indeed that ‘volens’ conduct on the part of the plaintiff affects the content of the defendant’s duty, that would seem to be conclusive in this case against the availability of the defence. That is because the judge found, without  
e challenge before us, that the duty in this case was to take reasonable care to prevent Mr Lynch committing suicide. It is very difficult to see how Mr Lynch’s voluntary act in actually so committing suicide can amend or affect the content of that duty at all; save at least by destroying that duty altogether, which would be inconsistent with the judge’s unchallenged finding as to the existence of the duty.

f Putting these difficult theoretical matters on one side, however, and approaching the defence on a more pragmatic basis, counsel for the commissioner said, without dissent by his opponent, that a valuable guide was to be found in *Smith v Baker & Sons* [1891] AC 325 at 360, [1891-4] All ER Rep 69 at 87, where Lord Herschell said:

g ‘The maxim is founded on good sense and justice. One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong.’

h That means, in a negligence case, not so much assent to infliction of injury as assumption of the risk of it: see *Salmond and Heuston on the Law of Tort* (21st edn, 1996) p 474. It will immediately be seen that there may be some difficulty in applying that analysis in a case such as ours, where the negligence of the defendant consisted not in the infliction of injury, but in not taking reasonable steps to prevent Mr Lynch from injuring himself. I return to that difficulty at a later stage of this judgment.

i Turning now to *Kirkham's* case, the prisoner in that case was, unlike Mr Lynch, suffering from what was described as clinical depression. He killed himself in prison, in circumstances where the defendant police authority was found to have been negligent in not passing on to the prison authorities information about his suicidal tendencies. In *Kirkham's* case, as in our case, the defences advanced were volenti and ex turpi causa. Both failed, but we should note now that in the argument in our case the difference between the mental state of deceased in *Kirkham's* case on the one hand and of Mr Lynch on the other looms very large.

Thus in *Kirkham's* case [1990] 3 All ER 246 at 250–251, [1990] 2 QB 283 at 289–290 Lloyd LJ said:

‘Where a man of sound mind injures himself in an unsuccessful suicide attempt, it is difficult to see why he should not be met by a plea of *volenti non fit injuria*. He has not only courted the risk of injury by another; he has inflicted the injury on himself ... But in the present case Mr Kirkham was not of sound mind ... If it had been a case of murder he would have had a defence of diminished responsibility due to disease of the mind ... he was not truly *volens*. Having regard to his mental state, he cannot, by his act, be said to have waived or abandoned any claim arising out of his suicide. So I would reject the defence of *volenti non fit injuria*.’

On the basis of this passage, the commissioner argues strongly that Lloyd LJ, albeit obiter, could see no answer to a claim of *volenti* in respect of the suicide of a person of sound mind: as on the judge’s findings Mr Lynch has to be taken to have been.

Farquharson LJ adopted a different approach ([1990] 3 All ER 246 at 254, [1990] 2 QB 283 at 294–295):

‘Dr Sayed, who gave evidence for the plaintiff at the trial and was well acquainted with Mr Kirkham’s medical history, agreed under cross-examination that Mr Kirkham’s suicide was a conscious and deliberate act. In those circumstances it is argued that the defendant could rely on the maxim *volenti non fit injuria*. In one sense there can be no better evidence of Mr Kirkham being *volens* than the fact that he died by his own hand. In my judgment this defence fails on two grounds. It is clear that Mr Kirkham was disturbed at the time of his death: quite apart from his recent medical history there was his behaviour at home immediately before his arrest, and his shouting at the magistrates in court, when they remanded him in custody to Risley, that if he was sent there he would never come back. Dr Sayed gave evidence that Mr Kirkham was, at the time of his death, suffering from clinical depression. I have already cited his opinion that Mr Kirkham was desperate and wanted to do away with himself. In the light of those facts and that evidence, it seems to me quite unrealistic to suggest that Mr Kirkham was truly *volens*. His state of mind was such that, through disease, he was incapable of coming to a balanced decision even if his act of suicide was deliberate. The second ground is that the defence is inappropriate where the act of the deceased relied on is the very act which the duty cast on the defendant required him to prevent. If in such circumstances the defendant could raise this defence, as counsel for the plaintiff submits, no action would ever lie in respect of a suicide or attempted suicide where a duty of care could be proved.’

Sir Denys Buckley ([1990] 3 All ER 246 at 255, [1990] 2 QB 283 at 296) said that he agreed with both the conclusion and the reasons of Lloyd and Farquharson LJ. On that basis, counsel for the plaintiff argues that that agreement must extend to the second of the grounds adopted by Farquharson LJ, and that the latter is therefore a binding ratio of *Kirkham's* case. I do not agree. Sir Denys Buckley did not distinguish between the second ground of Farquharson LJ and the approach adopted by Lloyd LJ, even though, as we can now see, with the benefit of the argument in this case, they are inconsistent or at least potentially inconsistent with each other. Sir Denys’ agreement as much extends to the doubts expressed by Lloyd LJ as to whether a man of sound mind may maintain an action as to the

a second ground of Farquharson LJ, that appears to set those doubts aside. It is not possible, therefore, to spell out of *Kirkham's* case the ratio that the plaintiff seeks.

b At the same time, however, Sir Denys conspicuously did not express disagreement with the second ground of Farquharson LJ, which remains open for consideration by this court. I consider that that ground is clearly correct, and should be followed. I say that with great respect to Lloyd LJ, while bearing in mind that, because of the view that he took of the impact on the result in *Kirkham's* case of the deceased's mental illness, he was not required to submit the issue that is now before this court to full and detailed analysis. My reasons for thinking that the defence of volenti is inept in the present case are as follows.

c First, the very short point is that the defence is inappropriate for the short reason given by Farquharson LJ. If the police's obligation was to guard against suicide, that is to protect Mr Lynch from a deliberate act against his own life, I do not see how they can be or should be exempted from liability because that deliberate act in fact occurred. If it were to be the law that the act of suicide by a sane person exempts the police from liability, one would expect that to be achieved by holding there to be no duty of care in the case of a sane man. That was not what the judge held, nor is it what the commissioner submits to us. It is the existence of that duty, d which contemplates the *prevention* by the defendant of the very act that is said to constitute the voluntary or intervening act on the part of the plaintiff, that sets this case apart from those such as *Cutler v United Dairies (London) Ltd* [1933] 2 KB 297, [1933] All ER Rep 594, where the plaintiff by his own act put himself within the zone of peril that caused the accident (see [1933] 2 KB 297 at 305, [1933] All ER Rep e 594 at 600 per Slessor LJ).

Second, I think that Farquharson LJ was right in saying that, if the defence of volenti is available, no action would ever lie for a suicide in respect of which a duty of care had been established. The judge did not agree, pointing to the outcome in *Kirkham* itself. But that outcome, if it is held (as in the commissioner's argument) f to uphold the availability of the defence where the deceased was sane or of sound mind, depends on making a distinction, within the persons who are suicide risks to whom the duty is owed, between those who are of sound mind and those who are not. But the law in imposing the duty in the first place makes no such distinction, as the judge's own findings in this case demonstrate.

g Third, if the defence of volenti is to be available, it is necessary to distinguish this case from the result in *Kirkham's* case. That can only be done on the basis that Mr Lynch was 'of sound mind'. That distinction is inconsistent with the recognition that a duty of care existed in his case as much as in the case of the deceased in *Kirkham's* case. But, further, the distinction in practical terms will be difficult or impossible to make. Counsel for the commissioner declined to specify where the h line could or should be drawn, or what mental state (over and above the mere existence of suicidal tendencies) might deprive a person of the status of soundness of mind. The court in *Kirkham's* case placed weight on the fact that the deceased there would, in a case of murder, have had the benefit of a defence of diminished responsibility. It is not clear whether that was a necessary, or merely a sufficient, condition for lack of soundness of mind. In either event, the possibility of i introducing that notoriously difficult inquiry into this area of litigation is one that I would not wish to contemplate unless driven to it.

Fourth, to introduce a criterion of soundness of mind would cause some difficulties in terms of evidence. In the nature of things, the deceased will not have been examined by anyone acting on behalf of the plaintiff, and any expert evidence given on the plaintiff's part will be theoretical only. This would of course not be a conclusive objection if the law otherwise demanded such an inquiry; but in our



case it underlines the practical as well as the principled objections to the availability of the defence of volenti. a

Fifth, more difficult to state and no doubt also less compelling, there is a considerable element of artificiality involved in applying the traditional statements setting out the elements of the defence of volenti to the facts of the present case. In a negligence case such as the present, the defendant can assert the defence if he can show that the plaintiff assumed or consented to his being exposed to the risk the existence of which constituted the defendant's negligent act. The risk that the defendants created or failed to dispel in this case was the risk that Mr Lynch might kill himself. But is it realistic to say that by deliberately killing himself Mr Lynch assumed a risk that he might kill himself? And how did he assume that risk? The only evidence of that assumption or agreement on his part is his actual suicide. Although in one sense it might be said that Mr Lynch manifested his agreement to the failure of the police to take precautions against his suicide by actually committing that suicide, I consider that analysis to be misleading. The case is quite different from the normal case of volenti, where the plaintiff can be said to have willingly entered a hazardous situation in which injury may or may not accrue to him from the future negligence of another party: most conspicuously, where the plaintiff accepts a lift from an obviously drunken driver. By contrast, in our case the defendant had an obligation to act towards Mr Lynch in and because of an already existing situation between them. Mr Lynch did not enter that situation, of incarceration, as a volunteer: quite the reverse. Nor, except by reference to the eventual outcome, is it possible to say that Mr Lynch agreed to or accepted the way in which the police performed their duty in that situation. Rather, he took advantage of the police's lapse: but it was the proffering of that opportunity that constituted the police's actual negligence. b

I mention these latter difficulties in applying the traditional analysis to this case not so much to suggest that they are conclusive in themselves, but rather further to illustrate that the defence of volenti simply does not fit into a case where the act demonstrating the plaintiff to be volens is that act that the defendant was negligent in not taking reasonable precautions to prevent. c

I would therefore reject the judge's conclusion on this issue. The defence of volenti non fit injuria is not available to the commissioner in this case. d

#### *Novus actus interveniens* e

I deal with this matter at this stage because the judge treated the plea or assertion of novus actus as being closely bound up with the defence of volenti, to the extent that he gave no separate consideration to novus actus. I doubt whether that view was correct; but I do not pause on that question, since the plea of novus actus was separately debated before us. Put shortly, the contention is that Mr Lynch's death was caused by his own act, not by the acts or omissions of the police officers, and therefore the necessary link between their negligence and any damage suffered by Mr Lynch or his representatives was broken. That argument at first sight has the attraction of appealing to practical common sense, but I am satisfied that it is incorrect in law. f

Counsel for the commissioner was at one stage minded to argue that the issue, being an issue of causation, was one of fact, and as such not one on which this court could lightly differ from the trial judge. There are two difficulties about that argument. First, because of the way in which the judge treated this question, as described above, it is not easy to identify any specific finding on the issue of causation that could claim the status at one time contended for by the g

a commissioner. Second, however, although issues of causation are generally ones of fact, they are subject to certain specific principles, the application of which is certainly not exclusively an issue of fact. That is particularly so when the claim is made that what otherwise might be thought to be a chain of causation between negligent omission and injury has been interrupted by a *novus actus*.

b It is convenient to cite the description of *novus actus* given in *Clerk and Lindsell* para 2-24:

c 'Whatever its form the *novus actus* must constitute an event of such impact that it rightly obliterates the wrongdoing of the defendant. The question which ought to be asked is "whether that intervening cause was of so powerful a nature that the conduct of the plaintiffs was not a cause at all but was merely a part of the surrounding circumstances."

d In our case, it cannot be said that Lynch's act of suicide rightly obliterates the wrongdoing of the defendant, because the defendant's act or failure was characterised as wrongdoing in the context of, and by reason of a duty to prevent, that very suicide. Another way of illustrating that point is to say that in the context of this case, and on the basis of the set of facts that require this inquiry to be made in the first place, the suicide was not an *intervening* cause at all, or was not a *new* act: because foresight of its possible occurrence was part of the reason, indeed by far the most important part of the reason, for placing the defendants under their duty in the first place. That approach is strongly reinforced by consideration of the well-known case, admittedly in contract, of *Stansbie v Troman* [1948] 1 All ER 599, [1948] 2 KB 48, where decorators in breach of their duty to take reasonable care for the safety of the premises where they were working had left them unsecured, thus enabling the entry of a thief. Tucker LJ ([1948] 1 All ER 599 at 600, [1948] 2 KB 48 at 51-52) said that the general rule with regard to responsibility for acts done by a third party was 'even though A. is in fault, he is not responsible for injury to C., which B., a stranger to him, deliberately chooses to do' (per Lord Sumner in *Weld-Blundell v Stephens* [1920] AC at 986, [1920] All ER Rep 32 at 47), but that principle did not apply where 'the very act of negligence itself consisted in the failure to take reasonable care to guard against the very thing that in fact happened'.

g In such a case, therefore, as Oliver LJ put it in *P Perl (Exporters) Ltd v Camden London BC* [1983] 3 All ER 161 at 167, [1984] QB 342 at 353:

h '... if there be a duty to take reasonable care to prevent damage being caused by a third party then I find it difficult to see how damage caused by the third party consequent on the failure to take such care can be too remote a consequence of the breach of duty.'

j The application of this principle in our case only at first sight appears unusual because of the unusual nature of the duty imposed on the defendant, to take steps to protect from himself the party under whom the plaintiff claims. But once that duty to take care to prevent Mr Lynch's suicide is admitted, the approach indicated by Oliver LJ in the case of duties to protect the plaintiff from third parties has necessarily to apply in this case also. The commissioner cannot therefore escape from liability on the basis of the destruction of the causal link through a new or intervening act on the part of Mr Lynch.

*Contributory fault*

The judge gave leave during the course of the trial for the defence of contributory fault to be pleaded and concluded: a

'On the facts of this case I accept that the defendant can establish a contributory defence. Further, I accept that, in the circumstances, the plaintiff's contribution must be set at 100 per cent.'

This ground was originally abandoned by the commissioner before us, but reinstated, without more than token objection by the plaintiff, on better consideration on the opening of the appeal. The debate before us principally concentrated on the question of whether the finding of 100% contributory liability was consistent with the existence of the defence, or indeed open to the judge in law in view of the observations in this court in *Pitts v Hunt* [1990] 3 All ER 344, [1991] 1 QB 24. The first and more important issue is, however, whether a claim that is not open to attack on grounds of volenti or novus actus interveniens can none the less be defeated on grounds of contributory fault. On closer examination, I am satisfied that doubt on that issue was indeed well founded, and that the defence of contributory fault is not available in this case. b

The inquiry must start from the Law Reform (Contributory Negligence) Act 1945, which provides in s 1: c

'(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons ... the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage ...' d

'Fault' is, by s 4:

'negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence ...' e

It is recognised that the last part of this definition applies to the claimant, and has the effect of providing that any conduct that would have amounted to contributory negligence at common law will continue to be regarded as contributory negligence under the 1945 Act. f

The basic problem in applying that test to this case is the same as with the other defence relied on by the commissioner: that it is simply artificial to contend that a defence to liability can rest upon the performance by the deceased of the very act that the defendant was under a duty to take reasonable steps to prevent. That said, closer examination of the terms of the defence present more particular difficulties. g

First, what was Mr Lynch's 'fault'? The answer must be, to have killed himself. It is quite obscure whether, in the terms of s 4 of the 1945 Act, that act would have given rise to a defence of contributory negligence at common law, and no authority was cited either to the judge or to us in support of that contention. However, for reasons that I shall shortly develop, if we have to decide that issue for ourselves, there are strong pointers against the defence being available in a case such as the present. h

Second, on the assumption that Mr Lynch's alleged 'fault' is to have killed himself, did Mr Lynch suffer death partly as a result of his killing himself and partly as a result of the defendants giving him an opportunity to kill himself, to adapt the terms of s 1 of the 1945 Act to this case? The commonsense answer to a question i



a posed in those terms is that given by the judge: that Mr Lynch suffered death entirely as a result of his killing himself. That conclusion would however entail, and be the same as saying, that Mr Lynch's act of self-destruction was in law a novus actus: which, as I have sought to demonstrate, is not the case. Rather, this verbal investigation strongly suggests that the defence provided by the 1945 Act simply does not fit a case such as the present.

b Third, strong support for the view that contributory negligence should not apply in this case is to be found in an analogous area where defendants are, as on the judge's findings was the commissioner, under a duty to take care with regards to the plaintiff. Such a duty rests on employers under the Factories Acts. That duty is absolute, and not merely a duty of reasonable care, but the warnings on policy grounds against permitting the employer's duty to be undermined by an appeal to contributory negligence seem equally appropriate to the duty that the judge found in the present case. Some few examples may be given. In *Hutchinson v London and North Eastern Rly Co* [1942] 1 KB 481 at 488, cf [1942] 1 All ER 330 at 336 Goddard LJ said:

d 'It is only too common to find in cases where the plaintiff alleges that a defendant employer has been guilty of breach of a statutory duty that a plea of contributory negligence has been set up. In such a case I always directed myself to be exceedingly chary of finding contributory negligence where the contributory negligence alleged was the very thing which the statutory duty of the employer was designed to prevent.'

e In *Staveley Iron and Chemical Co Ltd v Jones* [1956] 1 All ER 403 at 414, [1956] AC 627 at 648 Lord Tucker said:

f '... in cases under the Factories Act the purpose of imposing the absolute obligation is to protect the workmen against those very acts of inattention which are sometimes relied on as constituting contributory negligence, so that too strict a standard would defeat the object of the statute.'

g And in a somewhat similar case, Lord du Parcq graphically summed up the point by saying: 'The real complaint of the defenders is that the pursuer reposed an unjustified confidence in them' (*Grant v Sun Shipping Co Ltd* [1948] 2 All ER 238 at 247, [1948] AC 549 at 567).

h In my view, the present case is, by reason of the judge's finding as to the commissioner's duty, not different in principle. It would destroy the content of that duty if the commissioner could be heard to complain that Mr Lynch had done the very thing that society, rather than Mr Lynch, looked to the commissioner to take reasonable steps to prevent.

i This approach is not affected by *Jayes v IMI (Kynoch) Ltd* [1985] ICR 155, which was strongly relied on by the commissioner. There the appellant's contention was that it was impossible as a matter of law, where there had been a breach of statutory duty, to hold the workman 100% liable. This court held that there was no such rule. In a case where the plaintiff had admitted that what he did was 'a crazy thing to do', the trial judge was entitled if so minded to find that on the facts the fault was entirely that of the plaintiff. Neither the court's view on the legal argument put to it, nor its conclusion as to the trial judge's findings, in any way offsets the warnings cited above against finding contributory negligence when the act relied on as such negligence is the very thing (in our case, the very thing in precise detail) that the defendant had a duty to take steps to prevent.

Fourth, perhaps even stronger guidance can be obtained from cases in which the defence of contributory negligence has been asserted against child plaintiffs. In *Lynch v Nurdin* (1841) 1 QB 30, [1835–42] All ER Rep 167 the defendant negligently left a cart unattended in the street. The seven-year-old plaintiff climbed on to it and was injured. Lord Denman CJ said (1 QB 30 at 38–39, [1835–42] All ER Rep 167 at 170):

‘The most blameable carelessness of [the defendant] having tempted the child, he ought not to reproach the child with yielding to that temptation.’

That case was followed by the Privy Council in *Yachuk v Oliver Blais Co Ltd* [1949] 2 All ER 150, [1949] AC 386, where the infant plaintiff was negligently sold gasoline by the defendant and injured himself when he set fire to it. The Board, per Lord du Parc, held that the case was concluded by the judgment of the Ontario Court of Appeal that:

‘If one gives to a child an explosive substance and the child, with a limited knowledge in respect of the likely effect of the explosion, is tempted to meddle with it to his injury, it cannot be said in answer to a claim on behalf of the child that he did meddle to his own injury, or that he was tempted to do that which a child of his years might be reasonably expected to do.’ (See [1949] 2 All ER 150 at 155, [1949] AC 386 at 397.)

Mr Lynch was not a child, and he acted deliberately and not in ignorance. He did, however, do that what he might have reasonably been expected to do, given the opportunity provided to him by the commissioner. It was precisely because of that expectation that the commissioner had the duty towards him that the judge found and which is unchallenged before us. I can see no difference in principle between Mr Lynch’s case and the cases just cited. I do not see how it can be properly said in answer to Mr Lynch’s claim, or even in partial answer to his claim, that he did that which the commissioner was under a duty to take reasonable steps to prevent.

I am therefore of opinion that a plea of contributory negligence is inappropriate in this case, and that that defence must likewise fail.

#### *Ex turpi causa*

The commissioner argues strongly that this defence is available in this case. That was clearly also the preference of the judge, though since he rejected the claim on grounds of volenti he did not need to reach any final conclusion on the point.

The limits of this defence are very difficult to state or rationalise, it being recognised as sitting more easily in the law of contract than of tort: see for instance Lord Porter in *National Coal Board v England* [1954] 1 All ER 546 at 552, [1954] AC 403 at 419:

‘... the adage itself is generally applied to a question of contract, and I am by no means prepared to concede where concession is not required that it applies also to the case of a tort.’

However, in *Kirkham’s* case [1990] 3 All ER 246 at 251–252, [1990] 2 QB 283 at 291 Lloyd LJ cited a passage from Kerr LJ in *Euro-Diam Ltd v Bathurst* [1988] 2 All ER 23 at 28–29, [1990] 1 QB 1 at 35 which although found in a contract case he thought properly demonstrated the principle to be applied also in tort:

‘The *ex turpi causa* defence ultimately rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or

a immoral) conduct of which the courts should take notice. It applies if, in all the circumstances, it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts ...'

b On the basis of that passage Lloyd LJ held:

'We have to ask ourselves ... whether to afford relief in such a case as this, arising, as it does, directly out of a man's suicide, would affront the public conscience, or, as I would prefer to say, shock the ordinary citizen.'

c Lloyd LJ referred to the fact that suicide is no longer a crime and that the public attitude to it had changed, and concluded:

d '... I would hold that the defence of *ex turpi causa* is not available in these cases, at any rate where, as here, there is medical evidence that the suicide is not in full possession of his mind. To entertain the plaintiff's claim in such a case as the present would not, in my view, affront the public conscience, or shock the ordinary citizen.'

Farquharson LJ adopted a similar approach ([1990] 3 All ER 246 at 255, [1990] 2 QB 283 at 296):

e 'For my part, I would regard the passing of the [Suicide Act 1961] as a mark of changing public attitudes to suicide. In times gone by an act of suicide may well have met with universal condemnation and serious consequences, but nowadays society has a different view. With the development of medical science a much greater understanding has been achieved of those who are driven to act in this way. In cases where grave mental instability on the part of the victim has been proved it could hardly be said that any action brought in respect of the suicide, or for that matter the attempt, is grounded in immorality. The position may well be different where the victim is wholly sane ...'

f On the basis of these passages, counsel for the commissioner argued that Mr Lynch's case was that specifically reserved by Lloyd and Farquharson LJ in *Kirkham's* case. Both of them, and Sir Denys Buckley, had at the lowest left open the possibility that suicide by a sane man would be *turpis causa*, preventing his representatives from recovering. Although the matter was not pursued in *Kirkham's* case, and that case certainly does not decide the point, he urged that we should hold that the defence of *ex turpi causa* does indeed hold in this case.

h When a judge is asked to hold that a particular outcome would affront the public conscience or shock the ordinary citizen it behoves him to proceed with caution, as did this court in *Kirkham's* case. No evidence will be available to him on which to base such conclusions, and therefore the exercise must be one of speculation, albeit one would hope intelligent speculation. In the present case, however, I feel able to address the issue without descending into arena in that way, because there are in my view clear reasons why the defence of *ex turpi causa* cannot, as a matter of logic and of legal principle, be available in this case.

i First, the defence fails on a logical ground similar to that which is fatal to the defence of *volenti*. If it shocks the conscience of the ordinary citizen that a suicide could recover, why is it the duty of the police, not merely as public officers but in the private law of negligence, to take reasonable steps to prevent suicide? The case is, again, quite different from the usual application of *ex turpi causa*, where the



plaintiff suffers injuries in the course of a criminal enterprise such as an affray or burglary. Here, the alleged turpitudinous act is the very thing that the defendants had a duty to try to prevent, imposed by a law of negligence which itself appeals to public conscience or at least to public notions of reasonableness. a

Second, the present case does not fit at all well into the explanation of the defence given by Kerr LJ in the *Euro-Diam* case: the defence applies where it would affront public conscience to grant relief 'because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts'. I accept that this does not purport to be a complete statement of the nature and terms of the defence. I also accept that the actual application of Kerr LJ's exposition of *ex turpi causa* in *Euro-Diam* itself has been disapproved: see *Tinsley v Milligan* [1993] 3 All ER 65 at 79–80, [1994] 1 AC 340 at 363. Nevertheless, the exposition in my view remains a valuable guide to the basis of the defence, and was accepted as such by Lloyd LJ in *Kirkham's* case. To grant relief in our case does not assist or encourage either Mr Lynch or others in his situation to continue in their disapproved conduct; and even less is that the effect of the grant of relief to Mr Lynch's representatives. Nor even are others in Mr Lynch's position encouraged to act on their representatives' behalf: all that the latter recover is their actual loss, and no element of profit or windfall benefit. b  
c  
d

Third, I cannot in this connection see any difference between persons who are suffering from a defined mental illness and persons who are not; and here I may have with respect to differ from what was the at least preliminary view of Lloyd and Farquharson LJ in *Kirkham's* case. The plaintiff or rather his representatives recovers damages not because of his mental state but because as a suicide risk he has not received the care that he should have done. While it may be more obviously objectionable, as the court in *Kirkham's* case held, to hold an act by a mentally ill person to be morally repugnant, the question for this court is whether that act should deprive him of relief in the law of negligence. The defendant has been negligent towards him because he was a suicide risk, whether he was mentally ill or not; and therefore in either case the fact that he did what the authorities should have sought to prevent should not afford those authorities a defence. e  
f

I regard those considerations as conclusive against the availability of the defence in this case. However, if I were forced to do so, I would hold that, the burden of establishing this defence being on the commissioner, it is quite impossible for him to show on the material before the court, or even by reasonable judicial deduction and assumption, that the grant of relief to the plaintiff would so shock the public conscience that that relief, otherwise available, should be withheld. The citizen whose reactions are the basis of the defence must be taken to be fully informed of the circumstances of the case, and of the responsibilities and duties properly undertaken by the commissioner. I am quite unpersuaded that shock or affront (both of which are very strong reactions indeed) would be the reaction of a citizen armed with that information to an award of damages in respect of the suicide of a man known to be a suicide risk while he was involuntarily in police custody. g  
h

I say that conscious that the very experienced trial judge was inclined to a different view. He said: j

'I would hesitate before concluding that, unless a deceased's action in taking his own life can be attributed to serious mental instability which deprived him of his judgment so that he was not truly volens, public conscience would not be affronted, even in the present climate of social opinion, if he was not held in law to be fully accountable for his deliberate act ... if the law is to retain the

a confidence of the public, relief against the consequences of deliberate action, even under such pressures, should only guardedly be given.'

b I would respectfully make three comments. First, as the judge made clear, his view was only a preliminary one. Second, as expressed his approach appears to reverse the burden of proof on this issue. That is more than a technical point, because the need to make good the extreme claims of affront or outrage is a cardinal necessity of this defence. Third, the judge's view could not be, any more than the view of this court can be, a finding of fact, so it is not subject to the inhibitions affecting this court should it be minded to interfere with such findings.

c I feel also obliged to comment, I do not need to say with great respect, on one aspect of the view expressed by Lord Denning MR in *Hyde v Tameside Area Health Authority* (1981) Times, 16 April, [1981] CA Transcript 130, not least because the commissioner relied on it before us as the high point of his case on ex turpi. Lloyd LJ in *Kirkham's case* [1990] 3 All ER 246 at 252, [1990] 2 QB at 292, cited extensively from Lord Denning MR. I repeat part of that citation:

d '... he referred to the fact that suicide is no longer a crime, and continued ... "But it is still unlawful. It is contrary to ecclesiastical law, which was, and is still, part of the general law of England: see *Mackonochie v Lord Penzance* (1881) 6 App Cas 424 at 446 per Lord Blackburn."

But Lloyd LJ did not accept that view. He said:

e 'I accept, of course, that the ecclesiastical law is part of the law of England. But I would not for that reason refuse all relief in the common law courts. In the end it comes down to Lord Denning MR's view that to allow such an action as the present would be unfitting. I have respect for that view. But I do not share it. The court does not condone suicide. But it does not, in Bingham LJ's graphic phrase in *Saunders v Edwards* [1987] 2 All ER 651 at 666, [1987] 1 f WLR 1116 at 1134, "draw up its skirts and refuse all assistance to the plaintiff".'

g I agree. I would only add one point, with some considerable diffidence. I think that some caution should be exercised before acting on the proposition that ecclesiastical law is part of the (general) law of England. Lord Blackburn's dictum in *Mackonochie v Lord Penzance* was in the context of a case of prohibition to the Court of Arches for acting in excess of its jurisdiction, in a case that concerned not Christian doctrine but the rules of Anglican ritual. The House of Lords had therefore to consider whether what had been done had indeed been in excess of the jurisdiction of the Court of Arches, and for that purpose had to look at the terms of the law applied in that court. Lord Blackburn explained how a temporal court such as the House of Lords went about that task:

h 'The ecclesiastical law of *England* is not a foreign law. It is a part of the general law of *England*—of the common law—in that wider sense which embraces all the ancient and approved customs of *England* which form law, including ... that law administered in the Courts Ecclesiastical ... When the question arises what is the English ecclesiastical law, it is not ascertained by calling witnesses to prove it, as if it were a foreign law, but taking judicial notice of what the law is ...' (See 6 App Cas 424 at 446.)

j Lord Blackburn thus said no more than that temporal courts take judicial notice of English ecclesiastical law, without that having to be proved like foreign law. I for my part, therefore, quite apart from sharing the opinion expressed by Lloyd LJ, would not think that there is authority, or at least not authority to be found in the

speech of Lord Blackburn in *Mackonochie v Lord Penzance*, for thinking that a rule of the ecclesiastical law is part of English law in the sense that it has necessarily to be applied by the temporal courts. Should a judge find himself having to apply the terms of the *ex turpi causa* doctrine he may well wish to have regard to the view of the conduct in question entertained by the Church of England, or indeed by other churches. There is, however, in my respectful view nothing in *Mackonochie's* case to give those views a special status as part of the general law of England.

### Conclusion

I would hold that none of the defences asserted by the commissioner are made out, and that therefore the appeal should be allowed and the plaintiff should recover damages. What might at first sight seem to be a surprising outcome has to be seen in the context of the duty imposed on the commissioner, which he has not sought to challenge before us. And, for the avoidance of doubt, I am not by drawing attention to that last feature of the case to be taken as suggesting that such a challenge could or should have been undertaken.

**MORRITT LJ.** By this action under Fatal Accidents Act 1976 Mrs Reeves seeks to enforce the cause of action which would have been available to Mr Lynch if his death had not ensued. In that respect the judge, Judge Sir Frank White, concluded that, having regard to the fact that they had been warned that Mr Lynch was a suicide risk, the police officers at Kentish Town police station owed a particular duty of care to Mr Lynch. He considered that such duty was to take reasonable care to prevent Mr Lynch, as the person being held in custody, from committing suicide. He accepted Mrs Reeves' contention that it was negligent not to shut the wicket gate after Mr Lynch had been placed in the cell because, as might reasonably have been foreseen, it gave Mr Lynch an opportunity to secure a ligature through the spy hole with which to strangle himself. Finally the judge accepted that, if the action of Mr Lynch was not a *novus actus interveniens*, a causative link could be established between the negligence and the death because the failure to close the wicket gate materially increased the risk of Mr Lynch making a successful suicide bid.

The judge concluded:

'In this case the deceased at the time he took his own life was not suffering from any marked medical or psychiatric condition. On the evidence, I am unable to conclude other than that he was, when he took the decision to end his life, of sound mind.'

In the light of that finding, the judge formulated the relevant principle as 'where the judgment of a person is not seriously impaired, he or she will be held to account for his or her deliberate actions'. Though he expressed such principle in relation to the suggested defence of *volenti non fit injuria* he sought to apply it in relation to the other legal issues, namely whether the chain of causation was broken because the action of Mr Lynch was a *novus actus interveniens*, whether Mr Lynch would have been liable for contributory negligence and whether his claim would have been barred by public policy.

In these circumstances the first issue is whether the action of Mr Lynch in taking his life broke the chain of causation because it was a *novus actus interveniens* or new force intervening between the negligence and the damage. The judge impliedly accepted that it was but gave no reasons for that conclusion separate from his conclusions on the other issues to which I have referred. The general



a principle, as expressed by Professor Hart and Professor Honoré in *Causation in the Law* (2nd edn, 1985) p 136, is that 'the free, deliberate and informed act or omission of a human being, intended to exploit the situation created by defendant, negates causal connection'.

b The subsequent examples given by the authors cover the acts of the plaintiff as well as those of independent persons. They suggest, in relation to contributory negligence, that (p 215):

'If [a] defendant drove at an excessive speed and [the] plaintiff, in order to commit suicide, threw himself under the wheels of [the] defendant's car but suffered injury short of death, [the] plaintiff even under a system of apportionment would presumably be totally barred from recovery.'

c This is not disputed by counsel for Mrs Reeves. He submits that the instant case is not an ordinary one because the police were under a specific duty to take reasonable care to prevent Mr Lynch (whatever his mental state) from injuring or killing himself by his own deliberate, intentional act. For this submission he relies on the principle that the occurrence of the very thing which it was the duty of the d defendant to use reasonable care to prevent cannot be a new intervening force so as to break the chain of causation. This was established in *Stansbie v Troman* [1948] 1 All ER 599 at 600, [1948] 2 KB 48 at 51-52, in which Tucker LJ said:

e 'Counsel for the plaintiff has referred to *Weld-Blundell v. Stephens* ([1920] AC 956, [1920] All ER Rep 32) and, in particular, to a passage in the speech of LORD SUMNER where he said ([1920] AC 956 at 986, [1920] All ER Rep 32 at 47): "In general (apart from special contracts and relations and the maxim *respondet superior*), even though A. is in fault, he is not responsible for injury to C., which f B., a stranger to him, deliberately chooses to do. Though A. may have given the occasion for B.'s mischievous activity, B. then becomes a new and independent cause ..." I do not think that LORD SUMNER would have intended that very general statement to apply to the facts of a case such as the present, where, as learned the judge points out, the very act of negligence itself consisted in the failure to take reasonable care to guard against the very thing that in fact happened. The reason why the [decorator] owed a duty to the [householder] to leave the premises in a reasonably secure state was because g otherwise thieves or dishonest persons might gain access to the premises, and it seems to me that if, as I think he was, [the decorator] was negligent in leaving the house in this condition, it was a direct result of his negligence that the thief got in through this door which was left unlocked and stole these valuable goods.'

h Counsel were not able to refer us to any case in which 'the very thing' was the voluntary and intentional action of a plaintiff of sound mind. Thus, as it seems to me, the important issue is which should be applied to the facts of this case: the general principle expressed by Professor Honoré and Professor Hart or, by extension, the principle enunciated by Tucker LJ. For Mrs Reeves reliance is placed j on the particular duty of care found by the judge. It would be odd, so it is submitted, if the police owed that duty in respect of a prisoner who was not of sound mind but not to one who was.

I am unable to accept that submission. The duty of care arose because Mr Lynch was held in the custody of the police. The general duty is to take reasonable care not to harm him. If the person in custody is known to be a suicide risk and is not of sound mind there is a particular duty to take reasonable steps to prevent him

committing suicide: *Kirkham v Chief Constable of the Greater Manchester Police* [1990] 3 All ER 246, [1990] 2 QB 283. In such a case it may fairly be said that the omission of such steps materially increased the risk of the prisoner taking his own life. But where the prisoner is of wholly sound mind I find it hard to see how there is any material increase in the risk in any causative sense. It is true that the failure to take reasonable care provides the opportunity for the suicide but the occurrence of that event depends wholly on the will and intention of the prisoner. In my view the voluntary, deliberate and informed act of a plaintiff (or one whom the plaintiff represents) intended to exploit the situation created by the defendant albeit in breach of duty precludes a causative link between the breach of duty and the consequences of the plaintiff's action. If the law is otherwise then those who fail to take reasonable care will become insurers for the deliberate actions of those to whom they owe their duty of care. In my view this would extend the law of negligence far beyond its proper scope. I believe that this conclusion is consistent with the decision of Lloyd LJ and Sir Denys Buckley in *Kirkham's* case and of the House of Lords in *South Australia Asset Management Corp v York Montague Ltd*, *United Bank of Kuwait plc v Prudential Property Services Ltd*, *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1996] 3 All ER 365 at 371–372, [1997] AC 191 at 213 in relation to the mountaineering analogy given by Lord Hoffmann.

I should add three comments. First, in connection with the suggestion made in the course of argument that if the law is as I would hold it to be then the police may allow to die by his own hand the prisoner in their custody who is of sound mind; in my view that would not be so. Their public duty and their duty to their employer would each require them to save all prisoners alike whether of sound or unsound mind. The issue on this appeal is whether the police must treat both classes alike for the purposes of paying compensation to their representatives.

The second comment is the suggested difficulty of deciding whether a person was of sufficient soundness or unsoundness of mind. This was not argued but I would suggest that the test for unsoundness of mind would be whether the deceased was sufficiently informed and capable of forming the requisite intention. The satisfaction or otherwise of that test would depend on the medical or other evidence. My third comment relates to the fact that there was no argument on the scope of the duty of care owed by the police officers to Mr Lynch. No one would dispute that where one person is lawfully held against his will by another the latter must owe to the former a duty to take reasonable care of him. At that, general, level there is ample scope for the duty in respect of all persons detained against their will whether of sound or unsound mind. Commonly such a general duty is narrowed by reference to the facts of the particular case so that, as reformulated, it expresses an obligation on the part of the defendant to use reasonable care in a specific respect or to prevent specific harm. Such particularisation may well assist in elucidating the problems in that case. But I question whether it is permissible to narrow the general duty by reference to the facts of the case and then preclude questions of causation by applying the principle of *Stansbie v Troman* or, which seems to me to be much the same, finding the necessary causation because otherwise the duty so narrowed would be robbed of reasonable scope. As the editors of *Clerk and Lindsell on the Law of Torts* (17th edn, 1995) para 7-08 observe:

'Even if both the plaintiff and the kind of damage are foreseeable, there may still be a third question, namely whether the defendant should be held responsible for the manner in which the damage was caused. This problem arises where the damage was a direct result of the conduct of a third party and only indirectly the consequence of the defendant's conduct. It may be

a answered at the level of notional duty or by reference to the principles of causal responsibility. The courts are not consistent in their analysis of the problem, frequently merging the questions of duty and causation.'

In this case the damage was the direct result of the action of, in effect, the plaintiff; that is an a fortiori case. I am concerned that the lack of consistency discerned by the editors of *Clerk and Lindsell* may have been increased by the absence of any argument in this case in relation to the duty of care and its scope.

b For my part therefore I would dismiss this appeal on the ground that the action of Mr Lynch was a novus actus interveniens. But it is convenient also to consider the applicability of the maxim *volenti non fit injuria* for it is so closely linked to the issue of causation.

c This issue attracted the most attention in the course of argument because of the judgments of this court in *Kirkham's* case. Lloyd LJ said ([1990] 3 All ER 246 at 250, [1990] 2 QB 283 at 289–290):

d 'Where a man of sound mind injures himself in an unsuccessful suicide attempt, it is difficult to see why he should not be met by a plea of *volenti non fit injuria*. He has not only courted the risk of injury by another; he has inflicted the injury himself. In *Hyde v Tameside Area Health Authority* [1981] CA Transcript 130 the plaintiff, who had made an unsuccessful suicide attempt, brought an action for damages against the health authority alleging negligence on the part of the hospital staff. Lord Denning MR doubted whether a defence of *volenti non fit injuria* would be available in such a case "seeing that [the plaintiff] did not willingly injure himself. He wanted to die." I find that reasoning hard to follow. Any observation of Lord Denning MR is, of course, entitled to great weight; but the observation was obiter, since the court held that the hospital staff had not been negligent. Moreover we were told by counsel for the plaintiff, who happened to have appeared for the plaintiff in that case, as well, that the point was never argued. So I would be inclined to hold that where a man of sound mind commits suicide, his estate would be unable to maintain an action against the hospital or prison authorities, as the case might be. *Volenti non fit injuria* would provide them with a complete defence. There should be no distinction between a successful attempt and an unsuccessful attempt at suicide. Nor should there be any distinction between an action for the benefit of the estate under the Law Reform Act and an action for the benefit of dependants under the Fatal Accidents Act. In so far as Pilcher J drew a distinction between the two types of action in *Pigney v Pointers Transport Services Ltd* [1957] 2 All ER 807, [1957] 1 WLR 1121, I would respectfully disagree.'

h Farquharson LJ considered that the maxim *volenti non fit injuria* did not apply to the facts of that case because Mr Kirkham was not of sound mind at the time. He added ([1990] 3 All ER 246 at 254, [1990] 2 QB 283 at 295):

j 'The second ground is that the defence is inappropriate where the act of the deceased relied on is the very act which the duty cast on the defendant required him to prevent. If in such circumstances the defendant could raise this defence, as counsel for the plaintiff submits, no action would ever lie in respect of a suicide or attempted suicide where a duty of care could be proved.'

Though Sir Denys Buckley expressed his agreement with the conclusion of Lloyd and Farquharson LJJ and the reasons they had given, he said:



'I also agree that on the facts of this case the dead man, although he died as the result of his own act, should not be treated as volens within the meaning of the maxim volenti non fit injuria.' (See [1990] 3 All ER 246 at 255, 256, [1990] 2 QB 283 at 296, 297.)

In view of this later passage I do not consider that the judgment of Sir Denys Buckley can be construed as agreeing with Farquharson LJ's second point in relation to a prisoner of sound mind. (For reasons I have already explained in connection with causation I do not, with respect, agree with Farquharson LJ's second point in relation to such a prisoner.) It follows that it was the view of two members of the court, Lloyd LJ and Sir Denys Buckley, that the defence was available in the case of a prisoner of sound mind. This was the view of the judge. He concluded that Lloyd LJ had correctly expressed the current state of the law and upheld this defence.

Counsel for Mrs Reeves contends that, when properly analysed, the maxim volenti non fit injuria cannot be sensibly applied to the deliberate action of the plaintiff. He relies on the classic statement of Lord Herschell in *Smith v Baker & Sons* [1891] AC 325 at 360, [1891-4] All ER Rep 69 at 87:

'The maxim is founded on good sense and justice. One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong.'

As he pointed out in his excellent written argument the maxim envisages the free and voluntary acceptance by a claimant of the consequences to him of an act done, not by himself but, by another. He referred to the well-known examples of passengers, employees and those participating in games or sports. He submitted that this maxim cannot be sensibly applied to Mr Lynch who 'in his suicidal condition, of which [the police] were fully aware took advantage of an act of carelessness by a police officer which (but for [his] frame of mind) was not dangerous or risky at all'.

I do not accept this submission. Acceptance by a claimant of the consequences of his own intentional act is a stronger reason for excluding liability than acceptance of the risk created by negligence of the defendant. Professor Honoré and Professor Hart in *Causation in the Law* p 216 state:

'When the plaintiff's action fails because the harm is the consequence of his voluntary conduct, whether intentional or reckless, it is perhaps strictly speaking incorrect to say that he is barred by his contributory negligence since in such cases his conduct is not merely contributory but is described, from a common-sense point of view and also in law, as the "sole cause" or the cause of the harm. The "defence" is then simply that the plaintiff has not proved causal connection between the defendant's act and the harm. Often this state of affairs may coincide with one where the defence of voluntary assumption of risk is available.'

The authority relied on is *Cutler v United Dairies (London) Ltd* [1933] 2 KB 297, [1933] All ER Rep 594. In that case the plaintiff went into a field and tried to help to hold the defendant's horse, which had bolted. He had no experience of horses and was injured when the horse reared up and threw him to the ground. His action failed on the grounds that the plaintiff's intervention not only broke the chain of causation but was one to which the maxim volenti non fit injuria applied. Scrutton LJ said ([1933] 2 KB 297 at 303, [1933] All ER Rep 594 at 598-599):

- a 'A man is under no duty to run out and stop another person's horse, and, if he chooses to do an act the ordinary consequence of which is that damage may ensue, the damage must be on his own head and not on that of the owner of the horse. This is sometimes put on the legal maxim *volenti non fit injuria*; sometimes it is put that a new cause has intervened between the original liability, if any, of the owner of the horse which has run away. That new cause is the action of the injured person, and that new cause intervening prevents liability attaching to the owner of the horse.'
- b

Slessor LJ was of the same view. He said ([1933] 2 KB 297 at 306, [1933] All ER Rep 594 at 600–601):

- c 'However heroic and laudable may have been [the respondent's] act, it cannot properly be said that it was not in the legal sense the cause of the accident. For that reason I come to the conclusion that the jury could not find that the appellants' negligence, which I will assume to have existed, was the cause of the damage. The action therefore fails on the threshold, because of the failure to show that the negligence caused the damage of which complaint is made. The appellants can also properly say that the respondent agreed to accept freely and voluntarily, with full knowledge of the risk he ran, the chances of the injury he suffered. The case is one where the maxim *volenti non fit injuria* applies.'
- d

- e The third member of the court, Eve J, concerned not to fall behind the others in latinity, expressed his conclusion to be 'that the injuries sustained by the respondent were due to a course which he adopted *ex mero motu*' (see [1933] 2 KB 297 at 307, [1933] All ER Rep 594 at 601). Professor Honoré and Professor Hart suggest that in that case the plaintiff's conduct was not voluntary for he did not intend to injure himself and was not reckless. That qualification, if otherwise sound, could not apply to the conduct of Mr Lynch.
- f

- Accordingly, in my view, the criticisms of the judgments of Lloyd LJ and Sir Denys Buckley in *Kirkham's case* [1990] 3 All ER 246, [1990] 2 QB 283 are misplaced. I agree with the judge in this case that the maxim *volenti non fit injuria* applies so as to bar the action of Mrs Reeves.

- g In those circumstances it is not necessary to deal with the issues relating to contributory negligence and public policy. But in case this case goes further I should briefly express my views on those issues.

- The definition of fault contained in s 4 of the Law Reform (Contributory Negligence) Act 1945 includes any 'other act or omission which ... would, apart from this Act, give rise to the defence of contributory negligence'. As reckless conduct was capable of constituting such a defence I see no reason why deliberate conduct not breaking the chain of causation altogether should not do likewise (cf *Anglo-Newfoundland Development Co Ltd v Pacific Steam Navigation Co* [1924] AC 406). It is not suggested that if the act of Mr Lynch was such as to break the chain of causation then it falls within the definition. But if, contrary to my view, it did not, then the damage, defined as including loss of life, was sustained partly by the fault (as defined) of Mr Lynch and partly by the fault of the police. In such circumstances the Act applies and the court is entitled to reduce the recoverable damages to such extent as it thinks just and equitable.
- h
- i

The judge accepted that the Act applied to what might be described as deliberate fault, that the police could, accordingly, establish contributory negligence and set the contribution of Mr Lynch at 100%. Counsel for Mrs Reeves contends that that course was not open to the judge in the light of the decision of this court in *Pitts v*

*Hunt* [1990] 3 All ER 344, [1991] 1 QB 24. In that case the court considered that before the act could come into operation it must be found that there was fault on behalf of both parties. Such a finding presupposed that the claimant would recover some damage with which a finding of 100% responsibility was inconsistent.

I find no problem with the first part of that decision for I have approached the question of contributory negligence on the assumption, contrary to my view on causation, that each party was partly at fault in respect of the death of Mr Lynch. But in *Pitts v Hunt* the Court of Appeal was not referred to the earlier decision of the same court in *Jayes v IMI (Kynoch) Ltd* [1985] ICR 155. In the latter case the Court of Appeal upheld an apportionment of 100%. Robert Goff LJ, with whom Oliver LJ and Donaldson MR agreed, said (at 159):

‘In my judgment, there is no principle of law which requires that, even where there is a breach of statutory duty in circumstances such as the present (where the intention of the statute is to provide protection, inter alia, against folly on the part of a workman), there cannot be a case where the folly is of such a kind or of such a degree that there cannot be 100 per cent. contributory negligence on the part of the workman. If authority is needed for that proposition, we need only turn to *Mitchell v. W. S. Westin Ltd.* ([1965] 1 All ER 657, [1965] 1 WLR 297), where we find in the judgments in the Court of Appeal dicta both of Sellers L.J. and Pearson L.J. ([1965] 1 All ER 657 at 662 and 664–665, [1965] 1 WLR 297 at 305 and 308–309) which show very clearly that in such a case it can properly be held that the degree of fault on the part of the workman is so great that it would be appropriate to make no order for damages on the basis of 100 per cent. contributory negligence. It must be borne in mind that in a case of this kind the court does not, for example, hold that there is 1 per cent. or 2 per cent. fault on the part of the employer and 99 per cent. or 98 per cent. fault on the part of the workman. There comes a point in time where the degree of fault is so great that the court ceases to make fine calculations of that kind and holds that, in practical terms, the fault is entirely that of the workman. It follows that Mr. May’s submission is one which, in point of law, I am unable to accept.’

In my view the latter decision is to be preferred and followed in the sense that in cases where both parties are at fault the court is not required to make fine calculations of the sort referred to by Robert Goff LJ. Thus, though it may appear to be strictly illogical, an apportionment of 100% is permissible. On the facts as found by the judge I do not think that he erred in his apportionment of 100% to Mr Lynch. For these reasons, if it is necessary to do so, I would uphold the judge’s conclusion on contributory negligence.

There remains only the question of public policy. The judge said:

‘I would hesitate before concluding that, unless a deceased’s action in taking his own life can be attributed to serious mental instability which deprived him of his judgment so that he was not truly volens, public conscience would not be affronted, even in the present state of social opinion, if he was not held in law to be fully accountable for his deliberate act.’

Accordingly had it been necessary the judge was inclined to the view that public policy or the maxim *ex turpi causa* would have barred Mrs Reeves’ claim. This was contrary to the views of the members of the Court of Appeal in *Kirkham’s* case. For my part I would have difficulty in sharing the view of the judge. In 1961 Parliament abrogated the rule of law that suicide was a crime. Although it remains criminal to



a aid and abet a suicide that cannot affect the position of those who, like Mrs Reeves, claim solely under the person who committed suicide. I would not think it appropriate in those circumstances for a court to brand as contrary to public policy or offensive to the public conscience an act which Parliament has so recently legalised.

I would dismiss this appeal.

b **LORD BINGHAM OF CORNHILL CJ.** The trial judge held that the defendant owed the deceased a duty of care and found on the facts that the defendant had broken that duty. There is no appeal against those findings. The plaintiff failed at trial because the judge upheld the defendant's defences of novus actus, volenti and contributory negligence. It is plain that he would have upheld the defendant's  
c defence based on the maxim *ex turpi causa* or public policy had it been necessary to do so.

Despite the absence of controversy, it is in my view helpful for purposes of analysis to begin by seeking to define the duty to which the defendant was admittedly subject. The plaintiff in her amended particulars of claim pleaded no  
d duty expressly. The defendant in his amended defence denied that he 'owed a duty of care to the deceased to prevent him from taking his life'. The judge concluded that the defendant had plainly owed the deceased a duty, but did not define what the duty had been. In *Kirkham v Chief Constable of the Greater Manchester Police* [1989] 3 All ER 882 at 887 Tudor Evans J held at first instance that the defendant owed a duty in law to take reasonable care to prevent the deceased committing suicide.  
e On appeal, Lloyd LJ ([1990] 3 All ER 246 at 250, [1990] 2 QB 283 at 289) had no difficulty in holding that the police had assumed certain responsibilities towards Mr Kirkham when they took him into custody and in particular had assumed a responsibility to pass on information which might affect his well-being when he was transferred from their custody to the custody of the prison authorities:  
f Farquharson LJ said ([1990] 3 All ER 246 at 253, [1990] 2 QB 283 at 293–294):

'Counsel submits that there can be no duty to safeguard a man from his own act of self-destruction, on the principle that there is no duty of care to protect another from a risk of injury created by himself. The position must, in my judgment, be different when one person is in lawful custody of another, whether that be voluntarily, as is usually the case in a hospital, or involuntarily, as when a person is detained by the police or by prison  
g authorities. In such circumstances, there is a duty on the person having custody of another to take all reasonable steps to avoid acts or omissions which he could reasonably foresee would be likely to harm the person for whom he is responsible ... Where, as in the present case, the risk is specifically  
h identified, then reasonable steps must be taken to avoid that risk'.

The issue here, as I think, was whether the defendant by his officers at Kentish Town police station owed the deceased a duty to take reasonable care to ensure that he was not afforded an opportunity to take his own life. I have no doubt that  
i an affirmative answer to that question should have been given, as in effect it was.

Since breach of that duty is acknowledged, it would be inappropriate to comment on the detailed facts established before the judge. It should however be emphasised that the duty of the defendant and his officers was to take reasonable care, and not to guarantee that a fatality did not occur.

Since an act of self-destruction by the deceased was the very risk against which the defendant was bound in law to take reasonable precautions, I cannot see how that act can be regarded as a novus actus. So to hold would be to deprive the duty

of meaningful content. This was, after all, the very thing against which the defendant was duty-bound to take precautions. It can make no difference that the deceased was mentally 'normal' (assuming he was), since it is not suggested that the defendant's duty was owed only to the abnormal. The suicide of the deceased cannot in my view be regarded as breaking the chain of causation.

In *Kirkham's* case [1990] 3 All ER 246 at 250–251, [1990] 2 QB 283 at 289–290 Lloyd LJ held that Mr Kirkham had not been volens because he had at the time been suffering from clinical depression, but made it plain that a different result would have followed had Mr Kirkham been of sound mind. Farquharson LJ agreed that Mr Kirkham had not been volens, both on that ground and also because he regarded the defence as inappropriate where the act of the deceased relied on was the very act which the duty cast upon the defendant required him to prevent. In agreeing with the conclusion of both Lloyd and Farquharson LJ, Sir Denys Buckley is probably to be understood as agreeing with the argument which both accepted.

If the defendant owed the deceased a duty of care despite the fact that the deceased was of sound mind, then it again seems to me to empty that duty of meaningful content if any claim based on breach of the duty is inevitably defeated by a defence of volenti. Since there is in any event no sharp line of demarcation between mental normality and mental abnormality, it would be unworkable in practice to treat the state of mind of a deceased as determinative of his estate's right to recover. I have, for my part, great difficulty in regarding a defence of volenti as apt in circumstances such as these. There is on the authorities a difference in the juridical approach to this defence. But it is essentially based on the commonsense view that a plaintiff cannot complain of a defendant's negligence if he has knowingly consented to the defendant acting in the manner of which he now wishes to complain or has willingly accepted an obvious risk that the defendant will act in that way. It is difficult on present facts to see how the deceased can be said to have knowingly and willingly consented to the defendant's failure to take reasonable care to ensure that he was not afforded an opportunity to take his own life. It is true that the deceased wanted to take his own life, and it was because his wish to do so was known to the defendant that the particular duty binding on the defendant arose. The deceased took advantage of the defendant's breach of duty, as it was known he might, but he cannot in my judgment be said to have consented to it.

There is, I think, no difference in this case between the defence based on public policy and that based on the maxim *ex turpi causa*. In *Kirkham's* case [1990] 3 All ER 246 at 252 and 255, [1990] 2 QB 283 at 291 and 296, both Lloyd and Farquharson LJ were satisfied that the defence was not available where the deceased had been of unsound mind, but both accepted that the position might be different where a deceased is of sound mind when taking his own life. Is it therefore contrary to public policy to permit the estate of a deceased to recover in circumstances such as these when the deceased was not of unsound mind at the time of taking his own life? Although suicide itself is no longer a crime, criminal liability continues to attach to aiders and abettors and survivors of uncompleted suicide pacts, and in some circumstances and some circles a stigma continues to attach to those who take their own lives. It cannot however be said, in my judgment, that by permitting recovery in a case such as this the law is covertly conniving at or countenancing suicide: it is indeed imposing a civil penalty on those who, having a duty to try to prevent suicide, fail to do so. I do not, either, think that the conscience of the ordinary citizen would be affronted by the awarding of

a damages to the estate of a deceased in a case such as this. The ordinary citizen is well able to understand the feelings of helplessness and despair which may overwhelm even a guilty person who finds himself suddenly incarcerated and facing a long process of trial and imprisonment. It requires little imagination to appreciate the temptation to take one's own life in such circumstances; and I think the ordinary citizen would be inclined to criticise a custodian who, knowing of a detainee's suicidal wishes, fails to take reasonable care to prevent that result.

b Despite the decision of this court in *Pitts v Hunt* [1990] 3 All ER 344, [1991] 1 QB 24 that a plaintiff may not properly be held 100% responsible for his own loss under s 1 of the Law Reform (Contributory Negligence) Act 1945, it is clear that such findings have been made in earlier cases such as *Jayes v IMI (Kynoch) Ltd* [1985] ICR 155. I think perhaps such cases are properly to be understood as based on causation: the court has found that the defendant was negligent or in breach of statutory duty but has nevertheless concluded that such negligence or breach was not to any degree causative of the plaintiff's injury or damage. I agree with the decision of the trial judge in this case, however, that the definition of 'fault' in s 4 of the 1945 Act is wide enough to cover the act of the deceased in this case and to entitle the court, if it thinks it right, to reduce the damages recoverable to reflect his own responsibility for the loss. This would appear to me to be a case in which both the defendant and the deceased bore a substantial responsibility for the fatal outcome. It would not seem to me appropriate to attribute all the responsibility to one party or the other. If I were sitting alone, I would for my part conclude that the responsibility should be shared equally between the deceased and the defendant, and would on that ground hold that the damages recoverable by the plaintiff should be reduced by 50%. I am not, however, sitting alone, and were I to give effect to my opinion we should achieve the very unsatisfactory outcome that only one member of the court would support and two members would oppose each of the three possible solutions on contributory negligence. This being so I think it right, while adhering to my view on the applicability of the 1945 Act, to conclude that the claim of the plaintiff should not be reduced to reflect any fault on the part of the deceased.

While the argument for the plaintiff has, reasonably enough, been directed to the case advanced for the defendant, I have an uneasy feeling (fortified by the research which Morritt and Buxton LJ have independently done) that the latter could have been more fully developed, perhaps with the benefit of additional Commonwealth authority. Should the case go further, it may well merit a more detailed consideration both of principle and authority.

To that extent, and on those grounds, I would allow this appeal and award the plaintiff the full damages to which she is entitled.

h Appeal allowed. Leave to appeal to the House of Lords granted.

Kate O'Hanlon Barrister.



## Cargill International SA and another v Bangladesh Sugar and Food Industries Corp

COURT OF APPEAL, CIVIL DIVISION

STAUGHTON, SWINTON THOMAS AND POTTER LJ

18, 19 NOVEMBER 1997

*Contract – Bond – Performance bond – Plaintiffs providing performance bond in relation to contract for supply and delivery of goods to defendant – Bond liable to be forfeited on any breach of contract – Plaintiffs subsequently breaching contract and defendant making call on bond – Defendant not suffering loss to extent of value of bond – Whether plaintiff entitled to recover overpayment.*

The plaintiff companies successfully tendered for the supply of sugar to the defendant. The tender offer was accepted subject to the receipt of a performance bond covering 10% of the total cost and freight value and was subsequently confirmed in writing by a contract dated 16 June 1994. The contract stipulated that the cargo would be transported in a vessel which was not more than 20 years old and would be delivered before 15 September 1994. Clause 13 of the contract provided that the plaintiffs' performance bond was liable to be forfeited by the defendant if they failed to fulfil any of the terms and conditions of the contract and also if they were responsible for any loss or damage suffered by the defendant. Clause 16 provided that the defendant would be entitled to forfeit the bond if the plaintiffs failed to adhere to the arrival time. In the event, the vessel used was over 20 years old and arrived late. The defendant therefore rejected the shipment and made a call on the bond under cl 13. The plaintiffs thereafter applied to the Commercial Court for, inter alia, an injunction restraining the defendant from drawing on the bond and a declaration that the defendant was not entitled to make any call on the bond or to retain any money so received on the ground that it had suffered no loss. On the trial of certain preliminary issues the judge held that the defendant was entitled to make a call for the full amount of the bond but was entitled to retain only such amount as was equal to the loss suffered by it. The defendant appealed.

**Held** – In the absence of clear contractual words to the contrary, it was implicit in the nature of a performance bond that there would be an accounting between the parties after the bond had been called, so that if the amount received under the bond exceeded the true loss, the party who provided the bond was entitled to recover the overpayment. In the instant case, the terms 'forfeited' and 'forfeit' in cls 13 and 16 respectively did not indicate a plain intention to negative any later obligation of the defendant to account, since those terms were applied to the bond, not the moneys paid under the bond, and had simply been used as shorthand for the exercise of the buyer's right to call for payment under the bond, ie it referred to the position as between the defendant and the bank, not the defendant and the plaintiffs. Moreover, the bond was said to be liable to be 'forfeited by the buyer', whereas if the clause had been intended to convey that the sum paid or payable under the bond would be forfeited, in the sense of irrecoverably lost to the plaintiffs, a reference to forfeiture by the seller would have been more appropriate. Accordingly, the appeal would be dismissed (see p 410 *ef*, p 413 *j* to p 414 *b*, p 415 *fj* and p 416 *c* to *f*, *post*).

Decision of Morison J [1996] 4 All ER 563 affirmed.

**Notes**

- a For nature and effect of performance guarantees and bonds, see 41 *Halsbury's Laws* (4th edn) para 960.

**Cases referred to in judgments**

*Charter Reinsurance Co Ltd v Fagan* [1996] 3 All ER 46, [1997] AC 313, [1996] 2 WLR 726, HL.

- b *Comdel Commodities Ltd v Siporex Trade SA* [1997] 1 Lloyd's Rep 424, CA.  
*Harbottle (R D) (Mercantile) Ltd v National Westminster Bank Ltd* [1977] 2 All ER 862, [1978] QB 146, [1977] 3 WLR 752.

*Palm Shipping Inc v Kuwait Petroleum Corp, The Sea Queen* [1988] 1 Lloyd's Rep 500.  
*Robertson v French* (1803) 4 East 130, 120 ER 779.

- c *Schuler (L) AG v Wickman Machine Tool Sales Ltd* [1973] 2 All ER 39, [1974] AC 235, [1973] 2 WLR 683, HL.

*Société Anonyme Marocaine de l'Industrie du Raffinage v Notos Maritime Corp, The Notos* [1987] 1 Lloyd's Rep 503, HL.

*Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] 2 All ER 370, [1993] AC 573, [1993] 2 WLR 702, PC.

d

**Cases also cited or referred to in skeleton arguments**

*Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229, [1985] AC 191, HL.

*Cooper v Whittingham* (1880) 15 Ch D 501.

- e *IRC v Raphael, Re Sasson* [1935] AC 96, [1934] All ER Rep 749, HL.  
*Owen (Edward) Engineering Ltd v Barclays Bank International Ltd* [1978] 1 All ER 976, [1978] QB 159, CA.  
*Westminster (Duke) v Guild* [1984] 3 All ER 144, [1985] QB 688, CA.

**f Interlocutory appeal**

By notice dated 24 September 1996 the defendant, Bangladesh Sugar and Food Industries Corp (BSFIC), appealed from the decision on preliminary issues of Morison J ([1996] 4 All ER 563) on 7 June 1996, whereby he held that the appellant was entitled to draw the full amount of a performance bond provided by the plaintiffs, Cargill International SA, Geneva Branch and Cargill (HK) Ltd (Cargill), in connection with a contract for the sale and delivery of a quantity of sugar, and that the appellant was liable to account for any sums paid exceeding actual loss suffered. The facts are set out in the judgment of Brooke LJ.

g

*Ajmalul Hossain* (instructed by *Beale & Co*) for BSFIC.

- h *Stephen Males* (instructed by *Middleton Potts*) for Cargill.

**POTTER LJ** (delivering the first judgment at the invitation of Staughton LJ). This is an appeal by the Bangladesh Sugar and Food Industries Corp (BSFIC), which was, under a contract dated 16 June 1994, the buyer of a quantity of sugar from the respondents (Cargill) under a contract of sale in connection with which Cargill as sellers provided BSFIC with a performance bond issued on its behalf by the Banque Indosuez on 4 June 1994, in a sum equivalent to 10% of the total c & f value of the sugar to be supplied.

j

Disputes have arisen between the parties in respect alleged contractual breaches arising from the late arrival and the age of the ship carrying the cargo. BSFIC claimed to be entitled to forfeit the bond in respect of Cargill's breaches of contract. Cargill in turn claimed that the breaches were in fact caused by the

default of BSFIC. Cargill also claimed that, in any event, BSFIC suffered no loss because the market price of the sugar had fallen over the period between the date of contract and the date for delivery. a

The disputes led to the commencement of litigation in various jurisdictions, which was eventually compromised by an agreement of the parties dated 12 April 1996, under which it was agreed *inter alia* that the matter was to be submitted for determination before the Commercial Court. The parties further agreed that the court should determine two preliminary issues, on the assumption for the purpose of such determination that Cargill were indeed in breach of contract as alleged by BSFIC. b

The two preliminary issues were ordered to be tried by Rix J on 2 May 1996 in the following form: c

‘(1) Whether on the true construction of the contract of sale dated 16 June 1994 and on the assumption that the plaintiffs were in breach of the contract in the respects alleged at para 5 of the defendant’s points of defence (whether individually or cumulatively) the defendant was entitled to make a call for the full amount of the performance bond of Banque Indosuez in any of the following events, namely the plaintiff’s breach (or breaches) of the contract (a) caused no loss to the defendants, (b) caused some loss to the defendants which was less than the amount of the performance bond, (c) caused some loss to the defendants which was equal to or greater than the amount of the performance bond. (2) Whether on a true construction of the contract and on the same assumption as in (1) above, and in the event of the defendant having obtained payment under the performance bond as a result of any such call which it was entitled to make, the defendant was entitled to retain: (a) all of the moneys received by it, (b) only such amount as was equal to the amount of the loss suffered by it; or (c) some other and if so what amount.’ d

The breaches of contract alleged at para 5 of the points of defence, which were to be assumed for the purpose of the preliminary issue, were, (1) breach of cl 6(ii) of the contract of sale in shipping the sugar in an overage vessel without BSFIC’s clearance, and (2) breaches of cll 5 and 16, in that the vessel only arrived at Chittagong on 21 September 1994. e

In the judgment of Morison J ([1996] 4 All ER 563) and by his order dated 7 June 1996, he gave the answer Yes to question (1) and ‘(b)’ to question (2) (see at 567). He thus held that, on the assumption that Cargill were in breach of the contract, BSFIC was entitled to make a call for the full amount of the performance bond, even if Cargill’s breach or breaches caused no loss to BSFIC. However, on the same assumption, and in the event of BSFIC having obtained payment under the performance bond as a result of any call, BSFIC was entitled to retain only such amount as was equal to the amount of the loss suffered by it. f

For the purposes of the arguments raised before us on this appeal it is necessary to refer to three principal documents. g

The first is the form of tender invitation issued by BSFIC to tenderers in respect of 12,500 metric tons, plus or minus 5% of sugar as described. This required tenderers to furnish various documents under various headings. In particular, by cl 10, it required submission of two documents described as: ‘earnest money/bid bond’ and ‘performance guarantee’. In that respect cl 10 provided: h

‘(a) The tenderer/bidder will furnish 1% of the total quoted value as earnest money/bid bond in the form of bank draft/bank guarantee in favour of this corporation as per format given at annexure A ... (c) The earnest j



a money in respect of the tenderer/bidder whose offers have been accepted will be released to them only after they have furnished performance guarantee and signed the contract. The corporation reserves the right to forfeit the earnest money if the tenderers/bidders fail to sign the contract or to furnish performance guarantee for performance of the contract within the time stipulated and/or allowed for the purpose ... (d) In the event of the acceptance of this tender by the corporation, a letter of intent will be issued to the successful tenderer/bidder (hereinafter referred to as the supplier) who shall provide, within seven days from the date of the issue of the letter of intent, the performance guarantee in the form of a bank guarantee in the format given at annexure B ... The performance guarantee is liable to encashed/forfeited (i) if the successful bidder fails/refuses to sign the formal contract and (ii) if the full cargo in respect of both quality and quantity as per bill of lading and invoice is not received. But such encashment and forfeiture of the performance guarantee shall not limit the consignee to have the right to seek redress of full recovery of short receipt through other means.'

d Although the tender invitation, which was dated 5 May 1994, provided for signature by the tenderer and was in fact signed to indicate that Cargill as tenderer had understood and accepted the conditions as laid down, it also provided under the heading 'Acceptance and Contract' that: 'Issuance of a letter of intent shall not mean a formal contract and will be completed in all aspects when the formal contract is signed.'

e Cargill's firm offer in response to the invitation to tender was dated 28 May 1994. It gave details of the tonnage offered, origin, payment, delivery, price, etc and ended 'all other terms and conditions: as per tender'. It was accepted on 30 May. Cargill then procured its bankers, Banque Indosuez, to issue the second important document, namely the performance bond or 'performance guarantee' as it was called in the tender invitation. It took the form of a banker's 'letter of guarantee' dated 4 June 1994, providing inter alia:

g 'Whereas ... [BSFIC] ... has accepted the offer ... [of Cargill] ... for supply of 12,500 Metric Tons (5% more/less at [Cargill's] option) of sugar to be supplied by [Cargill] ... on the terms and conditions governing the purchase order and whereas the supplier has requested us through the Chase Manhattan Bank, London to issue a Guarantee for an amount of USD 526,273.15 ... only being 10% of the C & F (C) value of the contract, in consideration of aforesaid we, Banque Indosuez, Dhaka hereby undertake and guarantee due signing, acceptance and performance of the contract by the supplier and we unconditionally and absolutely bind ourselves: I) To make payment of USD 526,273.15 ... to the corporation [the defendants] or as directed by the said corporation in writing without any question whatsoever. II) ... The Guarantee is unconditional and it is expressly understood that the sole judge for deciding whether the suppliers have performed the contract and fulfilled the terms and conditions of the contract will be the [BSFIC].'

j On 16 June 1994 there was completed and dated the third important document: the contract of sale. Under its terms the respondents agreed to sell c & f (c) to the appellant 12,500 metric tons of sugar plus or minus 5% at the seller's option. There was an express promise by the respondent to ensure the arrival of the sugar at Chittagong before 15 September 1994 'positively'. There

was also a stipulation in the contract that the cargo would be shipped in a vessel which was not more than 20 years old. a

Clauses 13 and 16 of the contract of sale provided as follows:

‘13. PERFORMANCE BOND: The SELLER has already submitted a Performance Bond to the BUYER in the form of Bank Guarantee equivalent to 10% of the total offered C & F(C) value of 12,500 metric tons plus or minus 10% of Sugar. The Performance Bond is liable to be forfeited by the BUYER if the SELLER fails to fulfil any of the terms or conditions of this contract ... and also if any loss/damage occurs to the BUYER due to any fault of the SELLER ... b

16. SPECIAL CLAUSE: i) The arrival period/time is the essence of this contract. Therefore the SELLER shall strictly adhere to the arrival period/time stipulated in this contract. If the SELLER fails to do so, the BUYER shall be entitled to recover from the SELLER liquidated damage @ 2% of the contract value, as agreed, of the undelivered goods for each month or part of the month during which the delivery of the goods will be in arrear, or to terminate the contract and call back the LETTER OF CREDIT and also to forfeit the Performance Bond mentioned at clause 13.’ c

#### *The decision of Morison J*

Morison J held that it is implicit in the nature of a performance bond that in the absence of clear contractual words to a different effect there will be an accounting between the parties at some stage after the bond has been called, in the sense that their rights and obligations will be determined at some future date. If the amount of the bond is not sufficient to satisfy the beneficiary's claim for damages he can bring proceedings for his loss, giving credit for the amount received under the bond. d

Conversely if the amount received under the bond exceeds the true loss sustained, the party who provided the bond is entitled to recover the overpayment. The judge's reasoning in that respect has already been the subject of approving comment by this court in *Comdel Commodities Ltd v Siporex Trade SA* [1997] 1 Lloyd's Rep 424 at 431 and is not the subject of challenge in this appeal. The issue in this appeal centres upon the reservations expressed by Morison J that the implicit features set out above must give way to contractual words of contrary effect. It is the contention for BSFIC that the use of the word 'forfeited' in cl 13, echoed by the word 'forfeit' in special cl 16, demonstrates that the parties indeed intended to oust the usual implication as to any subsequent accounting between the parties. In that respect the judge observed as follows in relation to cl 13 ([1996] 4 All ER 563 at 572): e

‘It seems to me that on a proper construction of this clause, there is no indication that it was the parties' intention that the bond would either satisfy the whole of the buyer's damages (see above), or prevent the seller from recovering any overpayment. The word "forfeit" might be apt to suggest that, once called, the bond moneys had "gone" for good. But if it had been the intention of the parties to produce a result whereby the buyer could both call on the bond and sue for damages, whereas the seller forfeited his right to any overpayment, then much plainer words would have been required to take this case away from the general principles as I perceive them to be. That being so, it seems to me that treating the two parts of the clause disjunctively, and treating the right to forfeit as arising if either there was a breach or if any loss or damage occurred to the buyer due to any fault of the f

a seller (which might not be a breach) would make commercial good sense. The buyer is stipulating clearly that, as between himself and the seller, all he needs to show to be entitled to call on the bond is a breach of contract; he need not show damage (although damage will almost always follow); if, on the other hand, say through a misrepresentation by the seller, damage was caused to the buyer then the right to call the bond was conferred by the second half of the clause. But in either event there will be an “accounting”  
b at trial or arbitration to ensure that the buyer has not been underpaid or overpaid. Further, it seems to me that the more natural reading of the clause is to treat the events giving rise to a right to “forfeit” the bond as disjunctive. The words “also if” would otherwise be unnecessary and the words “due to any fault of the SELLER” would not lie easily with a construction which  
c treated the only triggering event as a breach of contract (“fails to fulfil any of the terms and conditions of this contract”).’

In relation to cl 16 the judge continued:

d ‘It seems to me that cl 16 clearly provides that if the arrival period/time stipulated in the contract is not adhered to then the buyer will either be entitled to liquidated damages or to terminate the contract and call back the letter of credit and forfeit the bond. Again, the right, as between the parties, of the buyer to call on the bond is not conditional upon him showing any damage. On termination he is entitled to receive immediate payment of the  
e bond moneys and sue for damages, and the seller, conversely, is entitled to recover any overpayment.’

f Given his conclusion on the question of construction, the question of whether or not the terms of the contract of sale as to forfeiture of the bond were penal in effect did not arise for the judge’s decision. However it had been argued before him, and in this respect he held (at 573):

g ‘Had I been persuaded that there was a term of the contract between the parties which enabled the buyer to call on the bond when he had suffered no damage, and to retain the moneys, I would have held the provision to have been penal.’

He then quoted certain remarks of Lord Browne-Wilkinson in *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] 2 All ER 370 at 376, [1993] AC 573 at 582 and went on:

h ‘It seems to me that it is a fortiori where, as here, there has been a “mere” breach not giving rise to non-completion of the contract. I do not, I hope without discourtesy to Mr Hossain’s interesting argument, need to consider the line of cases on forfeiture of moneys already paid under a contract, or of  
j analogous cases relating to the forfeiture of deposits. If provisions of the contract are penal, within principles which are well known, then the power to grant relief from their effect is undoubted. Relief from the effects of a penalty clause is akin to the right to relief from forfeiture in those cases where the court would grant specific performance of the contractual obligations, namely where the contract confers some proprietary or possessory interest.’



*The appellant's submissions*

In argument before us, Mr Hossain for BSFIC accepted that clear words are required to avoid the general principles expounded by the judge, and that, if he failed in his contention that cl 13 and 16 contained such clear words, then he must fail in this appeal. However, on the assumption that he was entitled to succeed, he submitted in his skeleton argument that the judge was wrong to go on to hold that cl 13 and 16 were penal in effect, and therefore enforceable only to the extent of damage actually suffered by BSFIC.

He submitted that neither cl 13 nor cl 16 is in any conventional sense a penalty clause, providing as each does for forfeiture of money already provided by the seller pursuant to a well-recognised tripartite commercial arrangement which, as Mr Hossain submits, would be undermined by introduction of doctrine of relief from penalties. He submitted that, whatever the statements of general principle made in authorities and textbooks, there is no reported authority directed to an analogous situation which could assist Cargill in this respect.

Mr Hossain's arguments may well have force. They did not attract Morison J, who, without deciding the point, certainly appears to have considered the principles relating to penal provisions were apt to be applied in a case of this kind. Since, for reasons which appear below, I consider the judge was right in his decision upon the principal issue of construction, I prefer to leave the 'penal clause' question undecided.

Mr Hossain relied upon the principle that no term should be implied into a contract which conflicts with other express terms of the contract. He argued that the meaning of the term 'forfeit' is clear. He relied upon the definition of the word in its ordinary and popular sense in the *Shorter Oxford Dictionary*, that the verb 'to forfeit' means to lose, to give up, to render oneself liable to be deprived of, or or to have to pay as the penalty of a fault, breach of duty or breach of engagement. He observed that it is implicit within that definition that the party to whom something, whether money or other property, is said to be forfeit is entitled to retain it. Thus, he said, use of the expression 'forfeit' in cl 16 and 'liable to be forfeited' in cl 13 in respect of a performance bond of this kind carries the plain and inevitable connotation that, once moneys have been paid pursuant to its terms, it is irrevocably lost to the payee. That being so, he relied upon the long established dictum that contractual terms are to be understood in their 'plain, ordinary and popular sense, unless they have generally in respect to the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense as distinct from the popular sense' (see *Robertson v French* (1803) 4 East 130 at 135, 120 ER 779 at 781).

Thus, submitted Mr Hossain, the judge was wrong in regarding the use of the words 'forfeit' and 'forfeited' as insufficiently clear to displace the implied term of ultimate accountability which is the usual incident of a performance bond. In this connection, he has rightly made the point that, when construing the effect of particular words in a commercial contract, it is wrong to put a label on the contract in advance and thus to approach the question of construction on the basis of a pre-conception as to the contract's intended effect, with the result that a strained construction is placed on words, clear in themselves, in order to fit them within such pre-conception.

*Discussion and conclusions*

As Saville J observed in another context in *Palm Shipping Inc v Kuwait Petroleum Corp, The Sea Queen* [1988] 1 Lloyd's Rep 500 at 502:

a 'It is not a permissible method of construction to propound a general or generally accepted principle ... and then (to use the words of Lord Goff in *The Notos* ([1987] 1 Lloyd's Rep 503 at 506) to seek to force the provisions of the [contract] into the straitjacket of that principle ...'

b On the other hand, modern principles of construction require the court to have regard to the commercial background, the context of the contract and the circumstances of the parties, and to consider whether, against that background and in that context, to give the words a particular or restricted meaning would lead to an apparently unreasonable and unfair result.

As Lord Reid observed in *L Schuler AG v Wickman Machine Tool Sales Ltd* [1973] 2 All ER 39 at 45, [1974] AC 235 at 251:

c 'The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.'

d That approach may fairly be said to have reached a high-water mark in the recent decision of the House of Lords in *Charter Reinsurance Co Ltd v Fagan* [1996] 3 All ER 46 at 51, [1997] AC 313 at 384, in which 'the landscape of the instrument of a whole', as Lord Mustill put it, led the court effectively to construe the words 'actually paid' in the ultimate net loss clause of a reinsurance contract as meaning 'actually payable'.

e If questions of reasonableness are taken into account and if the usual characteristics and broad commercial purpose of performance bonds are borne in mind, it seems to me that the following matters are pertinent to the task of construction in the case. First, as Mr Hossain accepts, such a bond is a guarantee of performance. That is not to say it is a guarantee in the sense it has all the normal incidents of a contract of surety; it is of course a contract of primary liability so far as the bank that gives it is concerned. However it has the feature f that its purpose is to provide security to the buyer for the fulfilment by the seller of his contractual obligations (see *R D Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1977] 2 All ER 862 at 864, [1978] QB 146 at 149 per Kerr J). Second, its purpose is also that the buyer may have money in hand to meet any claim he has for damage as a result of the seller's breach. Third, it confers a g considerable commercial advantage upon a buyer. Not only does the buyer have an unquestionably solvent source from which to claim compensation for a breach by the seller, at least to the extent of the bond, but payment can be obtained from the seller's bank on demand without proof of damage and without prejudice to any subsequent claim against the seller for a higher sum by way of damages. In h these circumstances the obligation to account later to the seller, in respect of what turns out to be an overpayment, is a necessary corrective if a balance of commercial fairness is to be maintained between the parties.

i In the light of those considerations, the question arising in this case is whether, by use of the word 'forfeit' in relation to the bond, the parties intended to negative any later obligation of the buyers to account, should the sum paid over exceed the damage actually suffered.

Turning to the use of the words 'forfeit' and 'forfeited' in the context in which they appear, I do not accept that such intention is plain. I start from the position that the words have not been used with any degree of precision, let alone with any eye to the ultimate position between the parties so far as damage suffered is concerned. In both cl 13 and cl 16, the terms 'forfeited' and 'forfeit' respectively are applied to the bond, not (as one would expect if Mr Hossain were right) to the

moneys paid under the bond. While Mr Hossain submits the point is a technicality and that, by their reference to the bond the parties must in fact have intended to refer to the moneys paid under it, I consider that the term has simply been used as a shorthand for the exercise of the buyer's right to call for payment under the bond. In other words it refers to the position as between BSFIC and the bank, not BSFIC and Cargill. This seems to me to be consistent with a further feature, that the bond is said to be 'liable to be forfeited by the buyer', whereas if the clause were intended to convey that the sum paid or payable under the bond would be forfeit, in the sense of irrecoverably lost to Cargill, a reference to forfeiture by the seller would have been more appropriate.

Further, the decision of the judge to read the words 'liable to be forfeited', in the context in which they appear, as equivalent to 'liable to be called or encashed' accords more with reason, fairness and commercial good sense than does the meaning for which Mr Hossain contends. The effect of Mr Hossain's construction would be to provide BSFIC with a substantial windfall in any case where it had suffered no loss or relatively nominal loss, and would run counter to the general proposition that compensation for breach of contract depends on proof of loss. Whilst national and international trade is encouraged and enhanced by the role of the performance bond, both as a security and as an incentive for the performance of the parties' contractual obligations, the very fact that such bonds are payable by bankers on demand and without proof of loss seems to me to require that, as between the parties, the circumstances said to justify such demand should remain open to subsequent challenge, and to quantification of damage so that an ultimate balance may be struck between the parties.

For those reasons I do not regard the 'dictionary definition' approach of Mr Hossain as helpful. However, even if that approach is appropriate, I note that one of the definitions of 'forfeit' on which he relies is 'to render oneself liable to have to pay'. Taken on its own, that definition is certainly not one which precludes or excludes any later intention or obligation on the part of the parties to account in respect of the actual loss suffered. I come back to the point that the real purpose of cl 13 is to define as between the parties the circumstances in which the buyer shall be entitled to make a call on the bank, a matter upon which the bond itself is silent. The use of the words 'forfeit' and 'forfeited' fall to be considered in that light.

Mr Hossain referred us also to certain examples of the use of the word 'forfeit' and 'forfeited' in *Stroud's Judicial Dictionary* (5th edn, 1986). While it is true that the opinion is expressed in the text that the words seem to involve the idea of permanent loss or liability thereto, the statutory examples given do not afford any real assistance in the present contractual context.

In further support of his argument Mr Hossain submitted: (1) that without the meaning contended for by BSFIC the bond would provide no incentive for the sellers to fulfil the terms of the contract and would be commercially worthless to achieve its claimed purpose; (2) that the text of a Cargill telex dated 27 May 1994 suggests that Cargill may have been adding a cushion of 10% over the stock market price, in order to hold the offer price until 30 May, which date was extendable on request, and thus would have taken into account the possible loss of 10% of the price, which might be sustained under any forfeiture of the bond; and (3) that cl 13 of the contract should be construed by reference to, and in harmony with, the earlier bid bond required to be provided by way earnest to the value of 1% of the contract price, in which respect cl 10 of the invitation to tender provided that BSFIC reserved the right to forfeit the earnest money if the



a tenderers/bidders failed to sign the contract or furnish the performance guarantee.

I find none of those arguments persuasive. (1) I do not think it is right to stigmatise the obligation to provide the bond as commercially worthless simply because the moneys paid over under its terms are not to be regarded as irrecoverable by the seller. I have already touched upon the commercial advantage to the buyer in obtaining a bond. The right to call on the bond at an early stage in respect of any breach or suspected breach by the seller is plainly of value. It acts as an obvious incentive for his performance. It achieves the effect of an early payment against loss or possibility of loss without the need to resort to litigation, and if it is sufficient (or more than sufficient) to compensate the buyer, it places the onus of challenge and recovery upon the seller. (2) The suggested evidence of an intended cushion is highly questionable. However, whether or not as a prudent seller Cargill indeed provided for a cushion, in what is an uncertain market, that does not provide evidence of any common intention or recognition that a cushion should be provided to cover the contingency of the bond being called, and thus it cannot affect the question of construction. (3) I do not consider that cl 13 and 16 of the sale contract fall to be construed by reference to the terms of the earlier bid bond. It is plain from the terms of that bond and from the requirement for the seller to furnish 1% as earnest money in respect of the signature of the contract and the performance bond, that the bid bond was to be provided as a deposit in the conventional sense. That is to say as an earnest of good faith prior to signature of a formal contract, the amount of which would be forfeit to the buyer, in the sense that he would be entitled to retain it, if the matter went off through the seller's default.

I consider that the judge was correct in the decision he reached upon the principal point for the reasons which he gave. That being so, the need to consider the argument as to the penal effect of cl 13 and 16, had he come to a different conclusion, does not fall for decision.

f There is one other aspect of this appeal to which I have not yet referred; it concerns costs. The judge ordered that the defendant should pay to the plaintiffs three-quarters of the plaintiffs' costs for the preliminary issues, determined pursuant to the order of Rix J.

g Mr Hossain suggests that there were no good grounds for the judge to make his order in that form because he had answered one issue in favour of BSFIC and the other in favour of Cargill; thus honours were at the very least even. The parties are not able to produce a proper note of the judge's reasons or, indeed, to recall them in detail. This court can only speculate that the order was made either on the basis of time spent in argument upon the issues, or on the basis of the view the judge took of the overall merits, in the absence of any suggestion that any damage had actually been suffered by BSFIC. He may have had both or, indeed, other considerations in mind; however, bearing in mind the width of the judge's discretion in the matter of costs, I see no reason or warrant to interfere with the order which he made. I would dismiss the appeal.

j **SWINTON THOMAS LJ.** This case has been succinctly and extremely well argued on both sides. The issue is as to the meaning to be given to the words 'forfeit' and 'forfeited' in cl 13 and 16 of the contract.

Although I have not found this an altogether easy question to answer, I agree with the conclusions reached by Potter LJ and for the reasons given by him I will also dismiss this appeal.

As to costs, I do not think it is possible in this case successfully to challenge the judge's exercise of discretion. a

**STAUGHTON LJ.** If my heart ruled my head I would award the \$526,000 to the state corporation of Bangladesh and not to an arm of the Cargill empire. But I have to decide this appeal according to law. I regard the law as providing that the Bangladesh Sugar and Food Industries Corp (BSFIC) cannot keep the money, except to the extent that they can establish loss from a breach of contract by Cargill. b

The general situation as to performance bonds is that they provide that the bank or other party giving the bond has to pay forthwith, usually on demand. but subsequently there has to be an accounting between the parties to the commercial contract. c

Mr Hossain accepts that, and in my judgment he is right to do so. But as Potter LJ has said, one does not place too much weight on that general approach. It is wrong to apply a label to a contract before one looks at the wording, and then bend the words to meet that label.

Nevertheless it seems to me right to bear in mind that the parties very probably will have known that that is a general feature of performance bonds. Is there then wording in this contract which shows a different intention? In my judgment there is not. The references to forfeiture of the performance bond in cl 13 and 16 of the sale contract are capable of being read as referring only to the position as between BSFIC and the bank, and not as between the BSFIC and Cargill. In other words, the bond is to be forfeited when it is called upon in the circumstances described, the bank must pay, and the money must go to the BSFIC. But that does not affect the position which generally applies, as between the BSFIC and Cargill, that there must be an accounting. d

I do not need to resort to the decision of the House of Lords in *Charter Reinsurance Co Ltd v Fagan* [1996] 3 All ER 46, [1997] AC 313 in order to reach that conclusion. I too would dismiss the appeal on the substantive point. e

As to the question of the costs in the court below, it seems to me that the order which Morison J made was well within his discretion, and we cannot interfere with it. f

*Appeal dismissed. Leave to appeal to the House of Lords refused* g

Kate O'Hanlon Barrister.

## R v Burt & Adams Ltd

HOUSE OF LORDS

LORD GOFF OF CHIEVELEY, LORD LLOYD OF BERWICK, LORD NOLAN, LORD HOFFMANN  
AND LORD HOPE OF CRAIGHEAD

23 FEBRUARY, 2 APRIL 1998

*Gaming – Amusements with prizes – Provision on premises in respect of which local authority permit obtained – Observance of statutory requirements – Statutory limit on value of prizes – Owner of amusement arcade allowing prizes to be combined to redeem larger prizes – Whether statutory limit contravened – Gaming Act 1968, ss 34(3), 38(6).*

The defendant company operated an amusement arcade and had been granted a permit under s 34 of the Gaming Act 1968 allowing the use of machines constructed or adapted for playing a game of chance by means of the machines. One of the machines, a 'crane and grab' machine, contained soft toys which could be won by operating a small crane to pick up the prize and drop it into a chute for collection. Only one such toy could be won in any one game and the value of it was within the limit laid down by s 34(3)<sup>a</sup> of the 1968 Act. Another type of machine was a 'pusher' machine, which had prizes, comprising 10 pence coins, £1 notes, wrist watches and red and black plaques, held on moving trays which could be obtained in any combination by dislodging them from the moving tray onto a chute from which the player could collect them. Notices stating that prizes obtained from the machines could be combined to redeem larger prizes according to the points value of those prizes were displayed within the premises. Those machines and the practice of trading up prizes won for larger or other prizes was brought to the attention of the police and Gaming Board, and the defendant was subsequently charged in the Crown Court with unlawful gaming contrary to s 38(6) of the 1968 Act in that a successful player of the machines was entitled to receive 'an article, benefit or advantage' in excess of what was permitted by s 34(3). At the hearing, the judge held that the activities concerned were unlawful and the defendant pleaded guilty. The Court of Appeal allowed the defendant's subsequent appeal against conviction, holding that the accumulation of prizes to exchange for a larger or other prizes was not unlawful. The Crown appealed to the House of Lords on the grounds that the right to aggregate and exchange prizes won in respect of any one game for a larger prize was a benefit or advantage which was not permitted by s 34(3) of the 1968 Act and was unlawful.

**Held** – (Lord Hoffmann dissenting) Section 34(3) of the 1968 Act did not prohibit the holder of a permit to operate a gaming machine from offering to the player, who won a non-monetary prize or token in playing any one game, the right to accumulate his prizes from playing further games and to exchange them for a non-monetary prize of a value exceeding the £6 limit within the section. Moreover, so long as the value of what could be obtained by trading up was limited to the aggregate of the value of the tokens given up in exchange, there was no additional benefit or advantage obtained by the player which could be said to be unlawful and contrary to s 34(3). In the instant case, the prizes won by a

<sup>a</sup> Section 34(3), so far as material, is set out at p 423 *e* to *h*, post



successful player in respect of any one game played by means of either the crane and grab or pusher machines were worth no more than £6 and were thus within the limits laid down by s 34(3); and provided the value obtained by trading up was limited to the aggregate of the value of the tokens given up in exchange, there was no additional benefit or advantage obtained from the exchange which was unlawful. Accordingly, the appeal would be dismissed (see p 418 *h j*, p 419 *f to h*, p 421 *h j*, p 423 *a* and p 432 *d* to p 433 *c*, post).

### Notes

For general restrictions applicable to gaming machines, see 4(1) *Halsbury's Laws* (4th edn reissue) paras 135, 137–138, 140.

For the Gaming Act 1968, ss 34, 38, see 5 *Halsbury's Statutes* (4th edn) (1993 reissue) 130, 134.

### Cases referred to in opinions

*Cronin v Grierson* [1968] 1 All ER 593, [1968] AC 895, [1968] 2 WLR 634, HL.

*Secretan v Hart* [1969] 3 All ER 1196, [1969] 1 WLR 1599.

### Appeal

The Crown appealed with leave of the Appeal Committee of the House of Lords given on 9 July 1997 against the decision of the Court of Appeal, Criminal Division (Kennedy LJ, Wright J and Judge Wickham) ((1995) *Times*, 22 November) on 9 November 1995 whereby the court allowed the appeal by the defendant company, Burt & Adams Ltd, against its conviction on a plea of guilty on 1 December 1994 at the Crown Court at Mold, before Judge Evans QC and a jury, of unlawful gaming contrary to s 38(6) of the Gaming Act 1968. In refusing leave to appeal, the Court of Appeal certified that a point of law of general public importance (see p 433 *a*, post) was involved in the decision. The facts are set out in the opinion of Lord Hope of Craighead.

*John Goldring QC* and *Adam Weitzman* (instructed by the *Crown Prosecution Service*) for the Crown.

*Michael Beloff QC*, *Susanna Fitzgerald* and *Helen Mountfield* (instructed by *Mincoff Science & Gold*, Newcastle upon Tyne) for the respondent.

Their Lordships took time for consideration.

2 April 1998. The following opinions were delivered.

**LORD GOFF OF CHIEVELEY.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Hope of Craighead. For the reasons he gives I would dismiss the appeal and answer the question in the negative.

**LORD LLOYD OF BERWICK.** My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hope of Craighead. I agree with his reasons, and conclusion, and gratefully adopt his description of the two types of amusement machine with which this case is concerned. For convenience I set out here s 34(3) of the Gaming Act 1968, so far as relevant:

‘Except as provided by subsections (4) and (9) of this section, in respect of any one game played by means of the machine no player or person claiming

a under a player shall receive, or shall be entitled to receive, any article, benefit or advantage other than one (and only one) of the following, that is to say ...

(b) a non-monetary prize or prizes of a value or aggregate value not exceeding £6 or a token exchangeable only for such a non-monetary prize or such non-monetary prizes; (c) a money prize not exceeding £3 together with a non-monetary prize of a value which does not exceed £6 less the amount of the money prize, or a token exchangeable only for such a combination of a money prize and a non-money prize ...'

In count 2 of the indictment the defendants were charged with contravening s 34(3)(b) on the ground that a successful player on the 'crane and grab' machine was entitled to receive 'an article benefit or advantage' in excess of what is permitted under the subsection, namely 'an article to be used as a token which could be exchanged with other such tokens for a non-monetary prize to a value in excess of £6'. The article in question was a teddy bear worth £6 or less. At an early stage of the appeal Mr Goldring QC, for the Crown, was asked what would be the position if the successful player, having won a brown teddy bear, was allowed to exchange it for another teddy bear of different colour but the same value. Mr Goldring replied that in such a case the police would be unlikely to prosecute. One was glad to hear it.

By the end of the argument he had conceded, correctly in my view, that the right to exchange one teddy bear for another of the same value is not caught by the subsection at all. For the right to exchange one non-monetary prize for another non-monetary prize of the same value does not confer a 'benefit or advantage' in excess of what is permitted under the subsection.

The sole question therefore is whether the right to exchange two small teddy bears worth £6 each for one large teddy bear worth £12 or (if the player was sufficiently persistent) 400 teddy bears for a battery operated car of equivalent value, contravenes the section.

In the judgment delivered by Kennedy LJ, which I for my part find entirely convincing, the Court of Appeal has held that this form of 'trading up' (as it is called) is not unlawful. It is a practice which has prevailed for many years, apparently without objection. Parliament has had more than one opportunity to say in plain terms, if it had so wished, that the practice of trading up is unlawful. It is difficult to see why the practice should be regarded as contrary to the legislative policy underlying Pt III of the Gaming Act 1968, since there is nothing to stop young people spending all day in the amusement arcade winning prizes of £3 on the 'pusher' machine and then spending the accumulated proceeds as they wish. For all these reasons it may be wondered why the Gaming Board should have seen fit to challenge the decision of the Court of Appeal before your Lordships. But since your Lordships are not of one mind, I add a short judgment of my own in support of the judgment below.

The prosecution case on count 2 depended on showing, as a first step, that the small teddy bear was either 'a token' when it emerged from the crane and grab machine, or at least became a token or was used as a token when it was exchanged with other 'tokens' for a larger teddy bear. If so, it was not exchangeable *only* for another small teddy bear, and the defendants would be in breach of s 34(3)(b).

It is important to notice that 'token' is not defined in the Act. There is no deeming provision by virtue of which the word 'token' is deemed to mean or include anything other than its ordinary meaning. Section 34(3)(b) itself

distinguishes between non-monetary prizes, such as teddy bears, and tokens exchanged for non-monetary prizes. In other provisions of the Act it is clear that 'token' is used in its ordinary sense. Thus s 26(1)(b) refers to 'a slot or other aperture for the insertion of money or money's worth in the form of cash or tokens'.

But it was argued that since teddy bears have a points value, and are exchangeable according to a fixed scale, they are tokens for the purposes of s 34(3)(b). I do not agree. Tokens are frequently exchangeable for goods. But it does not follow that all exchangeable goods are tokens. The man who is given a tie for Christmas, and is told that it can be exchanged at Harrods within 30 days, receives a tie and not a token.

Parliament could have provided that exchangeable articles, such as teddy bears, are to be deemed to be tokens for the purposes of the Act. But it has not done so. In my judgment 'token' in s 34(3)(b) is used in its ordinary sense, and does not include an exchangeable teddy bear.

The only other provision relied on by Mr Goldring was s 34(8), which defines a non-monetary prize as follows:

'In this section "non-monetary prize" means a prize which does not consist of or include any money and does not consist of or include any token which can be exchanged for money or money's worth or used for playing a game by means of the machine ...'

The argument, as I understood it, was that since the teddy bear could be exchanged for another teddy bear and since the second teddy bear would be worth something (with which I would agree) it must follow that the second teddy bear would be money's worth within the meaning of s 34(8) and therefore that the first teddy bear would be excluded from the definition of non-monetary prize. It must therefore be a token.

I would hesitate long before attaching criminal liability to such a convoluted argument. If Parliament had intended to prohibit the exchange of non-monetary prizes for other non-monetary prizes of the same value, by deeming such prizes to be 'tokens', it would surely have said so in plain words. But in any event the argument leads nowhere. Section 34(8) is, as Mr Beloff QC pointed out, an anti-avoidance provision. Its purpose is to inhibit circumvention of the £3 limit on cash prizes, by preventing non-monetary prizes being turned into cash or the equivalent of cash. There is nothing in the subsection which prohibits the exchange of one non-monetary prize for another non-monetary prize. Nor is there any reason why there should be. Indeed it would make nonsense of the definition if all non-monetary prizes were included in the meaning of money's worth; for the whole purpose of the definition is to distinguish between non-monetary prizes on the one hand and money and money's worth on the other. Money's worth in s 34(8) must therefore be given a narrow construction. It means the equivalent of money, as it does in s 26(1)(b). So far from lending support to the argument that exchangeable teddy bears are tokens for the purpose of s 34(3)(b) the definition in s 34(8) points in the other direction.

Since in my view exchangeable teddy bears are not tokens in themselves, nor used as tokens when exchanged for other teddy bears of the same value, the prosecution's argument on count 2 never gets off the ground.

I turn to count 3. It relates to the pusher machine, and is said to be covered by s 34(3)(c).



a The first question is whether the red and black plaques worth 20 and 100 points respectively are 'tokens'. Contrary to Mr Beloff's submission, but in agreement with all your Lordships, it seems obvious that they are. The plaques have no intrinsic value. Mr Beloff's submitted that they are non-monetary prizes. This is, with respect, almost as far-fetched as Mr Goldring's submission that teddy bears are tokens.

b Granted that plaques are tokens, the next step was for the prosecution to show that the right to accumulate plaques as tokens meant that the individual token was not exchangeable *only* for a prize or prizes worth £6 or less. In conjunction with other plaques it could be exchanged for a prize worth more than £6 depending on how many plaques the player had won.

c The fallacy in this argument is that it ignores the language of s 34(3). The limit of £6 (or £3 cash) applies only 'in respect of any one game'. The right to obtain a bear worth £12 is not 'a benefit or advantage' in respect of any one game, but a benefit or advantage in respect of not less than two games. There is nothing in s 34(3)(b) or elsewhere to prevent the accumulation of cash. Nor is there anything to prevent the accumulation of tokens. 'Trading up' in tokens, whereby  
d the player receives one larger prize instead of several smaller prizes of the same value is not unlawful. Nor is 'trading up' in teddy bears.

It is said that this construction would allow wholesale evasion of the Act. While a single plaque might be advertised as being worth only £6, the rules might provide for two or more plaques together to be worth not £12 but £100 or £1,000. The subsection would not be infringed because in respect of any one game  
e considered on its own the limit would not have been exceeded.

Putting aside the commercial implausibility of this example, it seems clear enough that the scheme would not work. It would meet with the same answer as that given by the House in *Cronin v Grierson* [1968] 1 All ER 593, [1968] AC 895. It was held in that case that the more favourable odds enjoyed by the player after  
f winning the jackpot was a benefit or advantage in excess of that permitted by s 2(2) of the Betting Gaming and Lotteries Act 1964 'in respect of any playing of the game', namely the game in which he won the jackpot. By the same reasoning the increased value of the second plaque in combination with the first plaque would be held to be a benefit received by the player in respect of the game in which he won the first plaque. So I see no scope for evasion.

g Finally it was said that the right to exchange a single plaque for a single teddy bear is itself a benefit. But if I am right that a plaque is a token, this is the very benefit which is permitted by the section. For the same reason the right to exchange a single teddy bear for another teddy bear of equal value does not infringe the Act, as indeed Mr Goldring conceded.

h I would dismiss the appeal.

**LORD NOLAN.** My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Hope of Craighead and Lord Hoffmann. I agree with Lord Hope in concluding that the appeal should be  
j dismissed and save in one respect I agree with the reasons by which he arrives at that conclusion.

The respect in which I differ relates to the statutory role of the teddy bears or other soft toys and of the plaques which are the subject of counts 2 and 3 of the indictment. Like Lord Hoffmann, I consider them to be tokens within the meaning of s 34(8). Let me repeat the words of the subsection, so far as material:

'In this section "non-monetary prize" means a prize which does not consist of or include any money and does not consist of or include any token which can be exchanged for money or money's worth ...'

The teddy bear or other soft toy brings to the player who wins it the right of exchange (to the value of 100 points) for another prize. It shares this characteristic with the red plaques (20 points) and the black plaques (100 points) which are the subject of count 3 and which, to my mind, are clearly tokens. It is said, however, that the teddy bear is distinguishable from the plaque because it has an intrinsic value and is designed to give pleasure to its owner. But a book token has an intrinsic value in the book market which is equal to its face value, and is designed to give its owner the pleasure of freedom of choice. In determining whether or not an article is a token I do not think that its appearance, or intrinsic value, or suitability for different kinds of use can be decisive. For the cold-blooded and unsentimental purposes of the subsection, as it seems to me, a token is simply an article which can be used as a means of exchange for money or money's worth.

Another argument put forward on behalf of the respondent is that neither the soft toys nor the plaques are tokens within the meaning of the subsection because the non-monetary prizes for which they may be exchanged are not money's worth within the meaning of Pt III of the Act. I cannot accept this argument. The prizes are indisputably to my mind, money's worth within the ordinary meaning of those words. They are worth money. Section 34(3) recognises their character as such by placing a limit upon their permissible monetary value. To read s 34(8) in such a way as to prevent articles with an intrinsic value from qualifying as tokens, and as excluding non-monetary prizes from the concept of money's worth would seem to me to place an unduly restrictive meaning upon the words used.

But whether the soft toys and the plaques are properly regarded as non-monetary prizes or as tokens, the 'trading up' question still has to be answered. As I have indicated, in company with the majority of your Lordships, I would answer it in favour of the respondent. For it is common ground that the soft toys or plaques, including the rights of exchange which they give, are worth no more than £6. Therefore, if properly regarded as non-monetary prizes, they are within the limit.

What if they are properly regarded as tokens? Here again the appellant fails in my judgment because no single token carries the right of exchange for non-monetary prizes worth more than £6. The fact that two tokens can together be exchanged for a non-monetary prize or prizes worth £12 is neither here or there. The exchange value of each token is still no more than £6. Strictly I suppose it might be argued that in this instance the token is not so much exchangeable for a non-monetary prize worth £6 as for an undivided share in half of a non-monetary prize worth £12: but I would see no harm and no great difficulty in reading 'non-monetary prize' to include an undivided share in a non-monetary prize provided that the £6 limit of value per token is not exceeded.

Suppose, however, two tokens together could be exchanged for a non-monetary prize worth £20, £200, or £2,000. In my judgment, the section would then be infringed. That is because the token could not be described as 'exchangeable only' for £6 in money's worth of non-monetary prize. So to describe it would ignore the possibility of its being exchanged, in combination with another token, for more than £6 worth of non-monetary prize. This

a possibility is a benefit which contravenes both the letter and spirit of the subsection, since it improves the odds in favour of the persistent gambler. But there is no such additional possibility or benefit in the present case.

For these reasons I concur with the answer proposed by Lord Hope of Craighead to the question before your Lordships on the assumption which his Lordship makes.

b **LORD HOFFMANN.** My Lords, gaming machines are regulated by Pt III of the Gaming Act 1968. Machines which offer large money prizes can be used only in premises such as licensed gaming clubs to which the public do not have access. But machines which are used, as the Act says 'for gaming by way of amusement with prizes', may be used at fairgrounds and amusement arcades to which entry  
c is unrestricted. The term 'amusement with prizes' accurately conveys the legislative policy. The machines are primarily for amusement and the prizes are intended only to add some excitement to playing the game.

To give effect to this policy, the Act severely restricts both the charges which can be made for playing the game and the value of the prizes which can be won.  
d In the original Act, the maximum charge allowed was a shilling and the maximum prizes which could be won in any game were two shillings in money or something worth less than five shillings. Since then, the values have from time to time been increased by statutory instrument. When the events giving rise to this appeal took place in 1993, the maximum charge was 20p and the maximum  
e prizes were £3 in money and £6 in kind. The limits as to prizes are imposed by s 34(3) of the Act, which reads as follows:

'Except as provided by subsections (4) and (9) of this section, in respect of any one game played by means of the machine no player or person claiming under a player shall receive, or shall be entitled to receive, any article, benefit  
f or advantage other than one (and only one) of the following, that is to say—  
(a) a money prize not exceeding [£3] or a token which is, or two or more tokens which in the aggregate are, exchangeable only for such money prize;  
(b) a non-monetary prize or prizes of a value or aggregate value not exceeding [£6] or a token exchangeable only for such a non-monetary prize  
g or such non-monetary prizes; (c) a money prize not exceeding [£3] together with a non-monetary prize of a value which does not exceed [£6] less the amount of the money prize, or a token exchangeable only for such a combination of a money prize and a non-monetary prize; (d) one or more  
h tokens which can be used for playing one or more further games by means of the machine and, in so far as they are not so used, can be exchanged for a non-monetary prize or non-monetary prizes at the appropriate rate.'

Contravention of any provision of s 34 is an offence: see s 38(6).

The respondents, whom I shall call 'the company', operate an amusement arcade at Rhyl. It includes two types of machine which have been respectively  
j called the 'pusher' and the 'crane'. The pusher has a moving tray carrying various items which can be dislodged into a chute by coins pushed in by the player. The dislodged items can then be extracted by the player. They include red and black plaques which can be exchanged for items in the company's prize redemption desk. The company allocates a value in points to the items of merchandise available as prizes. For the purposes of exchange, red plaques are worth 20 points and black ones 100 points.



Playing the crane involves using a grab to try to pick up a soft toy and drop it into the chute. The soft toys are prizes in their own right which players may keep if they so wish and it is agreed that they are worth less than £6. But prominent notices tell players that they may also be exchanged for merchandise at the prize redemption desk and for this purpose they have the same 100 point value as a black plaque. a

The novel feature of the company's operations which attracted the attention of the Gaming Board was that they did not require the player to exchange his plaque or soft toy after each game. He could accumulate plaques or toys or both and eventually exchange them for items of merchandise worth considerably more than £6. So, for example, the redemption desk offered items such as television sets and radios which could be exchanged in return for a stipulated number of plaques or soft toys. The Gaming Board took the view that the right to exchange the plaque or toy (together with other such plaques or toys) for an item worth more than £6 gave the player a 'benefit or advantage' additional to one of those permitted under the four paragraphs of s 34(3). It instituted a prosecution for infringement of s 34(3). There were three counts, but I need refer only to counts 2 and 3. Count 2 alleged that a player of the crane machine could receive a benefit or advantage other than one permitted under s 34(3), namely 'an article to be used as a token which could be exchanged with other such tokens for a non-monetary prize to a value in excess of £6'. Count 3 alleged that a player of the pusher machine could receive a similar benefit or advantage. b  
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There was no dispute of fact at the trial before Evans J. An agreed statement was put before him. On those facts he ruled that an offence had been committed and the company thereupon pleaded guilty. The Court of Appeal (Criminal Division) allowed an appeal and quashed the convictions. Against that decision the prosecution appeals. e

It will be convenient to begin with count 3, because count 2 has an additional complicating feature (namely, the use of a soft toy as a means of exchange) which count 3 lacks. In all other respects, the two counts raise the same issues. I shall therefore defer considering the effect of the additional feature of count 2 until I have dealt with the matters which both counts have in common. f

The first question is whether the plaques are tokens within the meaning of the Act. Mr Beloff QC, who appeared for the company, said that although the plaque might ordinarily be regarded as a quintessential token, it was deemed not to be by virtue of the definition of a 'non-monetary prize' in s 34(8): g

'In this section, "non-monetary prize" means a prize which does not consist of or include any money and does not consist of or include any token which can be exchanged for money or money's worth or used for playing a game by means of the machine ...'

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Mr Beloff submitted that the plaque could not be exchanged for money or money's worth or used for playing another game. 'Money's worth', he said, meant something rather like money and did not include the various items of merchandise at the prize redemption desk for which the plaque could be exchanged. j

In my view this construction is quite untenable. 'Money's worth' is a legal term of art. As Buckley J said in *Secretan v Hart* [1969] 3 All ER 1196 at 1199, [1969] 1 WLR 1599 at 1603 it is an expression—

a 'very familiar to lawyers as being a way of expressing the price or consideration given for property where property is acquired in return for something other than money, such as services or other property, where the price or consideration which the acquirer gives for the property has got to be turned into money before it can be expressed in terms of money.'

b In my opinion, 'money's worth' means anything which is capable of being turned into money, such as the items of merchandise for which the plaques could be exchanged. There is nothing in the context of the Act which suggests that it was intended to have any other meaning.

c The question is, therefore, whether it can be said of such a token that it is 'exchangeable only' for a money prize not exceeding £3 (para (a)), a non-monetary prize of a value not exceeding £6 (para (b)) or a money prize not exceeding £3 and a non-monetary prize not exceeding £6 less the amount of the money prize (para (c)). If, besides being exchangeable for one or other of these prizes, the plaque confers some additional 'benefit or advantage', s 34 is infringed.

d It seems to me plain that a plaque won in a single game does confer an additional benefit or advantage, namely, that of being exchangeable, together with other plaques or articles having a value in points, for merchandise of a value exceeding £6. Each plaque carries the advantage of being able to be exchanged together with other plaques for a television, radio, etc. Against this simple conclusion, Mr Beloff offered two arguments.

e First, he said that the additional benefit or advantage depended upon obtaining further plaques by playing additional games. Therefore the right to exchange plaques for more valuable items could not be said to have been obtained 'in respect of any one game'.

f This, in my view, is merely a piece of verbal sleight of hand. If the argument were correct, it would follow that the provisions of the Act could easily be evaded by providing that a single plaque could be exchanged only for, say, £3, but that anyone who obtained two plaques could exchange them for £200 or a television set worth £200. In such a case it could equally be said that £3 was all that could be obtained in respect of any one game.

g To meet this difficulty, Mr Beloff deployed his second argument, which was to point out that there was no evidence that the value of any prize divided by the minimum number of plaques needed to secure it was more than £6. Therefore, whatever benefit or advantage might be obtained, it did not exceed the permitted limit.

h But this argument in my view ignores the language of the Act. It does not say that the value of any benefits or advantages obtained by playing a game should not exceed £6. It says that the *only* benefit or advantage which a plaque may confer is the right to exchange it for a money prize of £3 or a non-monetary prize worth less than £6 or a combination of both. So far as the plaque confers any additional benefit or advantage at all, it infringes the section. Therefore, unless the right to make an exchange in combination with other plaques is ignored altogether (which leads to the absurd consequences I have just mentioned) it must be unlawful.

j I turn then to count 2, which is the same as count 3 except that the item which may be exchanged is not a plaque but a soft toy. The only additional question raised by this count is whether the toy is a 'token' or a 'non-monetary prize'. In the case of tokens, the Act is concerned with their exchange value. In the case of

non-monetary prizes, the Act is concerned only with their value and not with what can be done with them. a

The Act contains no definition of a 'token', but the scheme of the Act shows that the feature of a token with which Parliament was concerned was its exchangeability as of right for something else. In ordinary life, a typical token is a coin, which by virtue of the rules as to legal tender is exchangeable as payment for goods or services. A token may have little or no intrinsic value (as is nowadays the case with coins) but this is not necessarily the case, although obviously a token which had greater intrinsic value than exchange value would cease to be used as a means of exchange: something which has from time to time happened with coinage. b

In the context of this Act, therefore, it seems to me that the identifying characteristic of a token must be the right to exchange it for something else. Anything which can be obtained from the machine and exchanged for something else is, for the purposes of the Act, a 'token'. I do not think it is relevant to consider, as the Court of Appeal did, the analogy of the buyer of a book exchanging it for another, which is not as of right and in any case an altogether different commercial context. Nor am I concerned to decide whether the right to exchange a soft toy for another of the same value (say of a different colour) would make it a 'token'. Since *ex hypothesi* both are worth less than £6, the point is academic. In this case, however, the company advertised the exchangeability of a soft toy as a desirable right attached to them and in my opinion they were just as much tokens as the plaques. The fact that someone might choose to keep one rather than exchange it is not sufficient to deprive it of the character of a token. In construing the Act in this way, I am again concerned by the opportunity for wholesale evasion which any other construction would provide. If the soft toy can only be a 'non-monetary prize', there would be nothing to stop the operator from advertising that a single soft toy could be exchanged for a television set or a large sum of money. As long as the intrinsic value of the soft toy was less than £6, the Act would be satisfied. I decline to give the Act a construction which leads to such an absurdity. Nor do I think that the difficulty could be met by asking, as a question of fact, whether the value of the prize offered at the redemption desk was so disproportionate in value to the item recovered from the machine as to make the latter a token. This is a criminal statute which ought to be certain in its effect. The only way to prevent the consequences which I have described is to treat any exchangeable item as a token. c  
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Your Lordships have been shown photographs of the shelves of the company's prize redemption desk, stocked with desirable consumer durables. In my view, it was the policy of s 34 to ensure that children and others were not attracted to amusement arcades by the prospect of winning such prizes. The decision of the Court of Appeal entirely defeats this policy and I would therefore allow the appeal and restore the convictions. h

**LORD HOPE OF CRAIGHEAD.** My Lords, the issue in this appeal relates to the conditions which must be observed where machines are used for gaming by way of amusement with prizes. This activity is regulated by Pt III of the Gaming Act 1968. That Part of the Act applies to any machine which is constructed or adapted for playing a game of chance by means of the machine and has a slot or other aperture for the insertion of money or money's worth in the form of cash or tokens: see s 26. These machines may be used in a variety of premises for which an appropriate licence or permit is for the time being in force. The j



a premises with which we are concerned in this case are the Palace Amusement Arcade, 38–41 West Parade, Rhyl, Clwyd. They are owned and operated by the respondent, to whom a permit has been granted under s 34 of the Act.

b There were at the material time various types of amusement machine within the premises. Some of these machines gave prizes in respect of the games played on them. Two types of machine came to the attention of the police when they visited the Arcade together with members of the Gaming Board on 9 March 1993. One was a 'crane and grab' machine, of which there were 25 in the premises on that date. These machines contained soft toys such as teddy bears. They could be won by operating a small crane to pick up the prize and drop it into a chute for collection. Only one such toy could be won in any one game. The other type, of which there were five in the premises, was a 'pusher' machine. The prizes within c this machine were held on moving trays. They comprised 10 pence coins, £1 notes issued by the Royal Bank of Scotland, wrist watches and red and black plaques. These prizes could be obtained in any combination by dislodging them from the moving tray on to a chute from which the player could collect them.

d Section 34(1)(a) of the Act provides that the conditions specified in the following provisions of that section shall be observed where a machine to which Pt III of the Act applies is used for gaming on any premises in respect of which a permit granted for the purposes of that section is for the time being in force. The condition specified in sub-s (2) lays down the maximum amount which may be charged for play for playing a game once by means of the machine. On 9 March 1993 this amount, as substituted by the Gaming Act (Variation of Monetary e Limits) (No 2) Order 1989, SI 1989/2190, was one or more coins or tokens of an amount or value not exceeding 20 pence. The condition specified in sub-s (3) lays down the maximum amount which may be received by a player in respect of any one game played by means of the machine. Substituting for the figures in this subsection as originally enacted the figures in force on 9 March 1993 as set out in f the Gaming Act (Variation of Monetary Limits) (No 4) Order 1992, SI 1992/2647, this subsection provides as follows:

'Except as provided by subsections (4) and (9) of this section, in respect of any one game played by means of the machine no player or person claiming under a player shall receive, or shall be entitled to receive, any article, benefit or advantage other than one (and only one) of the following, that is to say— g (a) a money prize not exceeding [£3] or a token which is, or two or more tokens which in the aggregate are, exchangeable only for such a money prize; (b) a non-monetary prize or prizes of a value or aggregate value not exceeding [£6] or a token exchangeable only for such a non-monetary prize or such non-monetary prizes; (c) a money prize not exceeding [£3] together h with a non-monetary prize of a value which does not exceed [£6] less the amount of the money prize, or a token exchangeable only for such a combination of a money prize and a non-monetary prize; (d) one or more tokens which can be used for playing one or more further games by means of the machine and, in so far as they are not so used, can be exchanged for a j non-monetary prize or non-monetary prizes at the appropriate rate.'

No question arises in this case about the maximum amount which may be charged for playing a game once by means of these two types of machine. The crane and grab machines were operated for any one game by inserting a 20 pence coin into a coin slot attached to the machine. The pusher machines were also coin operated in the same way. The amounts were within the permitted

maximum. Moreover no prize or prizes won by a successful player in respect of any one game played by means of either machine was worth more than £6. The prize or prizes which could be obtained in respect of any one game were thus within the limits laid down by sub-s (3) which applied on the relevant date. a

Notices were displayed at various places within the arcade which stated that prizes for the crane and grab machines and tickets and tokens from the other machines, including the plaques from the pusher machines, had a points value. They also stated that these articles could be combined to redeem larger prizes according to the points value of these prizes. Inside each crane and grab machine there was a notice stating that each win was worth a 100 points. It invited the player to collect wins and to trade for larger prizes at the redemption desk. The red plaques in the pusher machines had a value of 20 points, and the black plaques had a value of 100 points. There were a number of display cabinets within the arcade in which there were displayed the various prizes which could be obtained in this way. These included many prizes which had a value of less than £6 per item. But they also included prizes which were worth much more than £6. These included television sets, radio cassettes, electric irons, a food processor and other electrical goods of high value. For example, there was a battery operated car with a points value of 40,000 points and a television set with a points value of 15,000 points. There were also various soft toys, amongst which was a teddy bear with a points value of 2,500 points. b  
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The question which lies at the heart of this case relates to the right which was given to the players in the arcade to aggregate and exchange their prizes for a larger prize—a practice which is known as ‘trading up’. The parties to this appeal have agreed in the statement of facts that, if the prizes won by a successful player in respect of any one game were accumulated and exchanged for a larger prize, the larger prize would not be worth more than the sum of all the prizes which were given up in exchange for it. For example, prizes won in respect of two games which would be worth no more than £6 each could not be exchanged for a larger prize which was worth more than £12. But the Crown maintains that the right to aggregate and exchange the prizes won in respect of any one game for a larger prize is a benefit or advantage which is not permitted by s 34(3) and is unlawful. So on 1 December 1994 the respondent was prosecuted at the Crown Court at Mold on three counts of unlawful gaming contrary to s 38(6) of the Gaming Act 1968. After hearing legal argument Evans J held that the activities with which each count was concerned were unlawful. The respondent pleaded guilty on all three counts and was given an absolute discharge. The convictions were then appealed to the Court of Appeal (Criminal Division). At the hearing in the Court of Appeal the respondent did not pursue the appeal in respect of count 1. But on 9 November 1995 the Court of Appeal (Kennedy LJ, Wright J and the Recorder of Liverpool) allowed the appeal on counts 2 and 3. It is against that decision that the Crown has now appealed to this House. e  
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Count 2 was concerned with the crane and grab machine. Count 3 was concerned with the pusher machine. The particulars of each offence were the same, except for the reference to the type of machine. So it is necessary only to quote the particulars in regard to the crane and grab machine which were set out in count 2. They were as follows: h  
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‘BURT AND ADAMS LIMITED, on or about the 9th day of March 1993, was the holder of a permit granted for the purposes of section 34 of the Gaming Act 1968 in respect of premises at the Palace Arcade, West Parade, Rhyl, in the

- a County of Clwyd, in relation to which premises a provision of the said Section was contravened, in that a player was entitled to receive, in respect of any one game played by means of a machine, namely a Crane and Grab machine to which Part III of the Gaming Act 1968 applies, an article, a benefit or an advantage other than one only of those permitted by Section 34(3) of the said Act; namely an article to be used as a token which could be exchanged with other such tokens for a non-monetary prize to a value in excess of £6.'
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- It will be noted that the particulars did not identify the paragraphs in s 34(3) which were applicable to the prizes which could be obtained in respect of any one game played by each of these two machines. But it is agreed that in the case of the crane and grab machine the relevant paragraph is para (b), as only one soft toy could be obtained in respect of any one game and it was neither a money prize nor a token which could be used for playing further games by means of the machine. It is also agreed that in the case of the pusher machine the relevant paragraph is para (c), as the prizes which could be obtained in respect of any one game on this machine consisted of a combination of prizes. Mr Goldring QC for the Crown said that the prosecution did not wish to take the point that the plaques, if they were tokens within the meaning of that paragraph, were not exchangeable only for a combination of a money prize and a non-monetary prize. In the result the prizes obtainable from both machines raise substantially the same issues.
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- e For the Crown it was submitted by Mr Goldring that both the soft toys and the plaques were 'tokens' within the meaning of s 34(3). This was because the successful player had the right to exchange these articles for something else in money's worth. He said that the entitlement to aggregate the soft toys or plaques for each game and to trade up for a prize worth more than £6 was not permitted by s 34(3). This was because paragraph (b) of that subsection provided that the only article, benefit or advantage which the player was entitled to receive in respect of any one game, if it was a token, was 'a token exchangeable only for such a non-monetary prize or such non-monetary prizes', that is to say a non-monetary prize or prizes with a value or aggregate value which did not exceed £6. The entitlement to trade up was therefore a benefit or advantage which was prohibited.
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- Mr Beloff QC for the respondent submitted that neither the soft toys nor the plaques were tokens. He said that they were both 'non-monetary prizes'. The mere fact that they were exchangeable for something else did not mean that they were tokens within the meaning of s 34. The opportunity to exchange them, when aggregated with other prizes, for a more valuable article was not a separate benefit or advantage but was an ordinary and integral part of the original prize. Furthermore, on the agreed facts, it did not increase the value of the original prize or prizes for each game. This was because the larger and more valuable article could not be worth more than the sum of the prizes won in respect of each game which were exchanged for it. For example, two teddy bears worth no more than £6 each could be exchanged only for a teddy bear worth no more than £12. They could not be exchanged for a more valuable teddy bear.
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The first point which has to be considered is whether the teddy bear or other soft toy which the player could receive from the crane and grab machine was a monetary prize or a token. The word 'token' is not defined in the Act. As Kennedy LJ said in the Court of Appeal, it is a word whose meaning can differ



according to the context. In the context of Pt III of the Act it is an article which may have one or other or both of two different uses. It may be used for playing a game by means of a machine to which that part of the Act applies, or it may be used for exchanging it for some other article. Section 26(1)(b) refers to 'a slot or other aperture for the insertion of money or money's worth in the form of cash or tokens'. Section 34(2) refers to 'one or more coins or tokens inserted in the machine'. The word is used in the same way in ss 34(4), 37(1)(b), 37(3)(b) and 52(5). These references all suggest that the word is being used here to describe a disc or other similar article which will perform the same function as a coin when put into the machine. On the other hand paras (a) to (c) of s 34(3) refer to tokens which can be exchanged for a money prize, for a non-monetary prize or non-monetary prizes and for a combination of a money prize and a non-monetary prize respectively. These references concentrate on the token as something which can be exchanged for some other article, according to the terms and conditions under which each game is played. A disc or other similar article, just like a coin, can perform that function also. Section 34(3)(d) refers to both uses when it states:

'(d) one or more tokens which can be used for playing one or more further games by means of the machine and, in so far as they are not so used, can be exchanged for a non-monetary prize or non-monetary prizes at the appropriate rate.'

Mr Goldring relied on the definition of the expression 'non-monetary prize' in s 34(8), which is in these terms:

'In this section "non-monetary prize" means a prize which does not consist of or include any money and does not consist of or include any token which can be exchanged for money or money's worth or used for playing a game by means of the machine ...'

He said that a soft toy which was used for trading in the premises by exchanging it for another article was a 'token' and not a 'non-monetary prize', because it was being exchanged for something which fell within the expression 'money's worth'. I do not accept that argument, for two reasons.

The first reason is that a teddy bear or other soft toy—assuming always that it is a genuine toy and not sham or a device—is something which has its own intrinsic value as a toy. It is something which can be played with or admired and kept for amusement. No doubt it can, like any other article, be exchanged for something else if another person is willing to enter into such a transaction. In that sense it has a value which can be measured in money. But that does not alter its essential character as a toy. The second reason relates to the function of the definition of 'non-monetary prize' in s 34(8). Its function is to distinguish between money and things which it calls tokens, which can be exchanged for money or money's worth or be used like money for playing a game by means of the machine on the one hand, and all other non-monetary articles on the other. This is something which had to be made clear, because different maxima are set in s 34(3) for money prizes on the one hand and for non-monetary prizes on the other. It was submitted that the expression 'money's worth' was wide enough according to the ordinary meaning of these words to include anything which could be valued in money, such as any non-monetary prize. But in the context of Pt III of the Act I do not think that such a wide meaning can be given to this

- a phrase. The meaning to be given to it in this context is indicated by s 26(3) of the Act, which provides:

‘In this Part of this Act “charge for play” means an amount paid in money or money’s worth by or on behalf of a player in order to play one or more games by means of a machine to which this Part of this Act applies.’

- b A token, in other words, is something which has no intrinsic value unless it is used or exchanged for something else. What that something else will be must depend on its design and the conditions under which it is issued. As to design, the Act uses the word ‘token’ when it means something which can be used for playing a game by inserting it into the machine. As to conditions, the Act requires the permit holder to specify the article or articles for which it is exchangeable. If
- c that article is a non-monetary prize only, and the token cannot also be used for playing a game by means of a machine, it is treated in the same way as a non-monetary article or articles. If it is money or money’s worth, or if it can be used like money for playing a game by means of the machine, it is treated in the same way as if it were money. In my opinion it is quite clear that, as the teddy
- d bears or other soft toys could be exchanged only for another non-monetary article, they fell outside the meaning of the word ‘token’ in s 34(8). And they were not tokens within the ordinary meaning of that word. They were genuine soft toys of the kind which is commonly bought and sold in a toy shop, not things which were got up to look like toys.

- e The next question to be considered is whether the red and black plaques which could be obtained as prizes from the pusher machines were tokens within the meaning of s 34(3)(c). Mr Goldring submitted that they were. Mr Beloff submitted that they were not, because they were not tokens as described in s 34(8). On this point I prefer Mr Goldring’s argument.

- f As I have already said, I think that the function of the definition of the expression ‘non-monetary prize’ in s 34(8) is to distinguish between non-monetary prizes on the one hand and money, or other things which can be used in the same way as money, on the other. But this subsection does not purport to offer an exhaustive definition of the word ‘token’. So, while I agree with Mr Beloff that the plaques were not tokens of the kind referred to in s 34(8), because the evidence was that these plaques could not be exchanged for money
- g or for things which could be used like money or used for playing a game by means of the machine, I do not think that this means that they could not be regarded as tokens at all. The plaques had no intrinsic value on their own. Their only value lay in the fact that they had a points value, so that they could be exchanged for other articles with an equivalent points value. It seems to me that they were
- h tokens within the ordinary meaning of that word.

- i I come now to the question of trading up. On this issue the argument for the Crown was that, as both the soft toys and the plaques were tokens and as they could be exchanged in combination with other plaques or soft toys for non-monetary prizes of a greater value than £6, the player obtained a benefit or advantage which was not permitted by s 34(3). This was because s 34(3) permits the player to receive or to be entitled to receive a token which is exchangeable only for a non-monetary prize or prizes of a value or aggregate value not exceeding £6.

I consider that this argument fails so far as the teddy bears and other soft toys are concerned, on the ground that they were non-monetary prizes and not tokens. Moreover the fact that the player could by aggregating several of these

non-monetary prizes obtain a non-monetary prize of a higher value at the redemption centre did not render the prize or prizes which he was entitled to receive in respect of any one game unlawful. This is because, on the agreed facts, the more valuable non-monetary prize which he could obtain by trading up could not exceed the value of all the non-monetary prizes which had to be given up in exchange for it. So the ability to trade up did not increase the value of the prize obtained from any one game above the permitted maximum.

In *Cronin v Grierson* [1968] 1 All ER 593, [1968] AC 895 the player was able to win a jackpot which rendered the machine operable for four further games at greatly increased odds for the same stake. Lord Morris of Borth-y-Gest said that the advantage which accrued to a person who won the jackpot was 'something other than or more than and additional to the maximum which was permitted' by s 2 of the Betting, Gaming and Lotteries Act 1964. He said that this advantage or benefit was 'a real one [which was] designed to be bountiful' (see [1968] 1 All ER 593 at 598, [1968] AC 895 at 907). Mr Goldring submitted that the situation in the present case was similar, but in my opinion it is quite different. The trading up in this case involved no element of bounty at all. It did not confer any benefit or advantage. The greater value prizes were not worth more than the aggregate of the value of those prizes which had to be given up in exchange.

The argument in regard to the plaques relates to the value of the articles which, by trading up, could be obtained in exchange for them. The question is whether the ability to trade up was in breach of s 34(3) because the items which could be obtained in exchange for them when aggregated were of greater value than the maximum amount which is permitted by s 34(3) in respect of any one game. The answer to this question is to be found in the provisions of the subsection. Two points emerge clearly from what it provides.

The first is that there is no discernible policy against the accumulation of prizes. As Kennedy LJ observed in the Court of Appeal, small money prizes are permitted by s 34(3)(a) and money by its nature can be accumulated. Moreover there is no discernible policy against the exchange of any non-monetary prize for another non-monetary prize within the same premises. This is not something which is expressly provided for by s 34(3). But there is nothing in the subsection to prevent this, just as there is nothing to prevent the player who has won a money prize from spending all his money on the premises.

The second point is that the scheme of control which s 34 lays down relates only to the playing of any one game. Section 34(2) limits the amount or value which can be charged 'for playing a game once by means of the machine'. Section 34(3) limits the value of any article, benefit or advantage which a person may receive 'in respect of any one game'. So the question whether these limits have been exceeded has to be examined game by game. There is nothing in s 34(3) to indicate that the matter can be held in suspense in order to see what may happen in any future game or games. Thus, so long as the token which is received in respect of any one game is exchangeable only for a non-monetary prize or non-monetary prizes of a value or aggregate value not exceeding £6, the conditions of s 34(3) are satisfied. And so long as the value of what can be obtained by trading up is limited to the aggregate of the value of the tokens which are given up in exchange, there is no additional benefit or advantage to be obtained from this which can be said to be unlawful.

For the reasons which I have given I would dismiss the appeal. The Court of Appeal certified the following question as involving a point of law of general public importance:



- a* 'Does Section 34 of the Gaming Act 1968 prohibit the holder of a permit to operate a machine to which the Section applies from offering to the player of the machine, who wins a non-monetary prize or token in playing any one game, the right to accumulate what he wins with non-monetary prizes and/or tokens won by playing further games, and to exchange the same for a non-monetary prize of an aggregate value exceeding £6?'
- b* On the assumption that the value of the non-monetary prize to be obtained in exchange does not exceed the aggregate value of the non-monetary prizes and/or tokens which are given up in exchange for it, I would answer the question in the negative.
- c* *Appeal dismissed.*

Celia Fox Barrister.

Commercial Union Assurance Co plc and  
others v NRG Victory Reinsurance Ltd  
Skandia International Corp and another v NRG  
Victory Reinsurance Ltd

COURT OF APPEAL, CIVIL DIVISION

LORD WOOLF MR, POTTER AND MAY LJJ

16, 17 FEBRUARY, 16 MARCH 1998

*Insurance – Reinsurance – Contract for excess of loss reinsurance – Liability under contracts of reinsurance – Insurers settling claim by original insured – Whether insurers entitled to claim indemnity in respect of settlement under reinsurance policies.*

In two separate cases the plaintiff insurers subscribed to a general corporate excess insurance policy under which a company claimed in respect of oil spillage caused when a tanker ran aground in Alaska. The insurers were reinsured in each case by the defendant reinsurers under excess of loss contracts. In 1993 the company commenced proceedings against the insurers in Texas, claiming clean-up costs arising out of the oil spillage under both sections 1 and 3 of the insurance policy, and in 1995 sought summary judgment on its claim under section 1. Despite raising defences based on section 1, shortly before the application was heard, the insurers entered into a settlement agreement whereby they agreed to pay the company \$US300m, having been advised by their Texas lawyer that they were unlikely to succeed in proceedings before a Texas jury as jurors were often unfavourable to insurers and biased against them when insurers were arguing for a limitation of cover. The insurers subsequently claimed against the reinsurers under the reinsurance contracts in respect of the amounts paid under the settlement agreement, and applied for summary judgment under RSC Ord 14. The judge granted the application, holding that the reinsurers had not demonstrated an arguable defence that the insurers were not liable to the company in respect of the claim under section 1 of the policy, since, had the Texas court given judgment for the company despite the insurers having advanced all reasonable defences, the insurers would have established their liability under the original policy for the purposes of indemnity by the reinsurers under the reinsurance policy; and, treating the prediction by the Texas lawyer as conclusive of the outcome of the Texas proceedings, liability had similarly been established in respect of the sums paid under the settlement agreement. The reinsurers appealed.

**Held** – In determining a dispute concerning a reinsurance contract, in the absence of any provision to the contrary in the contract, the court had to treat the judgment of a foreign court as to the reinsured's original liability as decisive and binding, provided that the foreign court was one of competent jurisdiction, that the judgment had not been obtained in breach of an exclusive jurisdiction clause, that the reinsured had taken all proper defences and that the judgment was not manifestly perverse. However, in the absence of such a judgment, it was for the judge to form his own view of whether or not an arguable defence had been shown by the reinsurers that the reinsured were not liable under the original

- a policy according to the applicable law and rules of construction. In the instant case, the judge had failed to do so, but had treated the Texas lawyer's opinion as to the likely outcome if the matter had proceeded before the jury as evidence of what the law was and had equated his prediction, which was directed to other considerations than those of legal merit, with an actual verdict of the Texas court. It followed that the judge had erred in his approach. Accordingly, since if the judge had considered whether the insurers were liable to the company under section 1 of the policy, he could not have failed to find that there were at least strong arguments that they were not, the appeal would be allowed and the order for summary judgment set aside (see p 449 c to g j to p 450 b f to h, p 451 e and p 452 b c g to j, post).
- b

c **Notes**

For reinsurance generally, see 25 *Halsbury's Laws* (4th edn reissue) paras 204–220, and for excess of loss insurance, see *ibid* para 524.

**Cases referred to in judgments**

- d *British Dominion General Insurance Co v Duder* [1915] 2 KB 394, [1914–15] All ER Rep 176, CA.  
*Charter Reinsurance Co Ltd v Fagan* [1996] 3 All ER 46, [1997] AC 313, [1996] 2 WLR 726, HL.  
*Chippendale v Holt* (1895) 65 LJQB 104.  
*Forsikringsaktieselskabet National (of Copenhagen) v A-G* [1925] AC 639, [1925] All ER Rep 182, HL.
- e *Hill v Mercantile and General Reinsurance Co plc, Berry v Mercantile and General Reinsurance Co plc* [1996] 3 All ER 865, [1996] 1 WLR 1239, HL.  
*Insurance Co of Africa v Scor (UK) Reinsurance Co Ltd* [1985] 1 Lloyd's Rep 312, CA.  
*London County Commercial Reinsurance Office Ltd, Re* [1922] 2 Ch 67.
- f *Toomey v Eagle Star Insurance Co Ltd* [1994] 1 Lloyd's Rep 516, CA.

**Cases also cited or referred to in skeleton arguments**

- Delver v Barnes* (1807) 1 Taunt 48, 127 ER 748.  
*DR Insurance Co v Seguros America Banamex* [1993] 1 Lloyd's Rep 120.  
*Du Pont (E I) de Nemours & Co v Agnew* [1987] 2 Lloyd's Rep 585, CA.
- g *Excess Insurance Co Ltd v Mathews* (1925) 23 Ll L Rep 71.  
*Fireman's Fund Insurance Co Ltd v Western Australian Insurance Co Ltd* (1927) 28 Ll L Rep 243.  
*Forsikringsaktieselskapet Vesta v Butcher (No 1)* [1989] 1 All ER 402, [1989] AC 852, HL.
- h *Gurney v Grimmer* (1932) 44 Ll L Rep 189, CA.  
*Henderson v Henderson* (1843) 3 Hare 100, [1843–60] All ER Rep 378, 67 ER 313, V-C.  
*Home Insurance Co of New York v Victoria-Montreal Fire Insurance Co* [1907] AC 59, PC.  
*Marten v Steamship Owners Underwriting Association Ltd* (1902) 7 Com Cas 195.
- j *Phoenix General Insurance of Greece SA v Administratia Asigurarilor de Stat* [1987] 2 All ER 152, [1988] QB 216, CA.  
*Stronghold Insurance Co Ltd v Overseas Union Insurance Ltd* [1996] LRLR 13.  
*Verschures Creameries Ltd v Hull and Netherlands Steamship Co Ltd* [1921] 2 KB 608, [1921] All ER Rep 215, CA.  
*Versicherungs und Transport Aktiengesellschaft Daugava v Henderson* (1934) 39 Com Cas 312, [1934] All ER Rep 626, CA.



*Western Assurance Co of Toronto v Poole* [1903] 1 KB 376.

*Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581, [1975] 2 WLR 690,  
PC.

## Appeals

*Commercial Union Assurance Co plc and ors v NRG Victory Reinsurance Ltd*

The reinsurers, NRG Victory Reinsurance Ltd, appealed with leave from the decision of Clarke J ([1998] 1 Lloyd's Rep 80) given in the Commercial Court of the Queen's Bench Division on 1 August 1997, whereby he gave summary judgment under RSC Ord 14 in favour of the plaintiff insurers, Commercial Union Assurance Co plc, Indemnity Marine Insurance Co Ltd, Ocean Marine Insurance Co Ltd, London Assurance, Gan Insurance Co Ltd and Bishopsgate Insurance Ltd, for claims under 16 excess of loss reinsurance contracts. The facts are set out in the judgment of Potter LJ.

*Skandia International Corp and anor v NRG Victory Reinsurance Ltd*

The reinsurers, NRG Victory Reinsurance Ltd, appealed with leave from the decision of Clarke J ([1998] 1 Lloyd's Rep 80) given in the Commercial Court of the Queen's Bench Division on 1 August 1997, whereby he gave summary judgment under RSC Ord 14 in favour of the plaintiff insurers, Skandia International Insurance Corp and Vesta Forsikring AS, for claims under 16 excess of loss reinsurance contracts. The facts are set out in the judgment of Potter LJ.

*Jonathan Sumption QC and George Leggatt QC* (instructed by *Clifford Chance*) for the reinsurers.

*Dominic Kendrick QC and Andrew Wales* (instructed by *Clyde & Co*) for the insurers.

*Cur adv vult*

16 March 1998. The following judgments were delivered.

**POTTER LJ** (giving the first judgment at the invitation of Lord Woolf MR).

### Introduction

In this appeal the defendant/appellant reinsurers (NRG) appeal from the judgment of Clarke J ([1998] 1 Lloyd's Rep 80) delivered in the Commercial Court on 1 August 1997 whereby he gave summary judgment in favour of the plaintiffs under RSC Ord 14 in two actions (the Commercial Union action and the Skandia action) in which the plaintiffs claimed for sums alleged to be due under 16 excess of loss reinsurance contracts made with NRG.

### The facts

The background facts are that on 24 March 1989 the tanker Exxon Valdez ran aground in Prince William Sound Alaska, thereby causing a major spillage of oil which led to heavy environmental damage and necessitated a huge clean-up operation. The tanker's owners, Exxon Shipping Co, had protection and indemnity cover in respect of their liability for spillage of \$400m in excess of \$US210m and recovered the full amount insured from their P and I club. The owners of the cargo of oil were the parent company of the shipowners, Exxon Corp (Exxon). Exxon made claims under a general corporate excess insurance policy (the GCE policy). The plaintiffs were among the insurers who subscribed to the GCE policy. It was placed through brokers in the London Market and

a comprised a Lloyd's policy, a UK companies' policy and a policy led in the Scandinavian market, all in materially identical terms. The plaintiffs in the Commercial Union action subscribed to the UK companies' policy and the plaintiffs in the Skandia action subscribed to Scandinavian-led policy; however, no further distinction need be drawn between them.

b *The GCE policy*

The addendum to the GCE policy described the interests insured as:

'Section 1 Property of the Assured or property held in trust for others for which they have responsibility or elect to insure (including but not limited to Hulls and Machinery, Cargo, Drilling Rigs, Offshore Platforms, Pipe Lines, construction risks and Onshore Property of every description) including

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Costs of Control, Removal of debris and/or Residual Structure and Liabilities and Directors and Officers and Fidelity Coverages.

Section 3 All liabilities in respect of Assured's World-wide operations all as per form.'

d Section 1 provided coverage under art VII (Interest and coverage) on the following terms:

'For each loss occurrence covered by this Policy the Insurers agree with the Insured to pay or to pay on their behalf subject to the Basis of Recovery art VIII: 1. All losses incurred by the Insured as a result of physical loss or

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damage to Property of any kind or description owned by the Insured or property of others held in trust or for which the Insured may have assumed responsibility, or for which the Insured may have an obligation to insure repair or replace ... 4. All sums which the Insured pays or incurs as costs or expenses on account of ... (b) *Removal of or attempted Removal of Debris or Wreck of Property and/or Residual Structure covered hereunder ...* (My emphasis.)

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Section 1, art VIII(2) (Basis of recovery: cargo and stock) provided:

'(a) Recovery for any loss hereunder shall be determined as follows: (i) for crude oil ... (b) ... recovery shall also include costs and expenses incurred in

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defending, safeguarding, recovering, preserving and forwarding the property, as well as costs and expenses in respect of general average, sue and labour, salvage, salvage charges and *expenses incurred in removal or attempted removal of debris or wreck or property even if incurred solely as a result of governmental or other authoritative order* and the amount of the reasonable extra cost of temporary repair or of expediting the repair, including overtime and the extra cost of express or other rapid means of transportation.' (My emphasis.)

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Section 1, art IX, para 3 excluded from cover under section 1:

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'Loss of, or damage to property, liability for which is imposed on the insured by law, other than such property as may be included under the terms of this policy.'

Section 1, art IV, para 3 provided:

'Notwithstanding anything else contained herein to the contrary, there shall be no recovery hereon for liabilities as described under Assured

Liability Policy(ies) (as more fully defined and covered under policy numbers 8 KM52362 & O3-036-88 as applicable) ...'

Similar words were also contained in art VII.

It is common ground that the specified policy numbers under para 3 above were a reference to section 3 of the GCE policy itself. Thus, on the face of it at least, the policy intended that losses sustained which might otherwise fall within the wording of section 1, but which were recoverable under section 3, should not also be recoverable under section 1.

Section 3A, art 1, under the heading 'Protection and indemnity risks etc', covered inter alia:

'(a)(i) ... all sums for which the Insured may become liable or incur which are absolutely or conditionally recoverable from or undertaken by The Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Limited and without the application of any limits or excesses contained in the rules of that Association in respect of the vessels and/or craft as per schedule. (ii) ... it is further agreed that this insurance is extended to also cover any loss sustained by the Insured or indemnify or pay on behalf of the Insured any sum or sums which the Insured may be obliged to pay or agrees to pay or incurs as expenses, on account of Removal of Debris or Wreck of Vessels and/or craft as per schedule ... even if incurred solely as a result of governmental or other authoritative order ... (c) ... this Section of this insurance is also to cover the legal ... liability of the Insured ... cargo owners for ... pollution and/or contamination ... (e) ... all legal and/or contractual liability of the Insured arising out of or incidental to or in any way connected with the Insured's marine operations anywhere in the world.'

Section 3B, art 1 of the GCE policy provided that the insurers agreed:

'To pay the Insured ... all sums which the Insured shall ... incur as expenses by reason of the liability imposed upon the Insured by law or by governmental or other local authorised order, or assumed by the Insured under contract or agreement on account of ... "Property damage" caused by or arising out of each loss occurring during the policy period, anywhere World-wide in respect of ... all transportation activities ...'

Section 1, art VI, cl 11 and 12 and identical provisions in section 3A conferred a choice upon the insured (Exxon) where to take proceedings in the event of dispute. In effect it could choose arbitration in New York (under cl 11) or litigation in New York (under cl 12) but there was no exclusive jurisdiction clause or any provision to prevent it issuing and serving proceedings in whatever jurisdiction it chose. Further, in the event of arbitration the arbitrators were entitled to abstain from following strictly the rules of law. To the extent that they did, however, such law was to be exclusively the law of New York. Further in section 3B, cl 10, it was provided that in relation to the particular liabilities thereby insured, either party could *require* the other to submit to arbitration in New York, in which event the arbitrators were also entitled to abstain from following strictly the rules of law.

#### *The reinsurance*

The reinsurances in this case are excess of loss treaties on the XL market standard form (the JELC) and short form schedule. [In fact the JELC terms are



a incorporated in all but four of the 16 reinsurance contracts, but the parties are agreed that the JELC terms should be treated as applicable in all cases for the purpose of the argument before us.] The words of reinsurance in the JELC reinsurance clause (cl 1) are a promise:

b '1.1 ... [to] indemnify the reassured in settlement of its net loss ... under business accepted by the reassured as fully described in section C of the schedule ...

1.3 It is a condition precedent to liability under this contract that settlement by the reassured shall be in accordance with the terms and conditions of the original policies or contracts.'

c In section C (as set out in the cover note) the business is typically described (the differences as between the various contracts are immaterial) as:

'All losses howsoever and wheresoever arising sustained by the Re-assured in respect of all business allocated to their Drilling Rigs Account ...'

Clause 3.1 of the JELC provides:

d 'Loss under this contract means loss, damage, liability or expense arising from any one of event or as described in Section J of the Schedule.'

e Section J of the schedule refers to: 'Any one loss or series of losses arising from one event.' In 11 of the 16 contracts comprising the reinsurance contracts there is a form of settlements clause. They are similar in all material respects, nine being in the form of the 'Aviation Settlements Clause 1987', which provides as follows:

f 'All loss settlements by the Re-assured including compromise settlements and the establishment of funds and the settlement of losses shall be binding upon the Re-insurers, *providing such settlements are within the terms and conditions of the original policies and/or contracts ...* and within the terms and conditions of this Re-assurance ...' (My emphasis.)

### *The various proceedings*

g In August 1993 Exxon commenced proceedings against the direct insurers including the plaintiffs in a Texas state court, claiming clean-up costs arising out of the oil spillage under both sections 1 and 3 of the GCE policy. Exxon's object was to recover under both the sections so as to be able to exceed the limits of indemnity under each. Thus, notwithstanding the provisions of section 1, art IV, h para 3 of the GCE policy, which, on the face of it, prevented recovery in respect of liabilities under section 3, and notwithstanding the assertion of Exxon in the proceedings that the clean-up costs represented 'the legal ... liability of the Insured as ... cargo owners for ... pollution and/or contamination' (see section 3, art 1(c)), Exxon asserted for the purpose of section 1 that such costs were also incurred in the 'removal or attempted removal of debris'. The direct insurers j disputed the claim under section 1, principally on the ground that coverage for removal of debris or property did not in its context apply to the clean-up of tanker oil spills, and that in any event such spills were covered and denominated as pollution risks under rules of various P and I associations including the International Tanker Indemnity Association which covered the Exxon Valdez and thus came within the ambit of section 3. The Exxon claim was for payment of the coverage limits of section 1 in the amount of \$US600m plus interest in

excess of \$US400m. Exxon also claimed to be entitled to payment of the separate coverage limits of section 3A in the amount of \$US250m plus interest. Finally, it also claimed punitive damages for alleged breach of the Texas Insurance Code. a

The direct insurers countered with an action in the Federal Court in New York seeking a declaratory judgment that they were not liable to Exxon under the GCE policy and asking the court to compel arbitration of the claim under section 3B. Exxon accepted that the claim under section 3B be arbitrated in New York but applied to have the declaratory judgment action dismissed. That application eventually failed in January 1996. b

In the meantime proceedings in the Texas state court moved towards trial. In October 1995 Exxon sought summary judgment on its claim under section 1 only, on the basis that the plain meaning of the language entitled it to coverage for its clean-up costs and expenses. However, despite their defences based on arts IV and VII of section 1, shortly before that application was heard the direct insurers (including the plaintiffs) entered into a settlement agreement (the first settlement agreement) dated 15 March 1996 whereby they agreed to pay \$US300m and Exxon agreed to the dismissal of the section 1 claim from both the Texas and New York proceedings. c

The reasoning behind the direct insurers' decision to settle appears from the affidavit of Mr Reasoner, the managing partner of the Texas law firm acting for the insurers, who had the conduct of their defence. In para 13 of his affidavit in support of the RSC Ord 14 proceedings he stated: d

'In my judgment, liability under Section 1 of the GCE was not going to turn simply upon construction of the policy language in the light of the factual matrix. Rather, the outcome of the claim depended upon an interpretation of the parties' intentions as to the meaning of the policy language, as determined by a Texas jury directed by a non-specialist Judge. Exxon Corporation was in a position to advance a simple straight-forward case based on policy wording, bolstered by the argument that the GCE policy provided all-risk coverage for catastrophic losses and that Exxon Corporation suffered such losses in an amount far in excess of the policy limits ... Jurors are often unfavourable to insurers and biased against them when insurers are arguing for a limitation of cover. On the other hand, Underwriters' case depended upon a complex explanation of the structure of Exxon Corporation insurance, the interplay between the GCE policy and the P & I Cover, market practices and market capacity, and the allocation of risks among the participants in the world-wide insurance market.' e

He continued:

'Underwriters' denial of Exxon Corporations' Section 1 claim, when viewed purely as a matter of construction in the commercial context, was certainly reasonable, and based upon reasonable and credible arguments. However, in my judgment, a jury verdict on Exxon Corporation's Section 1 claim in a District Court in Houston, 189th Judicial District, was going to depend in large part on wider factors. As stated above, after settlement of Section 1, Exxon Corporation's claim under Section 3A of the GCE policy went to trial, in April-June 1996, before a jury in the District Court in Houston, Texas ... The same judge and jury would have tried Exxon Corporation's Section 1 claim had that claim not been settled. Based on my experience at the Section 3 trial, in my opinion it is probable that Underwriters would have lost a jury trial of Section 1.' f

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a The claim of Exxon under section 3A of the GCE policy was excluded from the first settlement agreement. As indicated by Mr Reasoner above, it eventually came to trial in Texas before the same judge and jury which would have tried the claim under section 1. That claim succeeded, the jury deciding that the insurers were liable to Exxon for \$US250m under section 3. Since there was a deductible of \$US210m, that decision indicated the view of the jury that the recoverable liability was at least \$US460m.

b Following judgment against them on the claim under section 3A, the insurers appealed. By a further settlement agreement (the second settlement) dated 23 January 1997, the insurers compromised both the appeal in respect of the Texas judgment under section 3A and the New York arbitration proceedings on section 3B (which were still in progress) on terms that they would pay Exxon a further c \$480m.

The two actions presently before this court were begun in June 1996 and April 1997, the sole claim made being for the amounts paid under the first settlement agreement in respect of section 1. Clarke J gave summary judgment in the plaintiffs' favour on 1 August 1997.

d On 19 September 1997 the first three plaintiffs in this action began a new action (1997 Folio No 1893), and on 21 November 1997 a further action (1997 Folio No 2183) was begun by companies including the remaining plaintiffs in the present action and the plaintiffs in the Skandia action, for the purposes of recovering the sums paid in settlement of the claim made by Exxon under sections 3A and 3B of the GCE policy (the section 3 actions). On this appeal, NRG's position has been e that the plaintiffs are indeed under a liability under section 3A and that, as a matter of construction of the GCE policy, the clean-up costs were covered under para 1(c) of section 3A. The plaintiffs have applied for summary judgments in the 1997 actions, those applications standing adjourned until after the present appeal has been determined. If the appeal is successful, a number of the issues arising f out of the stance taken by each of the parties in the section 3 actions will fall away.

### *The judgment of Clarke J*

Before the judge, it was common ground between the parties that in order to recover under reinsurances the plaintiffs must establish that they were liable g under the GCE policies, the only question being whether they had done so. The authorities upon the basis of which both sides proceeded were those of *Re London County Commercial Reinsurance Office Ltd* [1922] 2 Ch 67 and *Hill v Mercantile and General Reinsurance Co plc*, *Berry v Mercantile and General Reinsurance Co plc* [1996] 3 All ER 865, [1996] 1 WLR 1239.

h In the former, P O Lawrence J said ([1922] 2 Ch 67 at 80):

j 'The fact that the policies are reinsurance policies and that the reassured have paid under the policies which they have issued does not in my judgment operate to enable them to substantiate their claims against the company. It is well settled that (subject to any provision to the contrary in the reinsurance policy) the reassured, in order to recover from their underwriters, must prove loss in the same manner as the original assured must have proved it against them, and the reinsurers can raise all defences which were open to the reassured against the original assured. This is equally true whether the reassured had or had not paid their assured, inasmuch as it would be inequitable for them to renounce any of their defences so as to prejudice the reinsurers ...'



In the latter, Lord Mustill ([1996] 3 All ER 865 at 880, [1996] 1 WLR 1239 at 1253), in the context of his consideration of the effect of a 'follow settlements' clause said:

'The reinsurers undertake to protect the reinsured against risks which they have written, not risks which they have not written. To allow even an honest and conscientious appraisal of the legal implications of the facts embodied in an agreement between parties down the chain to impose on the reinsurers risks beyond those which they have undertaken and those which the reinsured have undertaken would effectively rewrite the outward contract: it is this, in my opinion, which the provisos are designed to forestall.'

In relation to the question whether the plaintiffs were liable to Exxon under section 1 of the GCE policy the judge found it was unnecessary to decide, as it seems to me unnecessary for this court to decide, whether the GCE policy was governed by English law as Mr Sumption QC submitted for NRG, or alternatively New York law, as Mr Kendrick QC submitted for the plaintiffs. The judge said he was prepared to assume that the policy was governed by English law and to assume it was correct that, if section 1 of the GCE policy were construed in accordance with English law by an English court, the plaintiffs would have had at least arguable defences to Exxon's claim. However, he accepted the submission of Mr Kendrick for the plaintiffs that such assumptions were irrelevant, in that, so long as the plaintiffs proved that they were, or would have been, held liable under the GCE policy by a court of competent jurisdiction (in this case the Texas court), they thereby established the necessary liability under the original policy in order to satisfy the principle that the reinsured can only recover in respect of payments for which they were liable in law under the policy. In this respect the judge said ([1998] 1 Lloyd's Rep 80 at 84):

'In many policies such as the GCE policy it will be open to the insured to proceed against the insurers in one of a number of jurisdictions. The result of such an action might be different depending upon which jurisdiction is chosen. Some Courts may have more experience of insurance disputes than others. It would or ought to be within the contemplation of the plaintiffs when they entered into the GCE policy that that was so. The same is, in my judgment, true of NRG and the other reinsurers. If they had thought about it they would have appreciated that the insured might be sued in several jurisdictions of varying experience. They would also have appreciated that the nature and extent that the liability which they were reinsuring would or might depend upon where Exxon Corporation sued the plaintiffs. In my judgment it would make no sense to hold that reinsurers were only reinsuring the liability of the insurers as it would be established by an English Judge in an English Court. The position might I suppose be different if there were an English exclusive jurisdiction clause in the underlying insurance, but in circumstances where it was permissible for the insured under the underlying insurance to sue in any of a number of jurisdictions, the reinsurers were in my judgment reinsuring the insurers' liability in the jurisdiction in which they were in fact sued. It is in my judgment irrelevant what view an English Court might have taken if Exxon Corporation had sued the plaintiffs in England. I shall therefore not embark upon an analysis of the liability of the plaintiffs to Exxon Corporation on that hypothesis.'

a Later in his judgment he said (at 85–86):

b '... Mr. Kendrick submitted that it was reasonably foreseeable by the parties when the policy was made that the insured would choose the forum which seemed most favourable from its point of view. I accept that submission. It was no doubt because Texas seemed to satisfy that test that Exxon Corporation chose the State Court in Texas in which to proceed against the insurers. By the time that suit was commenced its head office was in Texas and it has not been suggested that the Texas Court was not a Court of competent jurisdiction. It plainly was ... As Mr. Kendrick pointed out, it must have been obvious that the claim arising out of business allocated to the reinsured's "Drilling Rig Account" might well be litigated in Texas. In these c circumstances it was to be expected that the insurers' liability might be determined in any one of a number of different Courts ... In my judgment, if the insured was entitled to proceed in Texas against the insurers any liability established in Texas would be liability under the policy and (subject to any relevant terms of the reinsurance) the reinsurers would be liable in respect of it, provided only that all proper defences were advanced in Texas d ... The question here is what was the liability of the insurer under the GCE policy. The answer to that question depends or may depend upon where that liability is established. If it is established in Texas, as a Court of competent jurisdiction, the answer is the liability of the insurer is whatever liability is established in the Texan Court ... The crucial point is that the e liability under the terms of the policy, which is what is in effect is being reinsured, is not the liability of the insurer in a vacuum but that liability as determined by a Court of competent jurisdiction ... any other conclusion would, as I see it, be unjust, because if insurers are sued in a Court in which the insured is entitled to proceed under the terms of the policy and if the f insurers take every point open to them, but are still held liable and (say) all appeals fail, if those insurers cannot recover under their contracts of reinsurance, they will not in truth be covered in respect of their liability under the policy, which is the whole point of the reinsurance.'

g Having stated what he regarded as the appropriate principle in a case where a court of competent jurisdiction has pronounced judgment in favour of an insured against the original insurer, the judge turned to consider the position where a claim, and in particular the claim of Exxon against NRG, had been made but settled before adjudication.

h He summarised the rival contentions of the parties in the Texas proceedings for summary judgment under section 1 much as I have summarised it above. He emphasised that there was no suggestion (as indeed there has been no suggestion on this appeal) that the insurers did not seek to advance all the points which NRG considered should be made as to why there was no liability under section 1 of the policy. He then set out the passages in Mr Reasoner's affidavit which I have already quoted. He observed that there was no evidence to contradict the j evidence of Mr Reasoner that, if the action against the insurers had continued, it would have succeeded. He went on to say (at 88):

'A judgment in favour of the insured, while arguably wrong as a matter of construction of the policy from the viewpoint of an English lawyer, would be readily understandable, and indeed in my opinion arguably right. However that may be, there is uncontradicted evidence of the liability of the

insurers to the insured in Texas, namely liability for at least U.S. \$600m. in respect of principal. I am not sure of the position with regard to interest.'

Having so decided, the judge proceeded to deal with two further matters advanced by NRG. In relation to a 'Seepage and pollution exclusion' to which several of the plaintiffs only were parties, the judge held that it was not apt to exclude liability. He also considered a submission for NRG that the plaintiffs had failed to provide evidence reasonably required by NRG relating to the make up of their claim. In relation to that, he held that the evidence relied on established both the fact and amount of the insurers' liability to Exxon and it was not arguable that it was reasonable for NRG to require any more evidence. Although the judge's decision on those two matters is the subject of grounds 5 and 7 in the notice of appeal, they have not been pursued before this court. The judge (at 89) concluded that—

'the plaintiffs are in principle entitled to succeed against NRG under the contract of reinsurance and that NRG has no arguable defence to the plaintiffs' claim ...'

#### *The issues on this appeal*

Much of the time spent on this appeal has been taken up in submissions as to the appropriate classification of the contract between the parties beneath the umbrella heading of 'reinsurance'. As stated in *McGillivray and Parkinson on Insurance Law* (9th edn, 1997) para 33-1, the English authorities do not provide a satisfactory definition of reinsurance and the evolution of reinsurance in its various forms has made it difficult to achieve a comprehensive definition. As pointed out by Hobhouse LJ in *Toomey v Eagle Star Insurance Co Ltd* [1994] 1 Lloyd's Rep 516 at 522, the word 'reinsurance' is often used loosely (ie in a broad sense), simply to describe any contract of insurance which is placed by or for the benefit of an insurer. In *Toomey's* case Hobhouse LJ described a reinsurance contract as 'properly defined' in the narrow sense enunciated by Buckley LJ in *British Dominion General Insurance Co v Duder* [1915] 2 KB 394 at 400, [1914-15] All ER Rep 176 at 178 ('a contract of reinsurance is a contract which ensures the thing originally insured ... not the interest of the reinsurer in the ship by reason of his contract of insurance upon the ship') and by Viscount Cave LC in *Forsikringsaktieselskabet National (of Copenhagen) v A-G* [1925] AC 639 at 642, [1925] All ER Rep 182 at 184 ('the reinsuring party insures the original insuring party against the original loss, the insurable interest of the original insuring party being constituted by its policy given to the original assured').

Hobhouse LJ ([1994] 1 Lloyd's Rep 516 at 522-523) went on to say:

'The fact that the insurance is a reinsurance means that the extent of the reinsured's insurable interest has to be identified by reference to the terms of the original policy and that the reinsured must therefore give to the reinsurer the benefit of any protection which the reinsured is entitled to enjoy or may have obtained under the original policy.'

In that connection he also quoted the passage from P O Lawrence J in *Re London County Commercial Reinsurance Office Ltd* to which I have already alluded.

In *Toomey's* case an argument was advanced by Eagle Star which sought to equate reinsurance with liability insurance. Hobhouse LJ stated (at 522):



a 'This is not and never has been correct. Liability insurance is a species of original insurance whereby an assured insures the risk of his becoming liable to others.'

He went on (at 523–524) to point out:

b 'The element of "liability" was effectively introduced into this branch of insurance by the attempts of insurers, through the use of special clauses, to get round the need to prove their loss by proving an insured loss of the original subject matter. The history of this part of the law is reviewed in the judgments of the Court of Appeal in *Insurance Company of Africa v. Scor (U.K.) Reinsurance Co. Ltd.* ([1985] 1 Lloyd's Rep 312). The original form of the relevant clause required reinsurers "to pay as may be paid thereon", a c wording which Mr. Justice Matthew in *Chippendale v. Holt* ((1895) 1 Com Cas 157) held only went to the quantum of any payment that had been made by the reinsured not to the question whether a loss covered by the original insurance had ever taken place. The market then introduced the clause d which required the reinsurers to "follow the settlements" of the reassured. This clause was successful in requiring the reassured to accept any bona fide settlements made by the reassured with the original assured. The position was summarised by Lord Justice Robert Goff in *Scor* ([1985] 1 Lloyd's Rep 312 at 330): "... the effect of a clause binding reinsurers to follow settlements of the insurers, is that the reinsurers agree to indemnify insurers in the event e that they settle any claim by their assured ... provided that the claim as so recognised by them falls within the risks covered by the policy of reinsurance as a matter of law and provided also that in settling the claim the insurers have acted honestly and have taken all proper and businesslike steps in making the settlement." ... Over the years, Judges have on a number of occasions, when dealing with reinsurance policies containing various types f of settlement or payment clauses, used the language of indemnification in respect of liabilities ... In my judgment these references to liability must not be read out of context. They derive in part from particular reinsurance clauses which have been included in policies and from the basic proposition that a reinsured must prove a loss and must give the reinsurer the benefit of all rights of subrogation. These, and similar, statements do not alter the g character of reinsurance or make it into something which is a mere liability insurance.'

h Hobhouse LJ went on to hold that the particular contract in that case, whereby Eagle Star agreed to pay 'all claims, returns, reinsurance premiums and other outgoings' in respect of particular underwriting years of account, was in fact equivalent to a 100% 'stop loss' policy and amounted neither to a reinsurance contract properly so described nor a 'mere liability' insurance.

The reinsurance in this case is non-proportional excess of loss reinsurance. The promise is—

j 'to indemnify the reinsured in settlement of its net loss ... under business accepted by the reassured as fully described in Section C of the schedule [ie] ... all losses howsoever and wheresoever arising sustained by the reassured in respect of all business allocated to their Drilling Rig Account.'

Mr Kendrick has submitted to this court that those words are appropriate to a reinsurance of liabilities, there being no reinsuring words referring to the many underlying risks. However, it seems to me that such doubts as might arise from

the wording as to whether or not the reinsurer should only be liable to the extent of the insurers' liability in respect of the original risk, are dispelled by reason of cl 1.3 of the JELC, which provides that it is a condition precedent to liability that settlement by the reinsured shall be in accordance with the terms and conditions of the original policies or contracts. Thus, while language of indemnity against loss is used, it is still in effect an indemnity against risks falling within the original policy or policies. a

In *Charter Reinsurance Co Ltd v Fagan* [1996] 3 All ER 46, [1997] AC 313 the House of Lords was concerned with the meaning of the words 'actually paid' in the context of the 'ultimate net loss' clause of two whole account excess of loss reinsurances. The terms of the reinsuring clause were 'to pay all losses howsoever and wheresoever arising during the period of this Reinsurance on any Interest under Policies ... underwritten by the Reinsured in their Whole Account', ie terms effectively indistinguishable from the contracts of reinsurance in this case. In construing the clause, Lord Mustill said ([1996] 3 All ER 46 at 51, [1997] AC 313 at 385): b

'This is not the place to discuss the question, perhaps not yet finally resolved, whether there can be cases where a contract of reinsurance is an insurance of the reinsurer's liability under the inward policy or whether it is always an insurance on the original subject matter, the liability of the reinsured serving merely to give him an insurable interest.' c

Thus, he left open the possibility that, in some cases, a contract of reinsurance may more properly be regarded as liability insurance than a reinsurance of the original subject matter, but the burden of his observation appears to be that such a case would be rare. Certainly, it is clear that Lord Mustill ([1996] 3 All ER 46 at 53, [1997] AC 313 at 387) did not think that was the case in the policy before him when he observed: d

'As I have already suggested, under this form of words, although perhaps not under all forms, the policy covers not, as might be thought, the suffering of loss by the reinsured in the shape of a claim against him under the inward policies, but the occurrence of a casualty suffered by the subject matter insured through the operation of an insured peril. The inward policies and the reinsurance are wholly distinct. It follows that in principle the liability of the reinsurer is wholly unaffected by whether the reinsured has satisfied the claim under the inward insurance ...' e

Again, against the background of the whole account excess of loss reinsurances before the court, Lord Hoffmann ([1996] 3 All ER 46 at 58, [1997] AC 313 at 392) said of contracts of reinsurance: f

'Such a contract is not an insurance of the primary insurer's potential liability or disbursement. It is an independent contract between reinsured and reinsurer in which the subject matter of the insurance is the same as that of the primary insurance, that is to say, the risk to the ship or goods or whatever might be insured. The difference lies in the nature of the insurable interest, which in the case of the primary insurer, arises from his liability under the original policy (see *British Dominion General Insurance Co v Duder* [1915] 2 KB 394 at 400, [1914-15] All ER Rep 176 at 178 per Buckley LJ).' g

I do not think it is necessary on this appeal further to consider the general question whether, or where, the line should be drawn between reinsurance h

a 'properly' or 'narrowly' so-called and 'mere' liability insurance effected by a reinsurer. That is because cl 1.3 of the JELC specifically provides the answer to the particular question in relation to which such an exercise in classification usually requires to be performed. In the light of its provisions, it seems to me that the parties were correct to pursue the matter before the judge on the basis that the first question which required to be answered for the purposes of the Ord 14 proceedings was whether NRG had demonstrated an arguable defence that the plaintiffs were not liable to Exxon in respect of the claim under section 1 of the GCE policies.

b In holding that NRG had not done so, the judge's reasoning involved two essential steps. First, he dealt with the question of whether, if the Texas court (as a court of competent jurisdiction) had given judgment for Exxon despite the insurers' having advanced all reasonable defences (as Mr Reasoner predicted was the likely outcome), the plaintiffs would have established their liability under the original policy for the purposes of indemnity by NRG under the reinsurance policy. He answered that question in the affirmative. Second, having done so, he treated the prediction in Mr Reasoner's affidavit, (uncontradicted as it was by affidavit evidence to the contrary), as conclusive of the likely outcome of the Texas proceedings and thus held that liability was similarly established by virtue of the settlement agreement.

c Before this court, Mr Sumption has attacked the judge's reasoning upon the following grounds.

d (1) He relies upon certain passages in the judgment of Clarke J to suggest that the judge misunderstood the nature of reinsurance and that, by adopting the approach he did, he dealt with the matter essentially as a reinsurance of the insurers' liability and not a reinsurance of the original risk ie losses in respect of which it was necessary for the plaintiffs to prove that they were in law losses for which they were liable under the terms of the original policy, as opposed to simply being losses sustained by the plaintiffs in respect of business allocated to the plaintiffs' drilling rig account.

e (2) Mr Sumption submits that the judge was wrong to approach the question of liability under the reinsurance policy from the starting point of a notional decision of the Texas court in favour of Exxon for two reasons. (a) In Mr Sumption's submission, such decision would not in itself have been definitive that the loss was recoverable under the terms of policy, that question depending on the view of the English court as to the proper construction of the policy according to its governing law and not (as Mr Reasoner treated it and as the judge appeared to accept) of predicting the uncertain outcome of a Texas jury trial. (b) In any event, no trial had in fact taken place. That being so, the settlement, and the question of whether or not it was a settlement in respect of a loss for which the insurers (and hence the reinsurers) were liable, fell to be considered by the court seised of the question of liability under the reinsurance contract, ie the English court. That question in turn fell to be decided according to the appropriate rules of construction under the applicable law and not according to the predicted findings of a Texan jury which, on the basis of Mr Reasoner's affidavit, might well not approach its task from the same standpoint.

f (3) Finally, given the necessity for the plaintiffs to establish their liability under the terms of the original contract, Mr Sumption submits that Mr Reasoner's affidavit was neither appropriate nor sufficient. It did not assert that it was, or purport to be, an affidavit of Texas law, or of any law different in substance from English law as applied to the proper construction of the original insurance contract. In effect, all that the affidavit did was to set out the arguments advanced



by Exxon on one side and the insurers on the other and assert the likelihood that a Texas jury, charged with the task of deciding the case, would have found in favour of Exxon. Further, the affidavit was in terms which, expressly or by implication, suggested that such a result was likely to follow, at best, by reason of the jury's inexperience and lack of expertise in insurance law, and at worst, by reason of bias in favour of an insured which had suffered heavy losses.

### *Discussion and conclusions*

As to Mr Sumption's submission (1), I do not consider that any individual passage in the judgment indicates that the judge misunderstood the nature and boundaries of reinsurance in general or as applicable in the particular context. The passage particularly relied on by Mr Sumption is that in which the judge said ([1998] 1 Lloyd's Rep 80 at 86):

'The question here is what was the liability of the insurer under the GCE policy. The answer to that question depends or may depend upon where that liability is established ... The crucial point is that the liability under the terms of the policy, *which is what is in effect being reinsured*, is not the liability of the insurer in a vacuum but that liability as determined by a Court of competent jurisdiction ... if those insurers cannot recover under their contracts of reinsurance, they will not in truth be covered *in respect of their liability under the policy* ...' (My emphasis.)

I consider that passage to have been no more than an acknowledgement of the fact that, in considering questions of liability, especially those which turn on the construction of a contract of insurance, different courts of competent jurisdiction may reach different conclusions, but that, if the effect of a decision of one such court as to the liability of an insurer to his original insured is not honoured or recognised by the (different) court which later determines the liability of the reinsurer to his reinsured, the overall purpose of the reinsurance will not have been achieved.

The judge well understood, and proceeded on the basis, that, in relation to the particular contract of reinsurance before him, it was common ground that the plaintiffs must establish that they were liable under the GCE policy. It was also common ground that, in the absence of special wording, NRG as reinsurers did not agree to indemnify the plaintiffs in respect of any payments which they considered it in their business interest as insurers to make, as to which the judge quoted Lord Mustill in *Hill v Mercantile and General Reinsurance Co plc* [1996] 3 All ER 865 at 880, [1996] 1 WLR 1239 at 1253 in commenting on the terms of the 'follow the settlements' clause (already set out above).

Turning to Mr Sumption's submission (2), I do not consider that the judge was wrong to hold in principle that, had it been the case that Exxon's claim had proceeded to trial in Texas (being a court of competent jurisdiction) and had it been the subject of a verdict against the insurers (they having taken all proper defences) then liability would prima facie have been established so as to render NRG liable as reinsurers, subject to any reversal on appeal. My reasons are essentially the same as those of the judge, which I have already quoted in extenso.

The broad purpose of reinsurance, if only as a corollary of its conventional definition, is for the reinsured to be covered (within the limits stated in the reinsurance) in respect, and to the extent, of his liability under the original policy, pursuant to which the original insured is entitled to recover from him. In a reinsurance giving world-wide cover of the kind in this case, it is within the

a inevitable contemplation of the parties that the reinsurance will apply to large  
b numbers of insurance contracts made with corporations in various parts of the  
c world and that the liability of the reinsured will be determined by courts of  
competent jurisdiction, or arbitrators, in many countries or states who will apply  
the law applicable to the original insurance. Indeed it may even be, as in this case,  
that the contract of insurance between the reinsured and his assured will provide  
for arbitration of those parties' disputes by an arbitrator who is not to be bound  
by strict rules of law. Thus the law applied to determine the original liability of  
the reinsured may differ to a greater or lesser extent in its content and approach  
from the law governing the reinsurance contract. However, it would be quite  
impracticable, productive of endless dispute, and against the presumed intention  
of the contract of reinsurance (absent contrary or special provision of a kind  
which does not exist in this case) for an English court trying a dispute concerning  
the reinsurers' liability to the reinsured not to treat the judgment of a foreign  
court as to the reinsured's original liability as decisive and binding, save within  
the most circumscribed limits.

d Like the judge, I would hold those limits to be: (1) that the foreign court should  
in the eyes of the English court be a court of competent jurisdiction; (2) that  
judgment should not have been obtained in the foreign court in breach of an  
exclusive jurisdiction clause or other clause by which the original insured was  
contractually excluded from proceeding in that court; (3) that the reinsured took  
all proper defences; and (4) that the judgment was not manifestly perverse.

e Mr Sumption has resisted that approach as one of convenience rather than  
logic. He has argued that, since the reinsured must establish that he was legally  
liable ie liable on a proper application of the applicable law, the decision of a  
foreign court can be no more than evidence of such liability which ultimately falls  
to be decided by the court deciding the dispute as to the liability of the reinsurer  
to the reinsured. He concedes that, in many cases, the foreign decision is likely  
to be treated as conclusive evidence of liability, but says that should not affect the  
principle. In my view, the matter is better treated as a question of implication  
into the reinsurance contract, the implied term being that, absent any provision  
to contrary effect, the insurer will treat the decision of a foreign court of  
competent jurisdiction as to the liability of the reinsured to his original insured as  
binding, subject only to reversal on appeal and the limits which I have mentioned.

g I would only add that, as to the ambit of limit (4), it does not seem to me  
necessary or desirable in the course of this judgment to explore the situations in  
which a plea of perversity might successfully be raised in respect of the decision  
of a foreign court. That is because there has been no such decision in this case.  
While I accept that the judge was correct in his view as to the effect of a judgment  
h of the Texas court had that position been reached, it seems to me that (given no  
such judgment existed) he fell into error in his approach to the question of  
whether or not the liability of the plaintiffs to Exxon under section 1 of the GCE  
policy was proved.

i In my view, in the absence of such a judgment, it was for the judge to form his  
own view of whether or not an arguable defence had been shown by the  
reinsurers that the plaintiffs were not liable to Exxon under section 1 of the GCE  
policy according to the applicable law and rules of construction. There had been  
debate before him as to what was the applicable law (ie New York law or English  
law), but he had no evidence before him that New York law differed in any  
relevant respect from English law, or indeed that Texas law (which was not in fact  
advanced as the applicable law) differed from either. Nor did he have before him  
any assertion that, by reason of any particular law or rule of construction properly

applied to the provisions of sections 1 and 3 of the GCE policy, Exxon were entitled, under the scheme of policy, to recover their clean-up costs under section 1. It therefore fell to the judge to deal with the question of whether there was an arguable defence on the basis of English law. It seems to me that, had the judge sought to embark upon the question of whether the insurers were indeed liable to Exxon under section 1, he could not have failed to find that there were at least strong arguments that they were not. However, he never did embark upon that task. He simply stated in his judgment ([1998] 1 Lloyd's Rep 80 at 84), when proceeding to answer the question whether the plaintiffs were liable to Exxon under section 1:

'I shall assume for the moment that the GCE policy was governed by English law. I shall also assume that Mr. Sumption was correct in submitting that if section 1 were construed in accordance with English law by an English Court the plaintiffs would have had at least arguable defences to Exxon Corporation's claim.'

He then went on to accept the submission of Mr Kendrick that—

'so long as the plaintiffs were or would have been held liable under the GCE policy by a Court of competent jurisdiction they have established the necessary liability under the original policy in order to satisfy the principle that the reinsured can only recover in respect of payments which they were liable in law to make under that policy ... provided only that any such Court was a Court of competent jurisdiction and that the plaintiffs took all the defences available to them.' (See [1998] 1 Lloyd's Rep 80 at 84.)

Thereafter, having reached his conclusion as to the position had judgment been obtained against the plaintiffs in the Texas court, the judge simply treated the question of the plaintiff's liability to Exxon as answered by Mr Reasoner's predictions. He thus, in effect, treated Mr Reasoner's opinion as to the likely outcome if the matter had proceeded before the jury as evidence of what the law was.

I now turn to Mr Sumption's submission (3). The difficulty with the judge's approach as just described was that Mr Reasoner did not purport to predict the jury's verdict by reference to the answer which a proper application of the law and appropriate rules of construction would produce. He stated that, in his judgment, liability was *not* going to turn 'simply upon construction of the policy language in the light of the factual matrix', as to which he stated that the insurers' case was 'certainly reasonable and based upon reasonable and credible arguments'. Rather, he made his prediction as to the verdict of the jury based upon the fact that they were likely to be directed by a 'non-specialised judge' in an area in which they lacked expertise, and that 'jurors are often unfavourable to insurers and biased against them when insurers are arguing for a limitation of cover'.

The judge accepted the evidence of Mr Reasoner as to the matters to which I have just referred with the observation: 'that evidence seems to me to make good sense'. While it seems to me that such an observation might appropriately have been directed to the decision of the insurers to settle in the light of Mr Reasoner's prediction, it did not bite on the question of whether the evidence demonstrated legal liability under the insurance contract.

As to the decision of the insurers to settle in the light of Mr Reasoner's prediction, as Mr Sumption in my view rightly submitted, it was not enough for



a the plaintiffs to establish that the settlement was business-like and sensible. They were required to demonstrate liability to Exxon, and could only be entitled to recover on some wider basis if they could show some kind of 'follow settlements' clause binding the reinsurers to the plaintiffs' settlement. However, as already noted, of the 16 contracts making up the GCE policy, five contained no follow settlements clause at all and 11 contained clauses in substantially the same form as in *Hill's* case [1996] 3 All ER 865, [1996] 1 WLR 1239. None bound the reinsurers to reasonable or business-like settlements regardless of the scope of the direct insurance. All provided that settlements should be binding upon the reinsurers only 'providing such settlements are within the terms and conditions of the original policies and/or contracts'.

b  
c The judge ([1998] 1 Lloyd's Rep 80 at 88) found that it was unnecessary to consider the terms of the follow settlement clauses because he found that the plaintiffs had—

d 'in the words of Mr. Justice Lawrence, proved the loss in the same way as the original assured must have proved it against them. They have proved the amount of the insurers' liability in the Court of competent jurisdiction, where they were properly sued. Since it is not suggested that they did not take all points available to them, it follows that none of the defences now suggested by NRG, whether relating to liability or quantum (which are the same as those which were advanced by the plaintiffs) would have been of any avail.'

e In that passage the judge appears to have equated Mr Reasoner's prediction with an actual verdict of the Texas court. In my view he was wrong to do so. A judgment of the court would have given rise to a source of obligation conclusive as between the plaintiffs and Exxon (subject to any appeal) and conclusive as between the plaintiffs and NRG subject to a possible argument of perversity, if later study of the issues as deployed at trial and the form of any judgment or verdict realistically gave rise to such a plea. Without it, if the plaintiffs wished to claim from NRG as reinsurers, there was an independent necessity to demonstrate legal liability which the affidavit of Mr Reasoner did not attempt to achieve other than by a prediction directed to other considerations than those of legal merit.

f  
g In this context, the judge's reference to proof in court after taking 'all points available to them' does not seem to me relevant. The matter did not proceed to judgment and payment was made pursuant to a settlement in which the insurers (no doubt for good and business-like reasons) decided that they would not submit the points available to them to the decision of the court, but would rather reach a compromise. It is in just such a position, that the reinsurer, in response to the reinsured's claim for indemnity has the right to require the reinsured to show that he was legally liable to the original assured, unless there is in the reinsurance contract an effective 'follow the settlements' provision which precludes such right (see *Insurance Co of Africa v Scor (UK) Reinsurance Co Ltd* [1985] 1 Lloyd's Rep 312).

j In finding as he did, the judge placed his decision in large measure upon the fact that there was no affidavit evidence proffered by NRG to contradict the evidence of Mr Reasoner that, if the action against the insurers had continued, it would have succeeded. However, in the context of this case, and in the light of the nature of the contents of Mr Reasoner's affidavit, it does not seem to me that the reinsurers were obliged to file such evidence in order to make their point. Their point was simply that, in the absence of any evidence as to a different law to be

applied, the judge should apply English law which would treat the question of liability as dependent on the construction of the documents rather than upon the uncertain approach which it appeared Mr Reasoner was suggesting a Texas jury might bring to the case.

In my view, there was evidence before the judge on the documents alone which not only entitled but obliged him to assume (as he did) that under English law NRG would have an arguable defence that the plaintiffs were not liable to Exxon under section 1 of the GCE policy. I do not think there was good reason for him to accept Mr Reasoner's assessment that the jury, properly directed, would not decide the matter in favour of Exxon. There should be an instinctive reluctance in any court required to make predictions about a decision in another court, to conclude that such decision, whether in the form of a judge's ruling or a jury's verdict, will not be arrived at according to law.

The statement by Mr Reasoner that in his opinion, based on his experience at the section 3A trial, it was probable that underwriters would have lost the trial under section 1, seems to me to be objectionable on a number of grounds. First it was not said to be based on the principles of law or construction properly to be applied. Second, it was, in truth, no more than a prediction of human behaviour based on the jury's consideration of different matters in the section 3A trial. Third, it ignored the fact that it was the decision of the plaintiffs to settle the section 1 claim which prevented the jury having the opportunity to consider the provisions of sections 1 and 3 together, so that, even assuming they were inclined to give judgment on a broad basis rather than one of strict legal principle, they would have had the opportunity to apply their minds as to whether it was right to give judgment under section 1 as well as section 3, in the light of the overall scheme of the insurance and the clear provision in art IV, para 3 of section 1.

Finally, I would observe by way of footnote that, given the nature of NRG's defence and the need for an early resolution of this dispute, it does seem to be one particularly appropriate for early determination in the proceedings as a matter of law. That result might well have been achieved had the judge been asked to determine the question of law as to the liability of the plaintiffs to Exxon under section 1 of the GCE policy at the same time as the Ord 14 proceedings. In the absence of such a request, it remains the unhappy position following this appeal that the question has yet to be determined despite two lengthy hearings relating to it.

I would allow this appeal and order that the judgment of Clarke J under Ord 14, r 3 be set aside and the plaintiffs' application by summons dated 20 May 1996 be dismissed.

**MAY LJ.** I agree.

**LORD WOOLF MR.** I also agree.

*Appeal allowed. Leave to appeal to the House of Lords refused.*

Kate O'Hanlon Barrister.

## Adan v Secretary of State for the Home Department

HOUSE OF LORDS

LORD GOFF OF CHIEVELEY, LORD SLYNN OF HADLEY, LORD LLOYD OF BERWICK, LORD NOLAN AND LORD HOPE OF CRAIGHEAD

26, 27 JANUARY, 2 APRIL 1998

*Immigration – Leave to enter – Refugee – Asylum – Fear of persecution held by applicant for refugee status – Civil war in country of origin – Home Office refusing to grant refugee status – Applicant not having current well-founded fear of persecution if returned to country of origin – Whether sufficient that applicant originally fled country or remained abroad for well-founded fear of persecution – Meaning of ‘refugee’ in context of civil war – Convention and Protocol relating to the Status of Refugees, art 1A(2).*

A applied for asylum in the United Kingdom. Under art 1A(2)<sup>a</sup> of the Convention relating to the Status of Refugees, the term ‘refugee’ applied to any person who ‘owing to well-founded fear’ of being persecuted for reasons of race, religion, nationality, or membership of a particular social group or political opinion was outside the country of his nationality and was unable or unwilling to avail himself of the protection of that country. A had come to the United Kingdom from Somalia, fearing persecution by the government for convention reasons. Subsequently, however, there was a change of regime, although a state of civil war existed in the north between local clans. The Secretary of State refused the application and A appealed to the special adjudicator, who allowed his appeal, finding that although he no longer had a well-founded fear of persecution from the government of Somalia, he did have a well-founded fear of persecution from the opposing clans in the civil war. The Immigration Appeal Tribunal allowed the Secretary of State’s appeal, holding that A did not have a current well-founded fear of persecution, since the fighting and disturbances in the civil war were indiscriminate and the situation was no worse for A’s clan than for the general population. The Court of Appeal allowed A’s appeal and the Secretary of State appealed to the House of Lords.

**Held** – The appeal would be allowed for the following reasons—

(1) For the purposes of art 1A(2) of the convention, it was necessary for the applicant to have a current well-founded fear of persecution for a convention reason in order to be recognised as a ‘refugee’; it was not sufficient that he had such fear when he left his country of origin (see p 454 g j to p 455 c, p 459 b, p 460 g j and p 464 h j, post).

(2) Where a state of civil war existed, it was not enough for an asylum-seeker to show that he would be at risk if he were returned to his country; he had to be able to show fear of persecution for convention reasons over and above the ordinary risks of clan warfare. In the instant case, there was no ground for differentiating between A and the members of his own or any other clan. It followed that the Immigration Appeal Tribunal had been justified in differing

<sup>a</sup> Article 1A, so far as material, is set out at p 456 e to g, post



from the special adjudicator and that A was not entitled to refugee status (see p 454 g, p 455 h to p 456 a and p 463 e j to p 464 f h j, post); *Salibian v Canada* (Minister of Employment and Immigration) (1990) 73 DLR (4th) 551 adopted.

Decision of the Court of Appeal [1997] 2 All ER 723 reversed.

### Notes

For control of immigration with respect to political asylum and refugees, see 4(2) *Halsbury's Laws* (4th edn reissue) para 82, and for cases on the subject, see 7(2) *Digest* (2nd reissue) 93–96, 518–530.

### Cases referred to in opinions

*C, Re* (22 September 1997, unreported), NZ Refugee Status Appeals Authority.

*R v Secretary of State for the Home Dept, ex p Jeyakumaran* [1994] Imm AR 45.

*Salibian v Canada* (Minister of Employment and Immigration) (1990) 73 DLR (4th) 551, Can Fed CA.

### Appeal

The Secretary of State for the Home Department appealed with leave of the Appeal Committee of the House of Lords given on 31 July 1997 from the decision of the Court of Appeal (Simon Brown, Hutchison and Thorpe LJ) ([1997] 2 All ER 723, [1997] 1 WLR 1107) on 13 February 1997 allowing the appeal of Hassan Hussein Adan from the decision of the Immigration Appeal Tribunal on 7 December 1995, allowing an appeal by the Secretary of State from the determination of an immigration special adjudicator on 21 September 1995 granting him asylum in the United Kingdom. The facts are set out in the judgment of Lord Lloyd of Berwick.

*David Pannick QC* and *Mark Shaw* (instructed by the *Treasury Solicitor*) for the Secretary of State.

*Nicholas Blake QC* and *Raza Husain* (instructed by *Wilson & Co*) for Mr Adan.

Their Lordships took time for consideration.

2 April 1998. The following opinions were delivered.

**LORD GOFF OF CHIEVELEY.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Lloyd of Berwick. For the reasons he gives I would allow the appeal.

**LORD SLYNN OF HADLEY.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Lloyd of Berwick.

As to the first issue raised in the case, there is, it seems to me, force in Mr Blake's argument that on humanitarian grounds a person who leaves his own country because of a well-founded fear of being persecuted for a convention reason and later is unable, or, owing to that fear is unwilling, to avail himself of that country's protection even when the grounds for his fear have gone, should be able to claim the status of a refugee.

I am satisfied, however, that the Geneva Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1954); Cmd 9171) (as amended by the 1967 Protocol (New York, 31 January 1967; TS 15 (1969); Cmd 3906) in art 1A(2), does not confer that status. The first matter to be established under the article is

a that the claimant is outside the country of his nationality owing to a well-founded fear of persecution. That well-founded fear must, as I read it, exist at the time his claim for refugee status is to be determined; it is not sufficient as a matter of the ordinary meaning of the words of the article that he had such fear when he left his country but no longer has it. Since the second matter to be established, namely that the person 'is unable or, owing to such fear, is unwilling to avail himself of the protection of that country' (art 1A(2)), clearly refers to an inability or unwillingness at the time his claim for refugee status is to be determined, it seems to me that the coherence of the scheme requires that the well-founded fear, the first matter to be established, is also a current fear. The existence of what has been called an historic fear is not sufficient in itself, though it may constitute important evidence to justify a claim of a current well-founded fear.

c Like Lord Lloyd of Berwick I also attach importance to the passages in Professor James Hathaway's book, *The Law of Refugee Status* (1991), set out in his speech and to the state practice recommended in the joint position dated 4 March 1996 (OJ 1996 L63, p 1) of the Council of the European Union, although the latter is not conclusive.

d Reference has been made in argument to art 1C(5) of the convention. That article is, however, dealing only with the situation where a person has qualified as a refugee but (a) the circumstances have changed so that he has no longer a well-founded fear of persecution for a convention reason, and (b) the protection of the country of his nationality is available. If (a) is satisfied then he cannot say that he is unwilling because of the previous fear to accept the protection of his country of nationality. I do not think that the special circumstances in which the convention is said to cease to apply to someone who was within art 1A assist in determining the general question as to whether for the purposes of art 1A(2) it is a current or a historic fear which has to be proved.

f As to the second issue, there is on the face of it more difficulty once it is accepted, as on the authorities and in principle it must be accepted, that there can be persecution of a group and that the individual in the group does not have to show that he has a fear of persecution distinct from, or over and above, that of his group. Thus if in a state two groups exist, A and B, and members of group A threaten to or do persecute members of group B the latter should, other necessary matters being established, be able to claim refugee status. If at the same time members of group B are persecuting or threatening to persecute members of group A the claim should be the same. The position is even stronger if the persecution is not exactly simultaneous but those in power change from time to time so that the persecutors become the persecuted.

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h Looking, however, at the language of the convention and its object and purpose I do not consider that it applies to those caught up in a civil war when law and order have broken down and where, as in the present case, every group seems to be fighting some other group or groups in an endeavour to gain power. In such a situation what the members of each group may have is a well-founded fear not so much of persecution by other groups as of death or injury or loss of freedom due to the fighting between the groups. In such a situation the individual or group has to show a well-founded fear of persecution over and above the risk to life and liberty inherent in the civil war. The line may be a fine one to draw in some situations but I agree with my noble and learned friend that the Immigration Appeal Tribunal was entitled in the present case to find that such persecution over and above the risk of the civil war was not established, though

I share his satisfaction that on the facts of this case exceptional leave to remain in the United Kingdom has been given to the applicant, his wife and children. a

Accordingly I too would allow the appeal of the Secretary of State.

**LORD LLOYD OF BERWICK.** My Lords, Hassan Hussein Adan is a Somali national who fled from Somalia in June 1988 owing to a well-founded fear of persecution at the hands of the then government. On 15 October 1990 he arrived in the United Kingdom with his wife and two children. He was refused asylum on arrival, but he and his family were granted exceptional leave to remain. There is no question of Mr Adan being returned to Somalia as things stand. b

But there are certain benefits in being accorded refugee status, which are not available to those who have exceptional leave to remain. These are well described in the judgment of Simon Brown LJ ([1997] 2 All ER 723, [1997] 1 WLR 1107). I need not repeat them. Mr Adan wishes to take advantage of those benefits. He claims that he is entitled to refugee status under art 1A(2) of the Geneva Convention and Protocol relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1954); Cmd 9171) (as amended by the 1967 Protocol (New York, 31 January 1967; TS 15 (1969); Cmd 3906). Mr Pannick QC for the Secretary of State submits that Mr Adan is not entitled to refugee status because he no longer has any fear of persecution. There has been a change of government in Somalia. President Barre has fallen from power. c

Article 1 of the convention provides: d

‘A. For the purposes of the present Convention, the term “refugee” shall apply to any person who ... e

(2) [As a result of events occurring before 1 January 1951 and] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence [as a result of such events], is unable or, owing to such fear, is unwilling to return to it.’ f

Mr Blake QC, for Mr Adan, submits that it is unnecessary for Mr Adan to show a present fear of persecution. It is enough that he had a fear of persecution when he left Somalia (historic fear), so long as the historic fear is the cause of his being outside his country today, and so long as he is unable to avail himself of his country’s protection. g

There is a second issue. Mr Blake draws attention to the political situation in northern Somalia where the local clans are engaged in civil war. If Mr Adan were to return to Somalia he would be in danger of his life owing to his membership of one of the warring clans. Mr Blake argues that this amounts to persecution for a convention reason, of which he has a current well-founded fear. If so then he would be entitled to succeed on the second issue, even if he fails on the first. h

Mr Pannick on the other hand submits that in a state of civil war between clans, where everybody is subject to the ordinary risks of war, then a person who is at no greater risk than anybody else, whether members of his own clan or any other clan, cannot claim the protection of the convention. Such a person may indeed be in fear for his life. But it cannot be said that he is in fear of persecution. j



*a* Simon Brown and Hutchison LJ decided the first issue in favour of Mr Adan, with Thorpe LJ dissenting. The court was unanimous in deciding the second issue in favour of Mr Adan. The Secretary of State now appeals.

*Issue (1)*

*b* 'If [Mr Adan] has no current well-founded fear of persecution for a Convention reason, is he nevertheless to be recognised as a refugee for the purposes of article 1A(2) of the 1951 Convention and the 1967 Protocol thereto if he fled his country of nationality as a result of a well-founded fear of Convention persecution and has been unable to return to that country or to avail himself of its protection subsequently?'

*c* It is common ground that the words in square brackets in art 1A(2), which were repealed by the 1967 Protocol, can be ignored. They throw no light on the true construction of the article.

*d* It was also common ground that art 1A(2) covers four categories of refugee: (1) nationals who are outside their country owing to a well-founded fear of persecution for a convention reason, and are unable to avail themselves of the protection of their country; (2) nationals who are outside their country owing to a well-founded fear of persecution for a convention reason, and, owing to such fear, are unwilling to avail themselves of the protection of their country; (3) non-nationals who are outside the country of their former habitual residence owing to a well-founded fear of persecution for a convention reason and are unable to return to their country; and (4) non-nationals who are outside the country of their former habitual residence owing to a well-founded fear of persecution for a convention reason, and, owing to such fear, are unwilling to return to their country.

*e* It will be noticed that in each of categories (1) and (2) the asylum-seeker must satisfy two separate tests: what may, for short, be called 'the fear test' and 'the protection test'. In categories (3) and (4) the protection test, for obvious reasons, is couched in different language.

*f* Mr Blake's case is that Mr Adan falls within category (1). He left Somalia because of a well-founded fear of persecution. He is outside Somalia now because of that well-founded fear in the past, and he has been unable to avail himself of the protection of his country at any time since he left. He submits that the words 'any person who ... owing to well-founded fear ... is outside the country of his nationality' is capable, linguistically, of including those who have had a fear of persecution in the past, as well as those who have a present fear. If the words are confined to those with a present fear of persecution, then the words 'and is unable ... to avail himself of the protection of that country' are otiose. They serve no purpose. This latter argument is the one which weighed most heavily with the majority of the Court of Appeal, and which in the end tipped the balance in what they clearly regarded as a difficult case.

*g* In addition, Mr Blake relies on the travaux préparatoires. He took us on a voyage of discovery through the early drafts of the convention. He pointed out, for example, that in a draft prepared and circulated by the United Nations Economic and Social Council on 16 August 1950 (resolution 319) there appeared the words 'who has had, or has, well-founded fear of being the victim of persecution'. The words 'has had, or has', dropped out in the draft circulated by the Third Committee (Ad Hoc Committee on Statelessness and related Problems) on 12 December 1950, and did not reappear in the final draft. While

these changes are no doubt of interest to historians, from a lawyer's point of view they are inconclusive. For we do not know why the changes were made. All we know is that successive drafts (as one would expect) were subject to continual changes in the light of comments by governments and specialist agencies. It may be therefore that the changes in language were intended to reflect a change in substance. Or it may be that they were intended to reflect the same meaning in different words. We do not know. In these unfavourable circumstances your Lordships did not feel it necessary to call on Mr Pannick in reply on the travaux préparatoires. a  
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I return to the argument on construction. Mr Pannick points out that we are here concerned with the meaning of an international convention. Inevitably the final text will have been the product of a long period of negotiation and compromise. One cannot expect to find the same precision of language as one does in an Act of Parliament drafted by parliamentary counsel. I agree. It follows that one is more likely to arrive at the true construction of art 1A(2) by seeking a meaning which makes sense in the light of the convention as a whole, and the purposes which the framers of the convention were seeking to achieve, rather than by concentrating exclusively on the language. A broad approach is what is needed, rather than a narrow linguistic approach. c  
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But having said that, the starting point must be the language itself. The most striking feature is that it is expressed throughout in the present tense: 'is outside', 'is unable', 'is unwilling'. Thus in order to bring himself within category (1) Mr Adan must show that he is (not was) unable to avail himself of the protection of his country. If one asks 'protection against what?' the answer must surely be, or at least include, protection against persecution. Since 'is unable' can only refer to current inability, one would expect that the persecution against which he needs protection is also current (or future) persecution. If he has no current fear of persecution it is not easy to see why he should need current protection against persecution, or why, indeed, protection is relevant at all. e  
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But the point becomes even clearer when one looks at category (2), which includes a person who is (a) outside the country of his nationality owing to a well-founded fear of persecution, and (b) is unwilling, owing to such fear, to avail himself of the protection of that country. 'Owing to such fear' in (b) means owing to well-founded fear of being persecuted for a convention reason. But 'fear' in (b) can only refer to current fear, since the fear must be the cause of the asylum-seeker being unwilling now to avail himself of the protection of his country. If fear in (b) is confined to current fear, it would be odd if 'owing to well-founded fear' in (a) were not also confined to current fear. The word must surely bear the same meaning in both halves of the sentence. g

I turn from these linguistic points to the more general point which concerned the majority of the Court of Appeal. They considered that if 'owing to well-founded fear ... is outside' is confined to current fear, then 'is unable ... to avail himself' would serve no purpose. If category (1) were confined to refugees who are subject to state persecution, then I can well see that such persons would, ex hypothesi, be unable to avail themselves of state protection. On that view the words would indeed serve no purpose. But category (1) is not so confined. It also includes the important class of those who are sometimes called 'third party refugees', ie those who are subject to persecution by factions within the state. If the state in question can make protection available to such persons, there is no reason why they should qualify for refugee status. They would have satisfied the fear test, but not the protection test. Why should another country offer asylum h  
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a to such persons when they can avail themselves of the protection of their own country? But if, for whatever reason, the state in question is unable to afford protection against factions within the state, then the qualifications for refugee status are complete. Both tests would be satisfied.

b So I would not regard the inclusion of a protection test as standing in the way of Mr Pannick's construction. On the contrary, I consider that the existence of the protection test, couched as it is in the present tense, adds positive support for the view that 'owing to well-founded fear' is also confined to current fear. In this way the two halves of the sentence are linked together.

That brings me to art 1C, which provides:

c 'This Convention shall cease to apply to any person falling under the terms of Section A if ... (5) He can no longer, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under Section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality ...'

d I had at first thought that art 1C(5) provided a complete answer to Mr Blake's argument. If a present fear of persecution is an essential condition of *remaining* a refugee, it must also be an essential condition for *becoming* a refugee. But it was pointed out in the course of argument that art 1C(5) only applies to refugees in category (2). It does not help directly as to refugees in category (1). This is true. But the proviso does shed at least some light on the intended contrast between art 1A(1) and 1A(2). Article 1A(1) is concerned with historic persecutions. It covers those who qualified as refugees under previous conventions. They are not affected by art 1C(5) if they can show compelling reasons arising out of previous persecution for refusing to avail themselves of the protection of their country. It would point out the contrast with art 1A(1), and make good sense, to hold that art 1A(2) is concerned, not with previous persecution at all, but with current persecution, in which case art 1C(5) would take effect naturally when, owing to a change of circumstance, the refugee ceases to have a fear of current persecution.

f Mr Pannick also founded an argument on art 33. But for my part I found the argument unconvincing. As Simon Brown LJ said in the Court of Appeal ([1997] 2 All ER 723 at 731, [1997] 1 WLR 1107 at 1116), it approaches the question from the wrong end. It throws no light on the definition of refugee in art 1A(2).

g I now turn to the authorities on the first issue. There is no judicial authority which is directly in point, other than *Re C* (22 September 1997, unreported), a very recent decision of the New Zealand Refugee Status Appeals Authority. In a lengthy, and carefully reasoned judgment, the Appeals Authority concluded that the majority decision of the Court of Appeal in the present case was wrong in law, and was not to be followed in New Zealand.

h Of equal and perhaps of greater importance are the views of academic writers, since it is academic writers who provide the best hope of reaching international consensus on the meaning of the convention. One of the leading figures in the academic field is Professor James Hathaway. In *The Law of Refugee Status* (1991) (pp 68–69), published in Canada, he says:

j 'In the Convention as ultimately adopted, therefore, persons determined to be refugees under earlier arrangements are not required to demonstrate a



well-founded fear of being persecuted, and are not automatically subject to cessation of refugee status if conditions become safe in their homeland. It was the intention of the drafters, however, that all other refugees should have to demonstrate "a present fear of persecution" in the sense that they "are or may in the future be deprived of the protection of their country of origin". Thus it was agreed that the first branch of the IRO [International Refugee Organisation] test which focused on past persecution should be omitted in favour of the "well-founded fear of being persecuted" standard, involving evidence of a present or prospective risk in the country of origin. The use of the term "fear" was intended to emphasize the forward-looking nature of the test, and not to ground refugee status in an assessment of the refugee claimant's state of mind.'

In a document headed joint position dated 4 March 1996 (OJ 1996 L63, p 3) the Council of the European Union adopted certain guidelines for the application of art 1 of the convention. Paragraph 3 provides:

'The determining factor for granting refugee status in accordance with the Geneva Convention is the existence of a well-founded fear of persecution on grounds of race, religion, nationality, political opinions or membership of a particular social group ... The fact that an individual has already been subject to persecution or to direct threats of persecution is a serious indication of the risk of persecution, unless a radical change of conditions has taken place since then in his country of origin or in his relations with his country of origin.'

Paragraph 9.1 reads (OJ 1996 L63, p 6):

'Political changes in the country of origin may justify fear of persecution, but only if the asylum-seeker can demonstrate that as a result of those changes he would personally have grounds to fear persecution if he returned.'

These and other passages indicate that the essential criterion for determining refugee status (other than refugees covered by art 1A(1)) is a current well-founded fear of persecution for a convention reason.

But even more significant than the positive support for Mr Pannick's construction of art 1A(2) among the academic writers is the complete absence of any support for Mr Blake's construction, whether in Professor Hathaway's book, or in other academic writings, or in the United Nations Handbook (*UNHCR Handbook on Procedures and Criteria for determining Refugee Status* (1992)), or elsewhere. So far as I am aware the suggestion that anything other than a current fear of persecution will suffice has never even been mooted.

So with great respect to the majority of the Court of Appeal, I would hold that on the first issue the views of Thorpe LJ are to be preferred. I am glad to have reached that conclusion. For a test which required one to look at historic fear, and then ask whether that historic fear which, ex hypothesi, no longer exists is nevertheless the cause of the asylum-seeker being presently outside his country is a test which would not be easy to apply in practice. This is not to say that historic fear may not be relevant. It may well provide evidence to establish present fear. But it is the existence, or otherwise, of present fear which is determinative. I would therefore answer the first issue in favour of the Secretary of State.

## Issue (2)

a 'Can a state of civil war whose incidents are widespread clan and sub-clan-based killing and torture give rise to well-founded fear of persecution for the purposes of the 1951 Convention and the 1967 Protocol thereto, notwithstanding that the individual claimant is at no greater risk of such adverse treatment than others who are at risk in the civil war for reasons of their clan and sub-clan membership?'

b The second issue raises more difficult questions, at least in theory, since, if Mr Pannick is right, it involves drawing a line between the persecution of individuals and groups, including very large groups, on the one hand, and the existence of a state of civil war on the other. Mr Pannick accepts that protection under the convention is not confined to individuals. He accepts further that the persecution of individuals and groups, however large, because of their membership of a particular clan is very likely to be persecution for a convention reason. But he says that where there is a state of civil war between clans, the picture changes. Otherwise the participants on both sides of the civil war would be entitled to protection under the convention. Indeed, as Simon Brown LJ pointed out, the only persons who would *not* be entitled to protection, on that view, would be those who were *not* the active participants on either side but were, as Simon Brown LJ ([1997] 2 All ER 723 at 735, [1997] 1 WLR 1107 at 1120) put it, 'lucklessly endangered on the sidelines'. Simon Brown LJ found this unappealing. So do I. It drives me to the conclusion that fighting between clans engaged in civil war is not what the framers of the convention had in mind by the word persecution.

e What then is the critical factor which distinguishes persecution from the ordinary incidents of civil war? Mr Blake sought to draw a distinction between the armed forces on either side, who would, he said, be governed by the rules of war, and the targeting of individual civilians or groups of civilians. I doubt, however, whether, in the context of clan warfare in Somalia, it is realistic to think in terms of rules of war, or the conventional distinction between civilians and members of the armed forces. Mr Adan's own evidence was that most of the population is armed.

f Mr Blake is nearer the mark when he refers to the targeting of civilians or groups of civilians. If an asylum-seeker can show that he is being targeted for convention reasons, other than his membership of one of the warring clans, then he might qualify for refugee status. This indeed comes near to Mr Pannick's submission. In a state of civil war between clans an asylum seeker must be able to show that he is at greater risk of ill-treatment than other members of his clan. There must, he said, be a differential impact.

g One can find a good deal of authority to support Mr Pannick's submission. In *Salibian v Canada (Minister of Employment and Immigration)* (1990) 73 DLR (4th) 551 the Federal Court of Appeal in Canada was concerned with a claim for refugee status by a citizen of the Lebanon. The Refugee Division had decided that the plaintiff was not entitled to refugee status because there was no evidence that he personally had been singled out for persecution. He was a victim of the disruption in the Lebanon, like all other Lebanese citizens. The Court of Appeal held that the Refugee Division had fallen into error, both in fact and law: in law, because it is unnecessary for a victim of persecution to show that the persecution has been directed against him in particular; in fact, because the evidence was that he had suffered persecution, not as a Lebanese citizen, but as an Armenian and a

Christian. The court stated the following proposition, among others, as having been established by previous authority (at 558): a

‘... a situation of civil war in a given country is not an obstacle to a claim provided the fear felt is not that felt indiscriminately by all citizens as a consequence of the civil war, but that felt by the applicant himself, by a group with which he is associated or if necessary by all citizens on account of a risk of persecution based on one of the [convention] reasons ...’ b

In support of that proposition, the court (at 559) cited two passages from a draft of Professor Hathaway’s book, *The Law of Refugee Status* (1991). The second, was (p 97):

‘In sum, while modern refugee law is concerned to recognize the protection needs of particular claimants, the best evidence that an individual faces a serious chance of persecution is usually the treatment afforded similarly situated persons in the country of origin. In the context of claims derived from situations of generalized oppression, therefore, the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status. If persons like the applicant may face serious harm in her country, and if that risk is grounded in their civil or political status, then she is properly considered to be a Convention refugee.’” c

This passage, with its rejection of a differential test (‘the issue is not whether the claimant is more at risk than anyone else in her country’) might at first sight appear to be inconsistent with Mr Pannick’s argument. He hinted that Professor Hathaway might be wrong. But the passage is not dealing with a country in a state of civil war. It is disposing of an argument that had prevailed in early decisions both in Canada and the United States that to qualify for refugee status the asylum-seeker had to have been ‘singled out’. It was for this reason, no doubt, that it was cited with approval in *Salibian’s* case. It is now accepted that generalised oppression may indeed give rise to refugee status, as Professor Hathaway makes clear. It is not necessary for a claimant to show that he is more at risk than anyone else in his group, if the group as a whole is subject to oppression. This is clearly right. But it does not touch on the more difficult questions which arise when a country is in a state of civil war. Professor Hathaway deals with these problems in a later chapter. d

He states (p 185) the first of two ‘essential points’ as follows: ‘Victims of war and conflict are not refugees *unless* they are subject to differential victimisation based on civil or political status.’ (Professor Hathaway’s emphasis.) He states (pp 186–187) the following general proposition: e

‘Nonetheless, the Convention today remains firmly anchored in the notion of elevating only a subset of those at risk of war and violent conflict to the status of refugee. This general proposition is well-established in Canadian law by a variety of cases involving the victims of violence in Lebanon, Ethiopia, and Chile. Moreover, as the decision in *Elias Iskandar Ishac* [Immigration Appeal Board Decision M77-1040, 25 April 1977] makes clear, the mere fact that the conflict escaped is based on religion or politics is not relevant unless persons of a particular religion or political perspective are differentially at risk. In this case, the Board found the risk to be roughly equivalent for persons of all beliefs, and hence refused the claim of a citizen of Lebanon attempting to escape the civil war in that country: If the f

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a appellant is a refugee at all, he is a refugee from civil war in his country, and not a refugee protected by the Convention ... A civil war, even on religious grounds, is not persecution as contemplated by the Convention.'

To the same effect is para 164 of the *UNHCR Handbook*, which provides:

b 'Persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol ...'

Finally one can refer again to the Council of the European Union document, joint position dated 4 March 1996 (OJ 1996 L63, p 5). Paragraph 6 provides:

c 'Reference to a civil war or internal or generalised armed conflict and the dangers which it entails is not in itself sufficient to warrant the grant of refugee status. Fear of persecution must in all cases be based on one of the grounds in article 1A of the Geneva Convention and be individual in nature.'

d With regard to the passage last quoted, I would not agree that fear of persecution must be individual in nature. As the decision of Taylor J in *R v Secretary of State for the Home Dept, ex p Jeyakumaran* [1994] Imm AR 45 shows, and *Salibian's* case confirms, the convention encompasses the persecution of groups as well as individuals. But otherwise I agree.

e I conclude from these authorities, and from my understanding of what the framers of the convention had in mind, that where a state of civil war exists, it is not enough for an asylum-seeker to show that he would be at risk if he were returned to his country. He must be able to show what Mr Pannick calls a differential impact. In other words, he must be able to show fear of persecution for convention reasons over and above the ordinary risks of clan warfare.

f What I have said so far applies only so long as the state of civil war continues. Once the civil war is over, and the victors have restored order, then the picture changes back again. There is no longer any question of both sides claiming refugee status. If the vanquished are oppressed or ill-treated by the victors, they may well be able to establish a present fear of persecution for a convention reason, and in most cases they would be unable to avail themselves of their country's protection.

g Obviously it may prove difficult, in the case of warring clans, to establish precisely when one side or the other has won. By way of example, Professor Goodwin-Gill in his book *The Refugee in International Law* (2nd edn, 1996) p 76 cites a number of French and German decisions in which a distinction is drawn between the civil war in Somalia and the civil war in Liberia, on the ground that h in the former country none of the competing clans has yet emerged 'as an authority in fact, controlling territory and possessing a minimum of organisation'. I agree with the Court of Appeal ([1997] 2 All ER 723 at 735, [1997] 1 WLR 1107 at 1120) that refugee status ought not to depend 'on casting around for the current underdog'. But the difficulty of establishing the facts does not i undermine the principle that those engaged in civil war are not, as such, entitled to the protection of the convention so long as the civil war continues, even if the civil war is being fought on religious or racial grounds. In so far as the second issue is capable of a generalised answer, I feel bound to disagree with the Court of Appeal, and answer it in favour of the Secretary of State.

I turn to the facts. The political situation in northern Somalia is well described in the decision of the special adjudicator. It is unnecessary for me to go into any detail. The special adjudicator found that Mr Adan had a well-founded fear of

persecution by the government when he left Somalia in June 1988. But she also found that he no longer had a well-founded fear from that source at the time of her decision, owing to the change of regime. Instead he had a well-founded fear of persecution from a different source, namely, the opposing forces in the civil war. 'The agents of persecution in the case of this appellant' she said 'are not the authorities of the country but the members of the armed groups or militias of other clans or alliances'. Accordingly she held that Mr Adan was entitled to refugee status.

The Immigration Appeal Tribunal disagreed. There could be no doubt as to the existence of a state of civil war in northern Somalia. But that would not, in the tribunal's view, be enough by itself to give Mr Adan a well-founded fear of persecution. I quote the critical paragraph in the tribunal's decision and reasons:

'Likewise, we find that there is no evidence that [Mr Adan] would suffer persecution on account of his membership of the Habrawal sub-clan of the Isaaq clan, from members of the armed groups of other clans or sub-clans, and we find that, while we accept that inter-clan fighting continues, that fighting and the disturbances are indiscriminate and that individuals from all sections of society are at risk of being caught up therein, and that the situation is no worse for members of the Isaaq clan and the Habrawal sub-clan, than for the general population and the members of any other clan or sub-clan.'

Mr Adan's evidence was that members of his own sub-clan were particularly at risk because they had attacked a militia stronghold of the main opposing sub-clan. But I do not consider that this throws doubt on the tribunal's conclusion that all sections of society in northern Somalia are equally at risk so long as the civil war continues. There is no ground for differentiating between Mr Adan and the members of his own or any other clan.

If I am right in the answer I have given to the two issues of principle, it follows that the tribunal were justified in differing from the special adjudicator. Mr Adan is not entitled to refugee status and the Court of Appeal were wrong to hold otherwise.

Less there be any misunderstanding, I repeat what I said at the outset: there is no question of Mr Adan being returned to Somalia as things stand. He and his wife and children have been given exceptional leave to remain in the United Kingdom on humanitarian grounds. The only effect of a decision to refuse refugee status is that they will be denied the additional benefits which refugee status attracts.

**LORD NOLAN.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Lloyd of Berwick. For the reasons he gives I would allow the appeal.

**LORD HOPE OF CRAIGHEAD.** My Lords, I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend Lord Lloyd of Berwick. I agree with what he has said on both issues, and for the reasons which he has given I also would allow the appeal.

*Appeal allowed.*

# a R v Crown Court at Stafford, ex parte Shipley

COURT OF APPEAL, CIVIL DIVISION

SIMON BROWN, HENRY AND AULD LJJ

29, 30 JULY, 12 DECEMBER 1997

b *Licensing – Permitted hours – Special hours certificate – Whether special hours certificate ‘bolt-on’ addition to ordinary permitted hours or in substitution therefor – Whether licensing justices having power to limit commencement time of special hours certificate – Licensing Act 1964, s 78A.*

c The appellant held a full justices on-licence for a public house. Following the grant of a public entertainment licence permitting the premises to be used for public dancing, music and other public entertainment between 11 am and 12 midnight on weekdays and Saturdays and with more restricted hours on Sundays, he applied for a special hours certificate (SHC) under s 77<sup>a</sup> of the Licensing Act 1964 for Wednesday to Saturday with the permitted hours for the sale of alcohol lasting until midnight. The licensing justices granted him a certificate but limited it in time to operate only between 7 pm and midnight. The appellant appealed to the Crown Court, contending that the licensing justices had no power to limit the commencement time of the SHC, but the court rejected that submission and dismissed his appeal. The appellant applied for judicial review to quash the decision but the judge dismissed his application. The appellant appealed on the ground that the judge had erred in ruling that by virtue of s 78A<sup>b</sup> of the 1964 Act (limitations on special hours certificates) the licensing justices had power to restrict the time of commencement of permitted hours for the sale of alcohol in premises which had the benefit of a SHC, contending that a SHC was simply a bolt-on extra to s 60<sup>c</sup> general licensing hours which only became operative after normal closing time, so that until 11 pm his ‘permitted hours’ were those permitted by s 60 of the Act, ancillary to nothing, and after 11 pm by the hours permitted by the SHC granted under s 77 provided they were ancillary to the provision of entertainment or food.

g **Held** – Having regard to the scheme of the 1964 Act as amended and the intended role within it of the SHC regime, the power of the licensing justices under s 78A of the Act to limit the times of the permitted hours when the SHC applied was not restricted to end times only but included a power to impose a start time. Furthermore, the SHC permitted hours operated in substitution for the general licensing hours under s 60 of the Act so that when the SHC was in operation the sale of intoxicating liquor during the permitted hours had to be ancillary to the provision of entertainment and food throughout. The appeal would therefore be dismissed (see p 468 g h, p 469 f, p 476 d to p 477 d, p 478 e to p 479 b g, p 482 b to e and p 483 c to f, post).

## Notes

j For special hours certificates, see Supplement to 26 Halsbury’s Laws (4th edn) para 322.

For the Licensing Act 1964, ss 60, 77, 78A, see 24 Halsbury’s Statutes (4th edn) (1989 reissue) 361, 381, 382.

a Section 77, so far as material, is set out at p 477 h, post

b Section 78A, so far as material, is set out at p 475 b, post

c Section 60, so far as material, is set out at p 474 d e, post



**Cases referred to in judgments**

*Carter v Bradbeer* [1975] 3 All ER 158, [1975] 1 WLR 1204, HL. a

*Chief Constable of West Midlands Police v Marsden* (1995) Times, 2 May.

*Padfield v Minister of Agriculture Fisheries and Food* [1968] 1 All ER 594, [1968] AC 997, [1968] 2 WLR 924, HL.

*Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL. b

*Spence v Cooper* (22 March 1996, unreported), QBD.

**Cases also cited or referred to in skeleton arguments**

*Lidster v Owen* (1982) Times, 14 January.

*Pollitt v Pwllheli Licensing Justices* (1974) 139 JP 279, DC. c

*Richards v Bloxham (Binks)* (1968) 66 LGR 739, DC.

*Young v O'Connell* (1985) Times, 25 May.

**Appeal**

Steven John Shipley, the holder of a full justices on-licence for a public house known as Stones in the Market Place in Cannock, Staffordshire, appealed with leave from the order of Keene J hearing the Crown Office List dated 16 December 1997 dismissing his application for judicial review by way of orders of certiorari and mandamus to remove into the Queen's Bench Division of the High Court and quash the decision of the Crown Court at Stafford (Judge Chapman and four licensing justices) on 31 May 1996 dismissing his appeal against the imposition by the Cannock licensing justices on 4 December 1995 of an opening limitation of 7 pm on a special hours certificate granted to him under the provisions of s 77 of the Licensing Act 1964. The facts are set out in the judgment of Henry LJ. d

*John Saunders QC* and *Jonathan Gosling* (instructed by *Jeffrey Green Russell*) for the appellant. e

*James Quirke* (instructed by *C R Alcock*, Stafford) for the respondent. f

*Cur adv vult*

12 December 1997. The following judgments were delivered. g

**HENRY LJ** (giving the first judgment at the invitation of Simon Brown LJ).

**INTRODUCTION**

This appeal raises fundamental questions of liquor licensing law in relation to the late-night (up to 2 am, or 3 am in London) sale or supply of liquor under a special hours certificate (SHC) granted by licensing justices under s 77 of the Licensing Act 1964 as amended. h

If a music and dancing licence is in force for the premises, then an SHC may permit the sale of liquor ancillary to the music and dancing and substantial refreshment that are provided to a later hour than is permitted by the regimes under which normal licensing hours are extended. The respondent contends that on days when the SHC permits the sale of liquor, the permitted hours for such sales (and the conditions of them) are set out in the SHC. j

The appellant contends that a SHC is simply a 'bolt-on extra' to the permitted hours of his existing on-licence which only becomes operative after normal closing time. Thus he claims that until 11 pm the premises can operate as a normal pub, selling liquor on its own, ancillary to nothing, under the general

a licensing hours permitted by s 60. After 11 pm, he contends that he can continue to sell liquor under his SHC provided that its sale is ancillary to the provision of dancing and food for so long as the SHC permits. So for the first part of his evening his 'permitted hours' are those permitted by s 60, and from 11 pm onwards by the hours permitted by the SHC granted under s 77.

b The issue arises in this way. The appellant holds a full justices on-licence for a public house known as Stones in the Market Place in Cannock, Staffordshire. The police describe the premises as 'a one-room pub, with a very small dance-floor, selling pub food'. From December 1993 until April 1995 the premises had an SHC for Wednesday to Saturday whereby the permitted hours lasted until midnight. In April 1995, however, the public entertainment licence for the premises was by oversight not renewed so that by virtue of s 81(1) of the  
c 1964 Act the SHC was revoked automatically. Following the grant of a new public entertainment licence on 4 October 1995 permitting the premises to be used for public dancing, music and other public entertainment between 11 am and 12 midnight on weekdays and Saturdays (with more restricted hours on Sundays), application was made for a new SHC on the same terms as before.  
d That application was heard by the Cannock licensing justices on 4 December 1995. There were no police objections, but they asked for a limitation on the time of commencement of the permitted hours of the SHC to 7 pm. Their reasons for so doing are set out in the chief officer of police's affidavit:

e '3 ... A policy of requesting the justices to impose starting times on Special Hours Certificates has been agreed by Divisional Command. The reasons include: (a) The spirit of the legislation distinguishes in our view between operations (however called) which are essentially of the night club/entertainment variety and pubs intending to open late. Pubs are not always structurally adapted to the purposes of providing entertainment set out in [section] 77 of the Licensing Act 1964. Many are marginally so. The instant  
f case must be near the border of such a requirement. (b) Night clubs and pubs should be distinguished as intended by Parliament. If not, a large number of pubs will be applying for Special Hours Certificates and turning into "night clubs" after 11 p.m. by means of the contended "bolt on" provisions. The consumption of alcohol all day followed by consumption  
g which may or may not be detectable as ancillary to entertainment etc. is undesirable. (c) If Special Hours Certificates proliferate, the resources of the police will be stretched more widely to cope with an increase in the number of potential sources of disorder. There are already a number of bona fide night clubs in the Cannock Town Centre Area which open until 2 a.m. and are easily identifiable as such for the purposes of Special Hours Certificates.  
h 4. It is upon these facts and policies that I instructed Police Inspector Timmis to make application to the justices to impose a start time upon Stones, The Stumble Inn and Silk's Night Club. All of these premises proposed to make applications for Section 77 Special Hours Certificates at the Cannock Licensing Justices on Monday 4th December 1995. The imposition of such a  
j restriction will in my view sort out those who wish to run night club operations in accordance with the intent of the Act from those who wish to run extended hours "pub" operations. The alternative is that breweries will see the Special Hours Certificate more and more as a way of extracting extra revenue from "pub" operations on the basis of a convenient misapprehension of the law.'

That affidavit is useful in explaining the police view. It was before Keene J, but not before the justices, nor the Crown Court on appeal. We do not know whether those submissions were made to those courts, and it does not help the questions of statutory construction. Similar comments can be made as to the affidavits before Keene J, and us, setting out the appellant's view, which I deal with below. a

The justices granted an SHC so limited 'in respect of Wednesday, Thursday, Friday and Saturday with a start time of 7 pm and an end time of midnight'. This was quite unacceptable to the appellant. He submits that if the respondent is right, it leaves him and others like him, on days when the SHC is operative, with the choice of either accepting the loss of his daytime trade and operating under the SHC alone, or surrendering his SHC and reverting to the general licensing hours for the district (see para 5 of Mr Coulson's affidavit). The appellant submits that to impose opening hours on an SHC was, before *Chief Constable of West Midlands Police v Marsden* (1995) Times, 2 May (see below), unheard of. And Mr Coulson, a specialist legal journalist, suggested that an object of the Licensing Act 1988 was to ensure that thereafter— b

'special hours certificates would be a form of extension to permitted hours, similar to other extensions [presumably under ss 68 and 70] and not, as previously, a set of "special hours" throughout the day.' c

The appellant's appeal against that decision was heard at the Crown Court at Stafford on 31 May 1996 by Judge Chapman sitting with licensing justices. The appellant argued that the Cannock licensing justices had no power to limit the commencement time of the SHC. The appeal, however, was dismissed because the court (reluctantly) ruled that it was bound by Owen J's decision in *Chief Constable of West Midlands Police v Marsden* (1995) Times, 2 May; he had held that the power exists. By these judicial review proceedings the appellant seeks to quash that decision of the Crown Court at Stafford. His application failed before Keene J on 16 December 1996. He now appeals to this court. d

Two grounds of appeal are raised: e

1. The learned Judge erred in ruling that by virtue of s 78A of the Licensing Act 1964 the Licensing Justices were entitled to restrict the time of commencement of permitted hours in premises which had the benefit of a Special Hours Certificate. f

2. The learned Judge erred in law in ruling that throughout the permitted hours in premises w[h]ere a Special Hours Certificate was in force the sale of alcohol has to be ancillary to music and dancing and/or substantial refreshment. g

The actual legal issue involved in this case is ground 1, whether the magistrates had power to impose an opening time of 7 pm on days when the SHC applied. The appellant sought to broaden the debate by ground 2, raising the question whether, on days when the SHC applies, the sale of liquor during the hours permitted by the SHC must be ancillary to the provision of music and dancing and refreshment (the respondent's case) or need only be so ancillary after the expiry of the 'general licensing hours' as defined by s 60 of the 1964 Act. It is said that this second issue is, in the words of Keene J, 'a significant consideration in the determination of the main issue'. The argument runs that unless the sale of liquor during the permitted hours on days when the SHC was operative has always to be ancillary to the food and entertainment provided, there would be no h



a point in imposing an opening time. I understand that point and will consider it, but at the end of the day, it is the first ground of appeal that is decisive.

This is because if the justices have power to lay down at what time the SHC comes into effect, then (as will be seen) there being no statutory fetters on the exercise of that jurisdiction, on ordinary principles the limits on the exercise of that discretion is that it should be used to promote the policy and the objects of the Act (see *Padfield v Minister of Agriculture Fisheries and Food* [1968] 1 All ER 694, [1968] AC 997). The police policy set out in the chief officer of police's affidavit clearly satisfies the *Padfield* test, and therefore in my view the decision on ground 1 is decisive of this appeal.

The appellant contends that, on days when their SHC comes into operation, the permitted hours for sale of liquor are: (i) from 11 am to 11 pm, being the permitted hours laid down by s 60 of the 1964 Act, without any kind of requirement that the sale of liquor must be ancillary to the provision of food and entertainment; (ii) from 11 pm to 2 am (at latest), being the permitted hours under the SHC with its requirement that sales under the SHC permitted hours regime must be ancillary to the provision of food and entertainment.

This interpretation of the Act is conveniently referred to as the SHC providing a 'bolt on extra' to the general licensing hours permitted by s 60.

If that was the appellant's entitlement under the 1964 Act, then the imposition by the Crown Court of a 7 pm commencement for the permitted hours would be unlawful, as made under an error of law, namely that the permitted hours on days when the SHC was operative were the hours when the premises were open for the provision of food and entertainment.

#### THE SCHEME OF THE ACT

The question then is one of statutory interpretation. I start by considering the overall scheme of the 1964 Act as it is today. We are dealing with Pt III, headed 'Permitted Hours'. There then follow various subheadings: 'Prohibition of sale, etc of intoxicating liquor outside permitted hours' (s 59); 'General provisions as to permitted hours' (ss 60 to 62); 'Exceptions' (s 63); 'Restrictions on permitted hours in licensed premises' (ss 64 to 67); 'Restriction orders with respect to licensed premises and clubs' (ss 67A to 67D); 'Extension of permitted hours in licensed premises and clubs' (ss 68 to 75); 'Special Hours Certificates' (ss 76 to 83).

While headings offer limited assistance in questions of statutory construction, the point to be made is that the sections dealing with 'Special Hours Certificates' are not included within the heading 'Extension of permitted hours in licensed premises and clubs'. The extensions to permitted hours possible under ss 68 and 70 are clearly both bolt-on extras. The respondent's case is that SHCs have always operated in substitution for ordinary permitted hours, and not as a bolt-on addition to them. Though the Act has often been amended, the scheme of the Act has never changed.

In examining the scheme of the 1964 Act, I will be summarising the effects of various sections. In doing so, I feel able to make certain simplifications when dealing with the law. The Act deals with licensed premises and clubs. I concentrate on licensed premises only. The Act deals with the possibility of the permitted hours (under whichever regime) applying to part of premises only—that is not this case as these premises are not divisible, and so I ignore it (but I note in passing that where an SHC is granted in respect of part of the premises only, other licensing regimes extending permitted hours may simultaneously apply to other parts of the premises (see s 82 and the notes to that section in *Paterson's*

*Licensing Acts 1997* (105th edn, 1996)). The Act deals with 'used' or 'intended to be used' (I deal only with the former). The Act deals with the sale and supply of liquor (again I deal only with the former). In illustrating opening hours, I have taken weekday timings, ignoring weekends and religious festivals specially provided for. Against that background I set out the regulatory regime.

Subject to the provisions of the Licensing Act 1964 as amended, liquor can be sold in licensed premises or clubs only during the permitted hours for those premises (see s 59, the offence creating section). There are four different regimes for those permitted hours.

First, basic permitted hours in any licensing district are 'the general licensing hours' as defined by s 60. Absent any local modification under s 60(4), the ordinary weekday hours are 11 am to 11 pm (s 60). In premises governed by this basic regime, there is never a need for the sale of liquor to be ancillary to anything—it can be the principal object of the transaction.

Second, those general licensing hours may be 'added to' (see s 68) on ordinary weekdays by one hour where the magistrates' court is satisfied (and issues a certificate that) the premises are set apart, adapted and habitually used for the purpose of supplying table meals (substantial refreshment) to which the sale of liquor is ancillary (the supper hours certificate (s 68), which provides that the s 68 hours 'shall be added to the permitted hours'). That is subject to the crucial proviso, 'but for other purposes ... the permitted hours shall be the same as if that paragraph did not apply to the premises' (s 68).

The effect of that provision is that advantage can only be taken of the extra hour by those taking the table meal to which the provision of liquor is ancillary. The extra hour is not for just drinking—the sale of liquor in that period to one not taking a table meal would be a sale outside the 'permitted hours' by virtue of that provision (see s 59(1)). The effect is that the extra hour for the 'supper licence' is 'added to' the general licensing hours as a true 'bolt-on extra'.

The third regime is that of the extended hours order granted under s 70, which permits the premises to be open until 1 am where licensed premises are structurally adapted and used for the purpose of habitually providing musical or other live entertainment as well as substantial refreshment, and the sale of liquor is ancillary to that refreshment and entertainment (s 70(1) and (2)). Though the same formula for qualification of premises is used as was for the extension to midnight under s 68, there the applicant was entitled to a certificate on satisfying the statutory criteria, while under s 70 the grant remains discretionary (see the powers given to refuse to sanction the use of premises or to limit the operation of the section by s 73(2)). The section does not authorise sale of liquor to persons admitted after midnight or less than half an hour before the end of entertainment. Section 70(4) provides that premises do not qualify as being used habitually for providing refreshment and entertainment—

'unless it is used ... for the purpose of providing them after, and for a substantial period preceding, the end of the general licensing hours on every weekday or on particular weekdays in every week ...'

In dealing with the permitted hours the section makes clear that the permitted hours are the s 60 hours plus 'the time added by the said section 68(1)' which (where an extended hours order is made) 'shall extend until' 1 am.

This then is also a bolt-on, albeit that the rule as to drinking being ancillary is apparently invoked in the part of the premises habitually set apart for the refreshment and entertainment 'after and for a substantial period preceding the

a end of general licensing hours'. That provision is, in my judgment, a pointer to Parliament's intention that entertainment at licensed premises should be integral to the enjoyment of a normal evening, and not an excuse for late night drinking. One of the mysteries of this case is why the appellant (who was only seeking an end time of midnight) could not get what he wanted from an extended hours order under s 70, unless it was because he did not wish to have to provide live entertainment and refreshment before 11 pm (but that is pure speculation, and I do not rely on it).

b The fourth regime is that of the special hours certificate, which extends weekday permitted hours until 2 am (subject to the exception in s 76(2)(a), (b) and (c)). Section 77 requires that a music and dancing licence must be in force, and the licensing justices then have a discretion to grant the SHC if the premises are adapted and used 'for the purpose of providing ... music and dancing and substantial refreshment to which the sale of intoxicating liquor is an ancillary'.

c So all but the SHC's extra hour can be provided by an extended hours order granted under s 71. But, if the judge below and the respondent are right, there is a fundamental difference so far as a public house is concerned between the two methods of obtaining an extension to permitted hours. If they extend permitted hours under ss 68 and 70, then while the provision of liquor must be ancillary to the meals and entertainment provided outside the general licensing hours, the extension does not affect their midday trade when non-ancillary sales of liquor are covered by the general licensing hours. But, if the respondent is right, that would not be true under an SHC. I turn now to examine in detail the SHC regime.

#### THE SHC REGIME AND ITS HISTORY

Keene J has summarised the history. Originally, SHCs applied to hotels, restaurants and clubs only (see the Licensing Act 1949, ss 18 and 19). When they applied it was clear that the hours they permitted were a complete substitute for the general licensing hours when the SHC was in force (see s 21(3)(a) of the 1949 Act, which laid down the SHC permitted hours 'notwithstanding anything in the Act of 1921'). Then in 1961 they were extended to licensed premises generally. But the statutory provisions continued to make clear that on any day when the SHC was operative, the terms of the SHC governed the permitted hours on that day. It did not operate by way of extension to permitted hours already available through the general licensing hours.

g That is made clear by s 76 as then enacted. I set out s 76 as it was between 1964 and 1988:

h '(1) This section applies to licensed premises or premises in respect of which a club is registered, or any part of any such premises, during the time that—(a) there is in force for the premises or part a special hours certificate granted under the following provisions of this Part of this Act; and (b) the section is applied, under subsection (7) of this section, to the premises or part, by the holder of the licence or, as the case may be, the secretary of the club.

j (2) Subject to the following provisions of this section, the permitted hours on weekdays other than Good Friday in any premises or part of premises to which this section applies shall be the periods between half past twelve and three o'clock in the afternoon and between half past six in the evening and two o'clock in the morning following, except that—(a) the permitted hours shall end at midnight on Maundy Thursday and Easter Eve and on any day on which music and dancing is not provided after midnight; and (b) on any



day that music and dancing end between midnight and two o'clock in the morning, the permitted hours shall end when the music and dancing end. a

(3) In relation to premises which are situated in any part of the metropolis outside the City of London which is specified for the purposes of this subsection by an order of the Secretary of State, subsection (2) of this section shall have effect with the substitution of references to three o'clock in the morning for the references to two o'clock in the morning. b

(4) Where the permitted hours are fixed by this section, section 63(1) of this Act shall apply to the consumption of liquor on the premises as if in paragraph (a) thereof half an hour were substituted for ten minutes and paragraph (b) thereof were omitted.

(5) Nothing in this section applies in relation to any bar in premises or a part of premises to which this section applies, and any such bar shall accordingly be treated as if it were a part of the premises to which this section does not apply. c

(6) Where a special hours certificate for any premises or part of premises is limited to particular days in the week, this section does not affect the permitted hours in the premises on days on which the certificate does not apply. d

(7) The holder of the licence or, as the case may be, the secretary of the club, may apply this section, or terminate its application, from such day as he may fix by notice in writing to the chief officer of police served not less than fourteen days before that day.' e

The basic permitted hours under the SHC set out under sub-s (2) were different from the permitted hours under s 60. Both regimes consisted of a morning and an afternoon session, divided by the 'dead afternoon'. In each session the SHC starting time was later: 1½ hours in the morning, and an hour in the afternoon. And of course the SHC permitted an extra three hours in the night. So SHC hours were, in the judge's words (picking up on a quotation from Viscount Dilhorne in *Carter v Bradbeer* [1975] 3 All ER 158 at 166–167, [1975] 1 WLR 1204 at 1212, as we will see) 'a complete substitute for the general licensing hours on those days to which the certificate applies'. f

That conclusion comes clearly from the words of the statute. Section 76(2) makes it clear that when the SHC is in operation, the 'permitted hours ... shall be' as there laid out, ie a regime quite different from the s 60 permitted hours regime. There are two further pointers towards substitution for the general licensing hours. Section 76(4) laid down a more leisurely drinking up time 'when the permitted hours are fixed by this section'. And s 76(6) makes the point negatively: g

'Where a special hours certificate for any premises ... is limited to particular days in every week, this Section does not affect the permitted hours on days on which the certificate does not apply.' h

What I take to be the clear inference from that subsection is that on a day when the SHC does apply, the permitted hours are affected by s 76, namely they shall be as set out in s 76(2) (or, after 1988, as further limited under ss 78A and 81A). j

Strong persuasive confirmation that that construction is correct can be found in the passage from Viscount Dilhorne's speech in *Carter v Bradbeer* [1975] 3 All ER 158 at 166–167, [1975] 1 WLR 1204 at 1212, dealing with the law in 1974:

a 'He obtained a special hours certificate and, having done so, it was open to him to apply the provisions of s 76 from such day as he might fix by notice to the chief officer of police. Having applied them, he could also terminate their application by notice (s 76(7)). The main consequence of the application of s 76 is that, while the section applies, *the permitted hours for the sale of intoxicating liquor prescribed by s 60 of the 1964 Act no longer apply and other permitted hours are substituted for them.* Under s 60, on weekdays other than Christmas Day or Good Friday the permitted hours are from 11 am to 3 pm and, in the case of Torquay, from 5.30 pm to 11 pm. Under s 76(2) the permitted hours on weekdays other than Good Friday on premises to which a special hours certificate applies are between 12.30 pm and 3 pm and 6.30 pm and 2 am. But the permitted hours under the special hours certificate end at midnight on Maundy Thursday and Easter Eve and also when music and dancing are not provided after midnight. If the music and dancing stop between midnight and 2 am the permitted hours also end. These provisions show that it was Parliament's intention to secure that *the sale of intoxicating liquor under a special hours certificate should always be ancillary to music and dancing, and that premises to which a special hours certificate applied should not be what was called in argument a "late night pub".'* (My emphasis.)

b

c

d

Those remarks were obiter (as the case was not concerned with the issue before us), but clearly were considered obiter. They are given particular force as Viscount Dilhorne had the responsibility, as Lord Chancellor, of introducing the 1964 Bill in the House of Lords.

e That the SHC regime operated in substitution for the permitted hours regime under s 60, as extended under ss 68 and 70 is in my view too clear to permit contrary argument (as well as being supported by Viscount Dilhorne, Owen J in *Chief Constable of West Midlands Police v Marsden* (1995) Times, 2 May, and Keene J below). Indeed when pressed by Simon Brown LJ, Mr Saunders conceded that

f point:

'Q. (referring to s 76(2) in its pre-1988 form): It was in truth an express substitution for s 60, is that it? A. Yes.'

To summarise the position before the time of the 1988 amendments: (i) on days when the SHC operated, it defined the permitted hours in substitution for the general licensing hours laid down by s 60—those hours were not a bolt-on extra as the extra hours under ss 68 or 70 would have been; (ii) the magistrates' court or licensing justices had no power to alter the start time of the SHC permitted hours (as that was laid down by s 76(2)); (iii) the first time that they were given powers to alter (restrict) the statutory end time of the SHC permitted hours was by s 81A of the Licensing (Amendment) Act 1980 (see what is now s 76(2)(c) of the 1964 Act).

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#### THE 1988 AMENDMENTS

j I generally find resort to parliamentary material of some limited value in understanding the general thrust of the Act, but seldom worth the real difficulties of the treasure hunt through *Hansard*. So when the editors of *Halsbury's Statutes* or *Current Law Statutes* do that work for me, I am both grateful and better informed.

I do not find in this Act any ambiguity requiring *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593 assistance, but record that counsel were agreed that the principal object of the 1988 Bill was to open up what the minister, Mr

Douglas Hurd MP, described as 'the forbidden afternoon'—the dead period between 3 pm and 5.30 pm when liquor could not be sold (see 122 HC Official Report (6th series) col 37), and that there was a subsidiary object to have better late-night control of nuisance. It also seems clear that nuisance by day was also considered (see s 67A). One does not need assistance from parliamentary debates to see that the 1988 amendments gave justices much broader powers to limit SHCs. I can find no support (either in the parliamentary material shown to us by counsel or in any of the statutory amendments) for the suggestion in Mr Coulson's affidavit (already referred to) that the government's intention (in 1988) was that—

'from then on special hours certificates would be in a form of extension to permitted hours, similar to other extensions, and not, as previously, a set of "special hours" throughout the day.'

I consider those amendments next. Central to the issue are the amendments affecting the permitted hours. Under both s 60 and s 76(2) the permitted hours were redefined:

*'60. Permitted hours in licensed premises.—(1) Subject to the following provisions of this Part of this Act, the permitted hours in licensed premises shall be—(a) on weekdays, other than Christmas Day or Good Friday, the hours from eleven in the morning to eleven in the evening ...*

*76. Permitted hours where special hours certificates in force ... (2) Subject to the following provisions of this section, the permitted hours on weekdays in any premises ... to which this Section applies shall extend until two in the morning following, except that—(a) the permitted hours shall end at midnight on any day on which music and dancing is not provided after midnight; and (b) on any day that music and dancing end between midnight and two o'clock in the morning, the permitted hours shall end when the music and dancing end; and (c) in any premises or part for which a certificate is in force subject to a limitation imposed in pursuance of section 78A or 81A of this Act, the permitted hours on any day to which the limitation relates shall not extend beyond the time specified in the certificate ...'*

The points to be made are as follows. (1) The basic permitted hours formula is retained, as are the four regimes, ss 60, 68, 70 and SHCs, each with its different set of permitted hours. (2) Section 76(2) no longer itself demonstrates that the SHC permitted hours must start at a different time from the s 60 permitted hours. But s 76(4) and (6) remain with their references to 'where the permitted hours are fixed by this section' and 'Where a special hours certificate ... is limited to particular days in every week, this Section does not affect the permitted hours in the premises [on other days]'. Both those subsections are indicators that a substituted regime continues on SHC days. (3) The appellant's best point is that s 76(2) makes no reference to when, on SHC days, the start time for the permitted hours shall commence. The only laid down limit is the end time. But, as will be seen, there are new broad powers given to limit the SHC 'to particular times of the days'. (4) I turn to those amendments giving the magistrates much greater powers in relation to the grant of SHC's, and the terms on which they are granted.

(i) Section 77 was amended to give the justices both a discretion as to whether or not to grant an SHC where the conditions in (a) and (b) are satisfied ('may



a grant' has replaced 'shall grant'), and such a grant may be 'with or without limitations'.

(ii) Such limitations are primarily set out in the new s 78A:

*'Limitations on special hours certificates.—(1) On an application for a special hours certificate the licensing justices ... may grant a certificate under Section 77 or 78 of this Act limited in any of the following respects.*

b (2) The limitations referred to are limitations—(a) *to particular times of the day*; (b) *to particular days of the week*; (c) *to particular periods of the year ...*

Such limitations may be varied by the court on the application of the licensee. Further powers to impose 'limitations to particular times of the day' are to be found in the new s 81A of the Act, empowering the making of such a limitation on an application for revocation, or on the application of the chief officer of police. The discretion to limit the times of the permitted hours is not fettered by s 78A, but subject to the normal *Padfield* principles.

c (iii) There were also various instances where earlier limited discretions of the justices were replaced by a general discretion: see the Licensing Act 1988, Sch 4, s 5(4) and Sch 3, para 8, which I must return to later.

d The appellant puts particular emphasis on the 1980 amendments already touched on and s 76(2)(c), which I will consider next.

e *Ground 1: That the licensing justices have no power to restrict the commencement of permitted hours under a SHC.*

Mr Saunders QC's submission on the first ground of appeal are summarised in his skeleton argument. He starts from the unpromising position that for reasons already given, before the 1988 amendments the permitted hours of SHCs as set out in s 76 were in substitution for the general licensing hours. He must therefore f show that the 1988 amendments changed that.

This is necessary because he contends for a situation where the SHC is a bolt-on extra to s 60 general licensing hours. Thus on any SHC day the permitted licensing hours *must* commence at 11 am, and the justices need only be satisfied that the premises will be used: 'for the purposes of providing for persons resorting to the premises music and dancing and substantial refreshment *to which the sale of intoxicating liquor is ancillary*' after the close of the general licensing hours at 11 pm. Thus he submits the SHC when operative would no longer be in substitution for the general licensing hours, it would be in addition to them. That would completely alter the scheme of the Act, and in my judgment is a position that simply cannot be reached from the Act as we find it.

h I set out the common ground. Until 1979 the justices dealing with an application for an SHC had no power to extend or restrict the permitted hours under s 76. The first such power came in by s 3 of the Licensing (Amendment) Act 1980, inserting a new s 81A into the 1964 Act. It dealt with a situation where either the music or dancing would be ending earlier or where noise or disorderly j conduct made it desirable for the permitted hours to end earlier, and it gave the justices power to cut the end time back to midnight. That power was preserved in the 1988 amendments by s 76(2)(c), the grounds limiting its exercise not being re-enacted: s 76(2)(c):

'in any premises ... for which [an SHC] is in force subject to a limitation imposed in pursuance of Section 78A or 81A of this Act, the permitted hours

on any day to which the limitation relates shall not extend beyond the time specified in the certificate.’ a

The scheme of the new s 76(2) and (3) is that the statute defines the end time of SHC permitted hours unless the music or dancing end earlier ((a) or (b)) or (c) the justices in their discretion impose an earlier limit under the new ss 78A and 81A. Thus the 1980 amendment (a discretion to the justices to act only when satisfied of certain misconduct) is replaced by exercise of the ss 78A and 81A powers, being a broad discretion limited only by *Padfield* principles. b

Mr Saunders compares the wording of the old s 3 of the 1980 Act, and the new s 76(2)(c) introduced by the 1988 amendment and submits that s 76(2)(c) was never intended to be ‘a power to limit the commencement time as well’ of permitted hours under an SHC. He reinforces this by pointing out that Sch 3 to the 1988 Act describes the introduction of the new s 76(2)(c) as a ‘minor amendment’, which categorisation is inconsistent with that provision heralding a major change. c

It is clear that s 76(2)(c) was never intended to give power to limit the start times of permitted hours under an SHC, and also that any such amendment would not be characterised as minor. But that does not assist the appellant. Sections 78A and 81A are not, unsurprisingly, in Sch 3 as minor amendments. Those sections relate to the imposition of (unqualified) limitations as to ‘particular times of day’ to which the permitted hours of SHCs may be subject. *Prima facie* those words apply to both start times and end times. SHCs granted under the regime may be either ‘with or without limitations’. If an SHC were granted *without* such limitations, I would take it as clear that the permitted hours of the SHC ran from the start of the general licensing hours until the end of those hours as fixed by s 76(2) or (3). Where there are limitations, s 76(2)(c) makes clear that in relation to limiting end times of permitted hours, ss 78A and 81A govern, and not the more restricted powers first introduced by the 1980 Act. In other words, by ss 78A and 81A the justices powers to control the operation of SHCs was significantly increased. d  
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In these circumstances, I can see no reason to restrict the ss 78A/81A powers to limiting end times only, for the following reasons.

There is nothing in the language that requires any such conclusion. To the contrary, everything points out against it. First, the fact that SHCs continued to have their own ‘permitted hours’, necessarily involving start times and end times. Second, that SHCs were *not* brought into line with the wording used in the bolt-on regimes established by s 68 supper hours certificates and s 70 extended hours orders. Third, that the wording of s 76(4) and (6) both still point to the SHC regime on operative days being substituted for the s 60 regime, and that there is nothing in the parliamentary material which we have been shown to contradict that. Nor is there anything to suggest that post-1988: (i) all SHCs must start at 11 am; and/or (ii) that on SHC days liquor can lawfully be sold in the general licensing hours under the provisions of the on-licence and s 60. Fourth, that the omission of any reference to any start time for the SHC regime is amply explained by the powers given by ss 78A and 81A to impose such a start time. Fifth, that the continued requirement of s 77 that the justices be satisfied that the premises while the SHC is operative will be used ‘for the purpose of providing for persons resorting to the premises music and dancing and substantial refreshment to which the sale of intoxicating liquor is ancillary’ indicates the need for the provision of start times. Sixth, as the skeleton of Mr Quirke, for the respondent, g  
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j

a reminded us, the prescribed forms for the SHC laid down by the Licensing (Special Hours Certificate) Rules 1982, SI 1982/1384, as amended, anticipate that the start time: (i) will be entered in the certificate; and (ii) will not *always* be 11 am by prescribing that the SHC shall read:

'[By virtue of section [78A] [and] [80] of the Licensing Act 1964 this certificate shall be limited to [the following times of day, namely] ...'

b Seventh, as the 1988 amendments were clearly directed to increasing the control exercised by justices over the grant of SHCs with the intention of preventing noise and nuisance and breach of the peace, this interpretation of the Act is consistent with that objective, and the appellant's contentions inconsistent.

c As will be clear, I am in no doubt whatsoever that the appellant has failed to make out his first ground of appeal. In so concluding, I am in agreement with both Owen and Keene JJ in the result they reached and essentially on the grounds they gave—though I have covered some ground not covered by them, and do not in all respects accept some of the points of detail each has relied on. But I am in agreement with them on the fundamentals.

d I believe this ground to be determinative of this appeal irrespective of ground 2. Once it is established that the justices have power to impose a 7 pm start time, then clearly the police's stated objective in seeking that limitation (contained in the affidavit already referred to) is within the policy of the Act.

e *Ground 2: That the sale of alcohol does not have to be ancillary to music and dancing and/or substantial refreshment throughout the permitted hours under the special hours certificate.*

Section 80(1), headed 'Special hours certificates limited to particular days or parts of the year' provides:

f 'Where a special hours certificate is granted for any premises ... which are used or intended to be used only on particular weekdays for the provision of music and dancing and substantial refreshment the certificate shall be limited to those days in the week on which it is shown to the satisfaction of the licensing justices ... granting it that music and dancing and refreshment are, or are intended to be, provided as required by section 77 or 78 of this Act.'

g Section 77 of the Act states, as we have seen, that the justices may grant a special hours certificate if satisfied, inter alia, that the premises will be bona fide used—

h 'for the purpose of providing for persons resorting to the premises music and dancing and substantial refreshment to which the sale of intoxicating liquor is ancillary.'

j While the sale of liquor outside permitted hours is an offence under the Act, there is no specific offence for an individual sale of liquor which is not ancillary to the food and music and dancing during the currency of the SHC. The sanction preventing such sales is revocation of the SHC, or other limitation being imposed on it (see ss 81, 81A and 78A). For the purposes of Mr Saunders' submission on this point, it is necessary to consider in particular s 81 ('Revocation of special hours certificates'). Section 81(2) provides:

'At any time while a special hours certificate for any premises ... is in force, the chief officer of police may apply to the licensing justices ... for the



revocation of the certificate on the ground that, while the certificate has been in force—(a) the premises have not ... been used as mentioned in section 77 ... of this Act; or (b) a person has been convicted of having at those premises or that part contravened section 59 of this Act [sales outside permitted hours]; or that on the whole the persons resorting to the premises ... are there, at times when the sale ... of intoxicating liquor there is *lawful by virtue only* of the certificate, for the purpose of obtaining intoxicating liquor rather than for the purpose of dancing or of obtaining refreshments other than intoxicating liquor; and if the licensing justices ... are satisfied the ground of the application is made out they may revoke the certificate.’

Mr Saunders emphasises the words ‘lawful by virtue only of the [SHC]’ and resubmits his basic submission that the SHC is only a bolt-on extra to the permitted hours. He contends that on a day when the SHC is operative, the only time when the sale of liquor is lawful by virtue only of the SHC is during the hours after ordinary closing time—11 pm to 2 am.

If that were the only time that the SHC was the only source of the permission to sell liquor, then that presupposes a second legal justification for those sales during the hours permitted by the SHC. The judge reasonably enough assumed that Mr Saunders was submitting that during general licensing hours the SHC for the day in question and s 60 ran together in harness, each providing a legal justification for sales during ordinary licensing hours.

For reasons already given, this submission is hopeless, as from 1949 until at earliest the 1988 amendments, it is clear and accepted by Mr Saunders that the SHC-permitted hours under s 76 operated in substitution for the hours that would have been permitted under s 60 had the SHC not been in operation. Thus during the whole of an SHC day, the sale of liquor was lawful by virtue only of that certificate, as that certificate laid down the permitted hours.

Mr Saunders submits that the judge misunderstood him. He says:

‘I hope I did not say that the words, as it were, were two sets of permitted hours running concurrently. I accept that pre-’88 the s 76 hours replaced the s 60 hours.’

But after 1988 he still contends for the bolt-on extra construction. After 1988 he is back to the submissions that have already failed in relation to first, the proper interpretation of s 76, and second, the more particular point made in relation to s 76(2)(c). To rehearse those reasons, it seems to me clear that nothing in the 1988 amendments altered the position that when the SHC was in force, it alone defined the permitted hours, and the SHC continued to operate in substitution for the general licensing hours. Parliament did not take the opportunity to turn the SHC regime under s 76 into a bolt-on extra regime for extended hours as can be found under ss 68 and 70. The scheme of the Act remains that the only operative regime legitimising the sale of liquor on SHC days is the SHC regime to be found between ss 76 and 83 of the Act.

But in any event, there is an anodyne construction to s 81(2) which I regard as the natural and correct one. Section 81 deals with grounds for revocation of the SHC. Section 81(2)(b) deals with convictions for the supplying of drink outside permitted hours. Such supply might or might not have occurred on SHC days. The section then proceeds to the particular ground of revocation relevant to the phrase ‘by virtue only’, namely a general ground relating to the conduct of the premises at a time when the consumption of liquor should have been ancillary to

a dancing or obtaining refreshment (which could refer to conduct under three regimes: supper hours under s 68; or an extended hours order under s 70; or the conduct of the SHC). The word 'only' is to make it clear that the only relevant conduct is conduct when an SHC is in operation, and not conduct under ss 68 or 70 extensions.

b Therefore it is clear to me that at all times when the SHC is in operation, the licensee cannot rely on a combination of his on-licence and s 60 to make any non-ancillary sale of liquor compliant with the law. Accordingly, I would dismiss the appeal on this ground also.

c Various authorities have been cited to us. None of those authorities have focused on the precise question posed by this appeal. Apart from Viscount Dilhorne's summary of the pre-1988 law in *Carter v Bradbeer* [1975] 3 All ER 158 at 166–167, [1975] 1 WLR 1204 at 1212–1213, I have not found any of these authorities of sufficient utility to require special treatment. Where a sentence in one authority or another taken out of context appears to assist one side or the other, it seems to me usually to be on the basis of a basic assumption as to what the law is, unsupported by analysis to show that such an assumption would be right. Also, though I looked carefully through the parliamentary material to see whether there was any basis for the contention that the 1988 amendments were to change the SHC regime into the bolt-on extra that the appellant's contended for, there seems to me to be no ambiguity in the post-1988 Act which would justify any *Pepper v Hart* intervention.

e Finally, after the hearing was concluded, the court was sent a transcript of an unreported case before Carnwath J (*Spence v Cooper* (22 March 1996)). There is a sentence in the judgment which seems to assume that on days when the SHC applies it would be lawful to sell intoxicating liquor up to 11 pm under both s 60 and the SHC. This concept of their running in harness was sensibly abandoned by Mr Saunders before us. The point was one of many considered by Carnwath J. f It clearly was not argued in any depth before him. If I am right in my construction of what he says, I do not agree with it. I get no assistance from it in this case.

AULD LJ. I agree.

g SIMON BROWN LJ. I too agree but, since the appeal was very fully argued and since my approach to it is not perhaps at all points identical to that of Henry LJ, I think it right to add a judgment of my own.

h The appeal raises two fundamental questions of liquor licensing law. Both concern special hours certificates (SHCs) and in particular their application to public houses. Question 1 is whether, ever since SHCs were first introduced in 1949, their requirement that the sale of intoxicating liquor be ancillary to the provision of music and dancing or substantial (non-alcoholic) refreshment applies throughout the whole of the permitted hours (the respondent's case), or only during the extra hours permitted by the SHC (the appellant's case). Question 2 is whether, since the Licensing Act 1964 was amended in 1988, licensing justices when granting SHCs (or instead of revoking them) have had power to limit only the licensee's closing time (the appellant's case) or whether they can also restrict his opening time (the respondents' case). These two questions are related in this sense: unless the sale of alcohol has to be ancillary to the provision of entertainment or food throughout the whole of the day's permitted hours rather than merely during the extra hours allowed by an SHC at night, there would

appear to be little purpose in having power to limit opening time as well as closing time. The converse is also true. a

The relevant facts and legislative provision have already been set out in Henry LJ's judgment and, gratefully taking them as read, I proceed at once to the two questions which I prefer to address in the opposite order to Henry LJ.

### Question 1 b

Must the sale of intoxicating liquor (hereafter drink) be ancillary to music and dancing and substantial refreshment (hereafter food) not merely during the additional time permitted by an SHC but also during the permitted hours which would have operated without the SHC?

Much of the argument revolved around s 81(2). This describes three situations in which the police can apply to revoke SHCs, the only sanction, be it noted, for failing to comply with the preconditions for their grant and proper operation. The three grounds for revocation are these: (a) while the certificate has been in force (by which both parties agree is meant the certificate has been granted and then applied under s 76(7)) the premises have not been used as mentioned in s 77, ie to provide customers with music and dancing and food to which the sale of drink is ancillary; (b) while the certificate has been in force someone has been convicted of selling drink at the premises outside permitted hours; (c) 'on the whole the persons resorting to the premises ... are there, at times when the sale or supply of [drink] there is lawful by virtue only of the certificate, for the purpose of obtaining [drink] rather than for the purpose of dancing or of obtaining [food].' c  
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The interrelation between grounds (a) and (c) is clear: ground (a) postulates that the certificate-holder has failed to provide the facilities of music and dancing and food to which the sale of drink is ancillary; ground (c) on the other hand postulates that the certificate-holder has done his part in providing those facilities but that 'on the whole' his customers have abused them by non-ancillary drinking, ie by drinking rather than dancing or eating. (That the customers are required to participate by way of dancing or eating rather than merely by listening to the music provided is hardly surprising.) e  
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Grounds (a) and (b), throw no light on the answer to question 1. True, the premises must be used to provide the customers with music and dancing and food to which the sale of drink is ancillary, but that says nothing as to whether this must be throughout the day or merely after general licensing hours. The extra supper hour too requires that the premises are used for the purpose of providing customers with food to which the sale of drink is ancillary (s 68), but there is no question of this having to be the position throughout the rest of the day. It is to the language of ground (c), therefore, that both parties principally look for an answer and each of them claims to find in it convincing support for his case. Mr Saunders QC for the appellant focuses in particular upon the words 'by virtue only' in the phrase 'at times when the sale or supply of intoxicating liquor is lawful there by virtue only of the certificate'. That, submits Mr Saunders, must mean times after the end of normal permitted hours, ie after 11 pm, rather than during hours which would in any event be permitted irrespective of whether the premises had an SHC and during which therefore drink could lawfully be sold whether or not there was a certificate in force. The respondent's contrary argument, accepted by the judge below, is that the words in question were included to make it clear that the requirement for ancillary drinking applied only to days (or indeed times of year) when the SHC governs the permitted hours, but that on those days the drinking 'on the whole' had to be ancillary. g  
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a It is necessary at this stage to indicate something of the history of SHCs and to point out that, until the 1988 amendments to the 1964 Act, an SHC, once in force, operated not merely to extend the permitted hours at the end of the day, but also to restrict the permitted hours during earlier parts of the day. That had been so ever since SHCs were first introduced in 1949, initially in respect only of hotels and restaurants in the metropolis, then, from 1961, in respect of hotels and restaurants countrywide, and finally, from 1964, in respect of all licensed premises. The position is sufficiently illustrated by reference to s 21(3)(a) of the Licensing Act 1949, which provided that while an SHC was in force 'the permitted hours shall be' 12.30 pm to 3 pm, and 6.30 pm to 2 am, instead of the general licensing hours which were at that time 11 am to 10 pm, with a two-hour break and subject to a maximum of eight hours. Thus, argues Mr Quirke for the respondent, the permitted hours under an SHC were always wholly different from the general licensing hours, and, for the days that they operated, they imposed a different regime.

That argument was accepted by the judge below, who held:

d 'It is inconceivable that, under the 1964 Act as it was, the additional time achieved by an SHC after the end of general licensing hours each day was intended to be seen as the only period of time when sale or consumption was lawful by virtue of the certificate, as if during other parts of the same day general licensing hours were still operating as it were in double harness with permitted hours under the certificate. That envisages that the licensee could assert that at, say, 10 pm his customers were drinking both under the authority of the certificate and under the authority of the general licensing hours. But if that were so, what about the general licensing hours that on the same day fell outside the permitted hours under the SHC? If this argument of the applicant were sound, it would mean that on a day to which the SHC applied customers could consume liquor on the licensed premises between 5.30 pm and 6.30 pm (part of the general licensing hours), even though the evening permitted hours at that date under the SHC were 6.30 pm to 2 am. Such a hybrid result is inconsistent with the wording of s 76(2) of the 1964 Act as it originally stood and with the wording of the similar provisions in the other Licensing Acts prior to 1988. The argument cannot, therefore, be a sound one.'

g Mr Saunders submits that the judge there was misunderstanding his argument: he has never contended that the certificate-holder is entitled to the benefit of both general licensing hours and such additional hours as are permitted under the SHC but argues rather that those additional hours which would not otherwise be permitted hours for drinking at all are the only ones subject to the restriction that drinking must be ancillary to dancing or eating.

h In urging his construction upon the court Mr Saunders poses a number of forensic questions. Why should Parliament wish to confine the benefit of SHCs to premises where the drinking is *always* ancillary to dancing or eating? Given that SHCs have been extended generally to licensed premises including public houses, and given that few if any public houses trade principally in entertainment and food rather than drink throughout the whole course of the day, why should Parliament require them to open only in the evenings? Why should public houses have to choose between being able to sell non-ancillary drink all day up until 11 pm, or only ancillary drink if they wish to stay open until 2 am, not least given that they are perfectly entitled to operate an SHC on some days only and

to operate general licensing hours on others? Why, in particular, should that be so, given that public houses can obtain cumulative extensions up to 1 am under ss 68 and 70, neither of which require that on the days of such extensions the drinking during the earlier parts of the day has to be ancillary (save only 'for a substantial period preceding' 11 pm under s 70(4)).

As it seems to me, the answers to those questions are to be found in Henry LJ's judgment, explaining as it does the scheme of the legislation as a whole and the intended role within it of the SHC regime. During whatever hours of trading are permitted by the SHC the drinking must 'on the whole' be ancillary to the provision of food and/or entertainment; an SHC should not be granted to an ordinary public house so as to turn it into a 'late night pub'.

True, until recently, SHCs have *apparently* been granted to many ordinary public houses and some of these in the result may indeed have been operating as late night pubs. But it must be remembered that until the 1988 legislative amendments were made, public houses with the benefit of SHCs had their opening hours postponed by 1½ hours in the morning, and a further hour in the evening, and to this extent were obviously providing less non-ancillary drinking time than the generality of public houses.

It seems to me no coincidence that when in 1988 Parliament not only opened up 'the forbidden afternoon' but also ended the otherwise automatic reduction of hours during the earlier parts of the day permitted to SHC holders, it at the same time allowed justices to limit SHC licence holders' opening hours as well as their closing hours. Thus may SHCs be confined to premises where (on the days they apply) drinking 'on the whole' is ancillary. That, of course, is to answer question 2 also in favour of the respondent and to that I now turn.

*Question 2. Do licensing justices have power to restrict the hours of SHCs generally or only as to closing time?*

Both ss 78A and 81A expressly allow the limitation of an SHC 'to particular times of the day'. On their face these provisions plainly favour the respondent's argument. They were, moreover, introduced in the context of amending legislation which not merely (a) substituted a discretion to grant one for what had previously been a mandatory requirement to grant an SHC upon the specified conditions being satisfied, but also (b) replaced a provision (the old s 76(2)) under which the permitted hours under an SHC on weekdays were specified as 'the periods between half past twelve and three o'clock in the afternoon and between half past six in the evening and two o'clock in the morning following' (subject to exceptions only as to closing time) with a new provision (the new s 76(2)) ending that previous automatic reduction of daytime permitted hours under an SHC, and, more particularly, (c) replaced a provision (the old s 81A(3)) permitting the imposition of a condition precluding the permitted hours from extending 'beyond such time earlier than two o'clock in the morning but not earlier than midnight as may be specified' with the present apparently more flexible provision permitting limits 'to particular times of the day'.

How then does the appellant seek to contend that a power to limit an SHC 'to particular times of day' on its true construction allows only a limitation of the closing hour?

Mr Saunders' argument fixes above all upon the terms of s 76(2)(c), which for convenience I now set out again:

a '... in any premises or part for which a certificate is in force subject to a limitation imposed in pursuance of Section 78A or 81A of this Act, the permitted hours on any day to which the limitation relates shall not extend beyond the times specified in the certificate.'

b The language of extension in s 76 had always previously referred only to an end time; its continued use, the appellant argues, is likewise intended and apt to refer only to an end time. As to the use of the plural in the phrase 'particular times of the day' in ss 78A(2)(a) and 81A(1), that, Mr Saunders submits, is simply to reflect the use of the word 'limitations', also in the plural, in the opening clause of both these provisions, and/or to reflect the fact that the justices could impose different end times on different days, and/or is because various different end times could be imposed, ie any time between midnight and 2 am.

c Imperfectly though I recognise the language of s 76(2)(c) accommodates limitations imposed other than as to closing time, and ingeniously though Mr Saunders' arguments were presented, I find myself wholly unpersuaded by them. Section 76(2)(c), although perhaps infelicitous for the purpose, is certainly capable of providing for restrictions on opening time too—as Keene J pointed out below, s 67A(3) demonstrates that the word 'time' is sometimes used in this legislation to encompass a period of time—and in those circumstances the terms of ss 78A and 81A ultimately seem to me just too plain to admit of the severe limitation which the appellants' argument would place upon them. Whatever difficulties there may be in this repeatedly amended legislation, I would hold fast to the apparent clarity of this newly introduced provision—a fresh power to limit an SHC 'to particular times of the day'—reserving any criticism for the somewhat clumsy adaptation of s 76 for the purpose, clumsiness which requires too an inference to be drawn in the opening clause of s 76(2) that it is the general permitted hours which (subject to the specified exceptions) are to extend to 2 am.

e In short, like Henry LJ, I would answer both questions in favour of the respondent and therefore dismiss the appeal.

f I add by way of footnote only this. Both parties sought to pray in aid various extracts from *Hansard*: Mr Saunders in support of his argument on question 2, Mr Quirk (after the hearing had been concluded) in support of his case on question 1. Although de bene esse I considered the parliamentary statements relied upon by both sides, to my mind neither satisfies the stringent tests laid down in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593 and certainly neither affects my conclusion on either question.

g *Appeal dismissed. Leave to appeal to House of Lords refused.*

h 25 February 1998. *The Appeal Committee of the House of Lords (Lord Browne-Wilkinson, Lord Nolan and Lord Hope of Craighead) refused leave to appeal.*

Mary Rose Plummer Barrister.



## Christofi v Barclays Bank plc

CHANCERY DIVISION

LAWRENCE COLLINS QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

15, 19 JANUARY 1998

*Bank – Banker/client relationship – Duty of bank – Duty of confidentiality – Wife of bankrupt obtaining loan from bank secured over matrimonial home – Trustee in bankruptcy subsequently registering caution on property – Whether disclosure to trustee in bankruptcy contrary to express instructions that caution warned off breach of bank's duty – Bankruptcy Act 1914, s 22.*

The plaintiff, whose husband had been adjudicated bankrupt, obtained a loan from the bank of £30,000, which was secured by a charge over the matrimonial home. Subsequently, the husband's trustee in bankruptcy registered a caution against dealings in respect of the property, and the bank in consequence refused the plaintiff's requests for further loans secured on the property. Thereafter, the caution was warned off; the caution was then reregistered, and the bank called in its loan to the plaintiff on the grounds that the trustee did not regard the property as being in her sole beneficial ownership. A few months later, the wife put the property on the market but as a result of the reregistered caution, she was unable to sell it for four years and then only for a price well below the asking price. The plaintiff issued proceedings for damages against the bank, alleging that it had breached its implied duty of confidence and her express instructions in informing the trustee that the caution had been warned off. The master refused the bank's application to strike out the claim and the bank appealed.

**Held** – Although a bank's implied duty of confidentiality extended beyond information which was secret, and applied to information gained during the currency of the account and derived from it, it did not apply to information which had, as a matter of statutory right, already been made known to the recipient. Since, in the instant case, the bank would have had every reason to suppose that the trustee in bankruptcy already knew that his caution had been warned off, it followed that it was not in breach of its duty of confidentiality. Moreover, any breach by the bank of express instructions not to give any information to the husband's trustee was not actionable, as such instructions would be a breach of the husband's obligation under s 22 of the Bankruptcy Act 1914<sup>a</sup>. Furthermore the claim for damages was in any event flawed in that the principal cause of the loss and damage was the bank's decision to call in the loan rather than the alleged breach of the duty of confidence. Accordingly, the appeal would be allowed and the writ and subsequent proceedings struck out (see p 485 j, and p 489 f to p 490 e, post).

*Tournier v National Provincial and Union Bank of England Ltd* [1923] All ER Rep 550 applied.

### Notes

For a banker's obligation of secrecy, see 3(1) *Halsbury's Laws* (4th edn reissue) para 240, and for cases on the subject, see 3(2) *Digest* (2nd reissue) 382, 2856–2858.

<sup>a</sup> Section 22, so far as material, is set out at p 489 a b, post

**Cases referred to in judgments**

- a* *Abrahams v Herbert Reiach Ltd* [1922] 1 KB 477, CA.  
*Laverack v Woods of Colchester Ltd* [1966] 3 All ER 683, [1967] 1 QB 278, [1966] 3 WLR 706, CA.  
*Maredelanto Cia Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1970] 3 All ER 125, [1971] 1 QB 164, [1970] 3 WLR 601, CA.
- b* *Marles v Philip Trant & Sons Ltd (No 2)* [1953] 1 All ER 651, [1954] 1 QB 29, [1953] 2 WLR 564, CA.  
*Tournier v National Provincial and Union Bank of England Ltd* [1924] 1 KB 461, [1923] All ER Rep 550, CA.

**c Appeal**

- The defendant, Barclays Bank plc, appealed from the decision of Master Dyson made on 28 October 1997 refusing its application to strike out the writ and statement of claim issued by the plaintiff, Mrs Elli Christofi, or dismiss the action under RSC Ord 18, r 19(1) or under the inherent jurisdiction of the court. The appeal was heard and judgment was given in chambers, but leave was given by
- d* Lawrence Collins QC for it to be treated as having been given in open court. The facts are set out in the judgment.

*John Odgers* (instructed by *Nicholson Graham & Jones*) for the bank.

*Jeffrey Bacon* (instructed by *Richard West Freeman Christofi*) for Mrs Christofi.

*e*

*Cur adv vult*

19 January 1998. The following judgment was delivered.

**f LAWRENCE COLLINS QC.****I. Introduction**

- This is an appeal from a decision of Master Dyson made on 28 October 1997 refusing to strike out the writ and statement of claim or dismiss the action under RSC Ord 18, r 19(1) or under the inherent jurisdiction of the court, and transferring the action to the Central London County Court. The essence of the
- g* claim is that, in breach of express instructions and its implied duty of confidence, the defendant Barclays Bank plc (the bank) informed the trustee in bankruptcy of the plaintiff's husband (contrary to express instructions) that a caution against dealings in favour of the trustee which had been placed on property owned by the plaintiff had been warned off; and that the consequence was that the caution was
- h* reregistered, the bank called in the loans made to the plaintiff, and the plaintiff sold the property at a price less than she would have originally achieved, and had to make a settlement of the trustee's claim.

- The bank denies that it was given the instructions or that it disclosed to the trustee in bankruptcy that the caution had been warned off. But for the purposes
- j* of the present application the bank accepts, as it must do, that the allegations in the statement of claim can be proved and applies to strike out on the basis that: (a) the duty of confidentiality does not apply to information which has, as a matter of statutory right, already been made known to the recipient of the information; (b) if given, the instructions were unlawful as being in breach of s 22 of the Bankruptcy Act 1914; (c) the loss and damage alleged does not flow from the alleged breach.

## II. *The allegations in the statement of claim*

The plaintiff, Elli Christofi (Mrs Christofi), and her husband, Mr Andreas Christofi (Mr Christofi) had, from about 1982, a joint account with the bank. A receiving order in bankruptcy was made against Mr Christofi on 4 July 1984 and he was adjudicated bankrupt on 6 August 1984. Between the date of the receiving order and the adjudication, Mrs Christofi opened an account in her sole name with the bank.

In about December 1987 the bank advanced to Mrs Christofi £30,000 to assist in the proposed purchase of a lease of a restaurant in Theydon Bois, Essex. The loan was secured by a second charge over a property in Woodford Green, which I take to be the matrimonial home.

In June 1988 Mr Nigel Falls, of Cork Gully, was appointed as trustee in bankruptcy of Mr Christofi. In February 1989 a caution against dealings in favour of the trustee was placed on the property. In May and June 1989 the bank had discussions with Mr and Mrs Christofi about further loans, in the course of which the bank told Mr Christofi that it would not be prepared to make any further advance secured against the property in view of the caution which had been registered. An overdraft was then given in the amount of £2,000, increased to £5,000 in the course of 1989 and 1990.

On about 18 October 1989 the caution was warned off. According to the statement of claim:

'In or about October or November 1989 Mr Christofi gave instructions on behalf of the plaintiff to have no contact with the said trustee and not give the said trustee any information whatsoever including information concerning the fact that the caution had been warned off as aforesaid. In or about October or November 1990 Mr Christofi on behalf of the plaintiff again instructed Mr Bond of the defendant not to divulge any information to the trustee in particular concerning the fact that the caution had been warned off.'

By letter dated 10 April 1991 the trustee in bankruptcy requested from the bank details relating to the joint account formerly held by Mr and Mrs Christofi and the bank gave information by letter dated 22 April 1991. The statement of claim goes on:

'On a date between 10th April and 7th May 1991 a conversation was held between an employee of Messrs Cork Gully acting on behalf of the trustee and the defendant in which the defendant disclosed inter alia to the trustee the fact that the caution registered by the trustee in 1989 against the property had been warned off in 1989. The said disclosure was in breach of and contrary to the express instructions of the plaintiff and in breach of the defendant's implied duty of confidentiality. Following the said disclosure the trustee applied through its then solicitors Messrs Stafford Young Jones to re-register a caution in respect of the property and a caution was duly registered in favour of the trustee in or about 11th May 1991. By letter dated 11th June 1991 the defendant gave notice of termination on the plaintiff's accounts with the defendant citing as the reason the "trustee's attitude towards the plaintiff's property".'



## III. Damages

a As indicated above, it is alleged that after the caution was reregistered on about 15 May 1991, the bank gave notice of termination of the advances to Mrs Christofi on 17 June 1991 because of what it is said to be the 'trustee's attitude towards the plaintiff's property' (which I take to be the claim that it was not in the sole beneficial ownership of Mrs Christofi). It is alleged that on 2 March 1992 the trustee brought proceedings against Mrs Christofi to challenge the transfer in 1982 of the property from joint names into the sole name of Mrs Christofi. She is said to have settled the claim for £10,000 payable in instalments. The property was put on the market in September 1991 at an asking price of £190,000; an offer of £172,000 was made in that month, but the sale could not be completed because of the caution; and the property was sold for £160,000 on 27 January 1995. It is apparent from the allegations of damage that the bank took no steps to enforce repayment of the loan and overdraft until the property was sold.

The damages claimed in the statement of claim are as follows. (1) It is claimed that on the sale in 1995 Mrs Christofi was required to pay the bank some £18,000 in interest on the overdraft and loan, together with £1,500 costs. By supplemental submissions made at the hearing it was explained that this claim was made on the basis that had it not been for the breach of contract the property would have been sold in 1991 and the interest and costs would not have been incurred. (2) It is claimed that were it not for the fact that the bank had called in the loans, Mrs Christofi would have achieved a sale at between £190,000 and £200,000 in 1991, and she claims the difference between £190,000/£200,000 and the sale price of £160,000 (£30,000 to £40,000), or alternatively the difference between the offer price apparently accepted in 1991, £172,000, and the ultimate sale price, £160,000 (£12,000). (3) Legal fees in connection with the repayment of the loans and the sale of the property. In answer to the point that these would have been incurred in any event, the supplemental submissions add the gloss that this head is intended to cover the fact that there were two sets of fees rather than one, and the costs of liaising with the bank on calling in the loans which would not have been incurred. (4) It is said that due to the pressures being exerted by the bank and her need to repay the bank and duty to mitigate her loss, Mrs Christofi settled the trustee's unmeritorious claim by a payment of £10,000. The supplemental submissions add the gloss that, but for proceedings which were triggered by the bank's breach of contract, there would have been no need to settle the action.

The bank attacks the pleading of loss and damage on the basis that it does not on the face of the pleading flow from the alleged breach of the duty of confidence by the bank. As regards (1) above, the bank submits that the discharge of Mrs Christofi's liability to pay interest cannot be a loss; as regards (2), the alleged loss flows from an entirely legitimate act by the bank, namely its entitlement to call in its loans; as regards (3), it is submitted that the legal fees would have been incurred in any event; as regards (4), the loss is not alleged to have flowed from the alleged breach of confidence, but from the fact that the bank legitimately called in its loans and that Mrs Christofi was subject to other unspecified financial pressures exerted at the time.

## IV. Duty of confidentiality

The starting point for each of the parties is the landmark decision in *Tournier v National Provincial and Union Bank of England Ltd* [1924] 1 KB 461, [1923] All ER Rep 550 in which the Court of Appeal restated the law relating to the banker's implied duty of confidentiality in classic terms. The decision rests on the basis

that 'one of the implied terms of the contract [between banker and customer] is that the bank enter into a qualified obligation with their customer to abstain from disclosing information as to his affairs without his consent' (see [1924] 1 KB 461 at 484, [1923] All ER Rep 550 at 560 per Atkin LJ). In a well-known passage, Bankes LJ ([1924] 1 KB 461 at 473, [1923] All ER Rep 550 at 554) indicated that there were a number of qualifications to the contractual duty of confidentiality, namely: (a) disclosure under compulsion of law; (b) duty to the public to disclose; (c) interests of the bank requiring disclosure; and (d) disclosure made with the express or implied consent of the customer.

The bank does not rely on any of these qualifications in the present application, but it contends that the information allegedly given to the trustee was not information to which the duty of confidentiality applied. The information allegedly divulged to the trustee by the bank was that the trustee's own caution over the property had been 'warned off'. The process of 'warning off' the caution involves a statutory notice being sent to the cautioner warning him that the caution will be removed in a prescribed period. The cautioner must then take steps to protect his interest, or lose the benefit of the caution—see s 55 of the Land Registration Act 1925; rr 218 to 221 of the Land Registration Rules 1925, SR & O 1925/1093. Accordingly, there cannot *prima facie* have been any duty on the bank not to disclose to the trustee the fact that the trustee's caution had been warned off by the Land Registry. The information was, as regards the trustee, not secret, and was information already in his possession. Counsel for Mrs Christofi retorts that this argument is a distortion of the principle in *Tournier's* case. For the principle to apply it is not necessary that the information be secret or not obtainable from other sources. It is sufficient that the information was imparted during the course of the relationship of banker and customer and was expressed to be imparted in confidence.

In *Tournier's* case [1924] 1 KB 461 at 473, [1923] All ER Rep 550 at 554 Bankes LJ, after referring to the qualifications to the contractual duty referred to above, asked himself what he described as 'limits' of the duty, and said:

'It is more difficult to state what the limits of the duty are, either as to time or as to the nature of the disclosure ... Information gained during the currency of the account remains confidential unless released under circumstances bringing the case within one of the classes of qualification I have already referred to. Again, the confidence is not confined to the actual state of the customer's account. It extends to information derived from the account itself.'

Atkin LJ said ([1924] 1 KB 461 at 485, [1923] All ER Rep 550 at 560):

'The first question is: To what information does the obligation of secrecy extend? It clearly goes beyond the state of the account, that is, whether there is a debit or a credit balance, and the amount of the balance. It must extend at least to all the transactions that go through the account ...'

#### V. Section 22 of the Bankruptcy Act 1914

The statement of claim alleges that the disclosure to the trustee was not only in breach of the bank's implied duty of confidentiality, but also in breach of and contrary to the express instructions of Mrs Christofi (given by Mr Christofi) not to give the trustee any information whatsoever, including information concerning the fact that the caution had been warned off. The bank points to the

a fact that Mr Christofi was the subject of a receiving order in 1984, and was subject to s 22 of the Bankruptcy Act 1914, which provides:

‘... (3) He shall, if adjudged bankrupt, aid, to the utmost of his power, in the realisation of his property and the distribution of the proceeds amongst his creditors.

b (4) If a debtor wilfully fails to perform the duties imposed on him by this section ... he shall, in addition to any other punishment to which he may be subject, be guilty of a contempt of court, and may be punished accordingly.’

c The bank argues that by deliberately seeking to deprive the trustee of information legitimately relating to the bankruptcy, Mr Christofi would have committed a statutory contempt of court, which must be regarded as having been authorised by Mrs Christofi. The bank relies on the well-known cases which establish the principle that if the plaintiff requires any aid from an illegal transaction to establish his cause of action, he shall not have any aid from the court: *Marles v Philip Trant & Sons Ltd (No 2)* [1953] 1 All ER 651 at 658, [1954] 1 QB 29 at 38 per Denning LJ. The answer for Mrs Christofi is that s 22 does not

d affect Mrs Christofi, who was solely protecting her own interest in the property. In any event, it is arguable, according to Mrs Christofi’s counsel, that there is no conflict between the duty under s 22 and what her husband told the bank, if he had a genuine belief that the trustee had no claim to the property or his wife’s interest in it. It was also submitted that there was no duty on a debtor to tell the trustee something which the trustee could find out for himself.

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VI. Striking-out

f In my judgment, the action is so plainly misconceived that it should be struck out. First, as regards the allegation of breach of express instructions, those instructions were allegedly given by Mr Christofi to ‘have no contact with the said trustee and not to give the said trustee any information whatsoever’. This instruction, if given, would have been the plainest possible breach of the obligation under s 22, and cannot give rise to actionable rights. It makes no difference whether the instruction was given on Mr Christofi’s own account or that of his wife. Accordingly, the portion of the statement of claim which pleads a breach of the express instructions must be struck out. Second, as regards the

g allegation of the implied duty of confidentiality, I accept the submission for Mrs Christofi that the duty extends beyond information which is secret. It is clear from the judgment in *Tournier’s* case that the duty extends to information gained during the currency of the account and that it goes beyond the state of the account, and extends to information derived from the account itself.

h But the obligation depends on a term implied by law—‘the duty is a legal one arising out of contract’ and ‘the limits and qualifications of the duty of the bank [are] a matter of law’ (see *Tournier v National Provincial and Union Bank of England Ltd* [1924] 1 KB 461 at 471–472 and 475, [1923] All ER Rep 550 at 554 and 556). The limits of the duty must be ascertained in accordance with common sense. In

j modern times, banks have a variety of dealings with persons other than account holders, and it is entirely contrary to the rationale of the rule in *Tournier’s* case, the privacy of the customer-banker relationship, that a bank should be bound not to inform a trustee in bankruptcy, making legitimate inquiries of the bank about an account in which the bankrupt had a joint interest with his wife, of a fact which any bank would have had every reason to suppose the trustee already knew, namely that the caution on the matrimonial home had been warned off.



The allegations of loss and damage are deeply flawed by the fact that they proceed on the basis that the principal cause of the loss and damage was the bank's decision to call in the loans rather than the alleged breach of the duty of confidence. It is trite law that 'a defendant is not liable in damages for not doing that which he is not bound to do' (see *Abrahams v Herbert Reisch Ltd* [1922] 1 KB 477 at 482 per Scrutton LJ, approved in *Laverack v Woods of Colchester Ltd* [1966] 3 All ER 683 at 690, [1967] 1 QB 278 at 293 per Diplock LJ and in *Maredelanto Cia Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1970] 3 All ER 125 at 136, [1971] 1 QB 164 at 203 per Edmund Davies LJ). The cause of the alleged loss is the lawful act of the bank in calling in the loans. It is impossible to see how a plaintiff can have a claim for damages for the payment of interest on money of which it has had the benefit, and the claim for loss of the opportunity to sell at a higher figure than the £160,000 is expressly put on the basis that it was caused by the fact that the bank 'had called in its loans' and the claim relating to the payment of £10,000 to settle the trustee's claim is put on the basis that it was caused by 'financial pressures exerted at the time including those exerted by the defendant on the plaintiff and her need to market the property in order to repay the defendant'.

In my judgment, Mrs Christofi's real complaint is that she and her husband failed to take advantage of the trustee's error or inactivity, and her effort to make the bank liable for it is bound to fail. The writ and subsequent proceedings should therefore be struck out.

*Appeal allowed.*

Celia Fox Barrister.

**R v Secretary of State for the Home  
Department, ex parte Simms and another**  
**R v Governor of Whitemoor Prison,  
ex parte Main**

COURT OF APPEAL, CIVIL DIVISION

KENNEDY, JUDGE AND CHADWICK LJ

17, 18 NOVEMBER, 4 DECEMBER 1997

*Prison – Visits – Visits by journalists – Prison authorities applying order made by Home Secretary only allowing visits to proceed if journalists signing undertaking not to use information gained for professional purposes – Journalists refusing to sign and visits not allowed to proceed – Whether Home Secretary's order ultra vires – Prison Act 1952, s 47(1) – Prison Rules 1964, r 33.*

*Prison – Letters – Prisoner's letters – Correspondence with legal adviser – Governor, by order, introducing revised rules for cell searching – Prisoners removed from cells and strip searched – Cell searched in prisoner's absence – Search of cell including inspection of correspondence with legal advisers – Whether governor's order valid – Prison Act 1952, s 47(1) – Prison Rules 1964, r 37A.*

In two separate cases the question arose as to the validity of decisions taken by prison authorities in relation to convicted prisoners, in accordance with orders reflecting policy at national level.

In the first case, the applicants were visited in prison by journalists interested in their separate stories. Alerted to the fact, the prison authorities stipulated that the visits could only continue if the journalists signed undertakings pursuant to para 37<sup>a</sup> of Prison Service Standing Order 5A (made by the Home Secretary pursuant to r 33<sup>b</sup> of the Prison Rules 1964, under authority conferred by s 47(1)<sup>c</sup> of the Prison Act 1952) that material obtained during the visits would not be used for professional purposes. Each journalist refused to sign the undertaking and therefore the visits were not allowed to proceed. The applicants applied for judicial review of the Home Secretary's decision contending that para 37 of the standing order was ultra vires s 47(1) of the 1952 Act. The judge granted the application, holding that the right of free speech included a right of oral access to the media, and that while s 47(1) authorised curtailment by the minimum interference necessary to achieve the statutory objectives, the blanket prohibition on making use of material obtained during a visit could not be justified on that basis. The Home Secretary appealed.

In the second case, the governor of the prison where the applicant was detained, in response to recommendations in a report after an escape at the prison, introduced, by order, revised arrangements for cell searching. The revised practice was for prisoners to be removed from their cells and strip searched. In their absence their cells were searched, such search extending to the

a Paragraph 37, so far as material, is set out at p 495 b to d, post

b Rule 33 is set out at p 497 e to j, post

c Section 47(1) is set out at p 498 c d, post

examination of correspondence, including correspondence with legal advisers falling within r 37A of the 1964 rules. The applicant applied for judicial review of the governor's decision, but the Divisional Court dismissed his application. The applicant appealed. a

**Held** – (1) A convicted prisoner had no right to communicate orally with the media through a journalist, since a sentence of imprisonment meant that he could no longer speak to those outside prison or receive visits from anyone other than his lawyer and relatives and friends. It followed that if one of his friends happened to be a journalist the Prison Service was entitled to require an undertaking in accordance with para 37 of Standing Order 5A, not least so as to ensure the maintenance of parity between one prisoner and another. Paragraph 37 was not therefore, *ultra vires*, nor was it irrational or disproportionate. b  
Accordingly the Home Secretary's appeal in the first case would be allowed (see p 501 c to f, p 509 g to p 511 a and p 512 e, post); *Raymond v Honey* [1982] 1 All ER 756 and *R v Secretary of State for the Home Dept, ex p Leech* [1993] 4 All ER 539 considered. c

(2) Legal professional privilege attached to correspondence with legal advisers which was stored by a prisoner in his cell and so had to be protected from any unnecessary interference by prison staff. It followed that even if the correspondence was only inspected to see that it was what it purported to be and was not read by those inspecting it, that was still likely to impair the free flow of communication between a prisoner and his legal adviser, and thus constituted an impairment of the privilege. However, since it was essential to maintain security in closed prisons and s 47(1) of the 1952 Act permitted rules requiring that periodically, and without prior notice, cells and everything therein be thoroughly searched, that necessarily involved examining correspondence so far as necessary to ensure that it was in truth bona fide correspondence between the prisoner and a legal adviser and did not conceal anything else. It followed that the governor's order was no more than the minimal interference with the prisoner's rights which was necessary to ensure that security was maintained. The applicant's appeal in the second case would therefore be dismissed (see p 505 f to j and p 511 j to p 512 e, post); *Campbell v UK* (1992) 15 EHRR 137 considered. d  
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## Notes g

For prisoners' visits and communications with legal advisers, see 37 *Halsbury's Laws* (4th edn) paras 1146, 1178–1179, and for cases on the subject, see 37(3) *Digest* (Reissue) 409, 5361, 5365–5367.

For the Prison Act 1952, s 47, see 34 *Halsbury's Statutes* (4th edn) (1997 reissue) 702. h

For the Prison Rules 1964, rr 33, 37A, see 15 *Halsbury's Statutory Instruments* (1996 reissue) 273, 274.

## Cases referred to in judgments

*Campbell v UK* (1992) 15 EHRR 137, ECt HR.

*Derbyshire CC v Times Newspapers Ltd* [1993] 1 All ER 1011, [1993] AC 534, [1993] 2 WLR 449, HL. j

*Pierson v Secretary of State for the Home Dept* [1997] 3 All ER 577, [1997] 3 WLR 492, HL.

*R v Derby Magistrates' Court, ex p B* [1995] 4 All ER 526, [1996] AC 487 [1995] 3 WLR 681, HL.



- a* *R v Secretary of State for the Home Dept, ex p Anderson* [1984] 1 All ER 920, [1984] QB 778, [1984] 2 WLR 920, DC.  
*R v Secretary of State for the Home Dept, ex p Bamber* [1996] CA Transcript 120.  
*R v Secretary of State for the Home Dept, ex p Leech* [1993] 4 All ER 539, [1994] QB 198, [1993] 3 WLR 1125, CA.  
*R v Secretary of State for the Home Dept, ex p Norney* (1995) 7 Admin LR 861.
- b* *R v Secretary of State for the Home Dept, ex p O'Dhuibhir* [1997] CA Transcript 383.  
*Raymond v Honey* [1982] 1 All ER 756, [1983] 1 AC 1, [1982] 2 WLR 465, HL.  
*Silver v UK* (1980) 2 EHRR 475, ECt HR.  
*Solosky v R* (1979) 105 DLR (3d) 745, Can SC.  
*Turner v Safley* (1987) 482 US 76, US SC.
- c* **Case also cited or referred to in skeleton arguments**  
*Golder v UK* (1975) 1 EHRR 524, ECt HR.

### Appeals

#### *R v Secretary of State for the Home Dept, ex p Simms and anor*

- d* The Secretary of State for the Home Department appealed with leave from the decision of Latham J delivered on 19 December 1996 allowing the applications of Ian Simms and Mark O'Brien for judicial review of the Secretary of State's continuing decision that they could only receive visits in prison from two named journalists, if the journalists signed a disclaimer to the effect that any material or information obtained would not be used for professional purposes. The facts are set out in the judgment of Kennedy LJ.
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#### *R v Governor of Whitemoor Prison, ex p Main*

- Ronald Main appealed with leave from the decision of the Divisional Court (Pill LJ, Latham and Astill JJ) delivered on 16 May 1997 dismissing his application for judicial review of the continuing decision of the governor of HM Prison Whitemoor to authorise prison staff to search, in his absence, his confidential legal correspondence. The facts are set out in the judgment of Kennedy LJ.
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- g* *Tim Owen and Phillippa Kaufmann* (instructed by *Bindman & Partners*) for Simms and (instructed by *Atter Mackenzie & Co*, Evesham) for O'Brien.  
*Tim Owen* (instructed by *Atter Mackenzie & Co*, Evesham) for Main.  
*Kenneth Parker QC* and *Steven Kovats* (instructed by the *Treasury Solicitor*) for the Secretary of State.

*Cur adv vult*

- h* 4 December 1997. The following judgments were delivered.

### KENNEDY LJ.

#### (1) Introduction

- j* Simms and O'Brien are two convicted prisoners each serving long sentences, and each still protesting his innocence. For a time each was being visited by a journalist, in the case of Simms it was a freelance journalist, Robert Woffinden, and in the case of O'Brien it was Karen Voisey of BBC Wales. When the prison authorities discovered the occupation of the visitors they made it clear that the visits could only continue if the journalists signed an undertaking that any material obtained during the visit would not be used for professional purposes,

and in particular for publication by the journalist or anyone else. Each journalist refused to sign, so further visits were not allowed. Each prisoner then commenced proceedings for judicial review of what he described as 'the continuing decision' of the Home Secretary that he may only receive visits from the journalist if the journalist has signed the undertaking. The applications for judicial review were heard together before Latham J, who, on 19 December 1996, found for the applicants and gave leave to appeal to this court. a

Main is also a convicted prisoner who is serving a substantial sentence of imprisonment. As a result of recommendations made in the Woodcock Report after the escape from Whitemoor prison it became the practice for prisoners to be removed from their cells and strip-searched. Then in their absence their cells would be thoroughly searched. The search would extend to correspondence, including correspondence with lawyers, which would be examined to see that it was what it purported to be. Main objected to the examination of such correspondence and applied for judicial review of 'the continuing decision of the governor of HM Prison Whitemoor to authorise prison staff to search in his absence the applicant's confidential legal correspondence covered by r 37A of the Prison Rules 1964'. The application was heard by the Divisional Court (Pill LJ, Latham and Astill JJ) and on 16 May 1997 it was dismissed. b  
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We heard the appeals one after the other because in each case the decision under challenge was taken in accordance with prison standing orders, or a governor's order, which reflected policy at national level. It follows that the decision can only be impugned if either the standing order or the governor's order in question is shown to have been made ultra vires, or the decision itself was unreasonable in a *Wednesbury* sense (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). There is therefore raised in each case the issue as to what should be the court's approach to problems of this kind, but having indicated why the appeals were heard sequentially I propose to return to deal first with the appeal of Simms and O'Brien. That involves looking in each case a little more closely at the facts before turning to the law and the standing orders. e  
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## (2) *Facts of Simms and O'Brien*

In 1988 Simms was convicted of murdering Helen McCourt. He sought leave to appeal, but leave was refused by the Court of Appeal, Criminal Division on 8 October 1990. In that year he wrote to Robert Woffinden, a journalist who had done work connected with miscarriages of justice, and Woffinden began to visit him in prison. In 1995 Woffinden wrote a newspaper article about Simms' case and tried to get a television documentary commissioned. According to both Woffinden and Simms they became close friends, and Woffinden says that Simms writes long letters to him about once a week, but it is clear that much of what has passed between them was and is concerned with Simms' attempts to establish that he was wrongly convicted. g  
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In August 1994 a member of Parliament, who represented the constituency in which Helen McCourt's mother lived, wrote to the Home Secretary to ask what was going on, and in particular if Woffinden had been given permission to make a documentary about Helen McCourt's murder. If so, was the object to establish Simms' innocence, were the prison authorities co-operating, and did Woffinden have unlimited access to Simms? There were other questions raised which are not material for present purposes. The MP's letter clearly caused inquiries to be made by the Prison Service which revealed that Woffinden had visited Simms at j

a HM Prison Full Sutton on three occasions using the limited number of statutory  
visiting orders issued to prisoners for family and social visits. Woffinden had not  
sought permission to visit Full Sutton as a journalist, and he was advised that if  
he wished to visit again as a friend he must sign a written undertaking in  
accordance with para 37 of Prison Service Standing Order 5A. Standing Order 5  
deals with communications, and section A with visits. Paragraph 37 is one of two  
b paragraphs which appear under the heading 'Visits by journalists or writers' and  
it reads:

c 'Visits to inmates by journalists or authors in their professional capacity  
should in general not be allowed and the governor has authority to refuse  
them without reference to headquarters. If a journalist or author who is a  
friend or relative wishes to visit an inmate in this capacity and not for  
professional purposes, the governor should inform the intending visitor that  
before the visit can take place he or she will be required to give a written  
undertaking that any material obtained at the interview will not be used for  
professional purposes and in particular for publication by the intending  
d visitor or anyone else.'

Mr Woffinden has so far refused to give the undertaking.

The facts in the case of O'Brien have many similarities, but there is one  
important distinction. O'Brien was convicted of murder and robbery in the  
Crown Court at Cardiff on 20 July 1988, and his application for leave to appeal  
e was refused by the Court of Appeal, Criminal Division on 16 March 1990. He too  
protests his innocence, and he made contact with Karen Voisey of BBC Wales.  
She visited him at HM Prison Long Lartin on 22 November 1995, but on 19  
December 1995 when she went to the prison again, O'Brien having applied for a  
visiting order for her as his friend, she was told that unless she signed an  
undertaking identical to that which was sought from Woffinden the visit could  
f not proceed. The form of undertaking reads:

'I [name] visiting inmate no [number] name [name] hereby undertake that  
any material obtained during the visit will not be used for professional  
purposes, and in particular for publication by me or anyone else.'

g Karen Voisey refused to sign so the visit did not proceed. The significant  
difference between the case of Simms and that of O'Brien is that in his affidavit  
O'Brien does not claim that Karen Voisey ever became his friend, even though  
that was the implication when he applied for a visiting order, hence the request  
to her to sign the undertaking envisaged by para 37 of Standing Order 5A. She,  
h like Woffinden, has never sought admission to Long Lartin as a journalist. Had  
she done so the relevant paragraph of Standing Order 5A would have been  
para 37A, which provides:

j 'Where, exceptionally, a journalist or author is permitted to visit an inmate  
in his or her professional capacity, or is allowed general access to the  
establishment, he or she will be required to give a written undertaking that  
no inmate will be interviewed except with the express permission in each  
case of the governor and the inmate concerned, that interviews will be  
conducted in accordance with such other conditions as the governor  
considers necessary, and that any material obtained at the interview will not  
be used for professional purposes except as permitted by the governor. No



inmate should be permitted to accept any payment or gratuity in exchange for an interview or for a radio or television appearance.'

Both Simms and O'Brien have remained free to correspond with Woffinden and Voisey, subject to the constraints of Standing Order 5B, which deals with correspondence. Paragraph 34 of Standing Order 5B, so far as material, provides:

'General correspondence, as defined in paragraph 33(1), may not contain the following ... (9) Material which is intended for publication or for use by radio or television (or which, if sent, would be likely to be published or broadcast) if it ... c. is about the inmate's own crime or past offences or those of others, except where it consists of serious representations about conviction or sentence or forms part of serious comment about crime, the processes of justice or the penal system ...'

The exception clearly covers the serious representations which each inmate wished, and still wishes, to make.

### (3) *The prison service response*

In paras 12 and 13 of her affidavit of 25 September 1996 Audrey Wickington, on behalf of the Prison Service, says that in formulating policies the Secretary of State:

'12. ... has had regard to the importance of the freedom of speech, which is a fundamental human right, and to the importance of the confidentiality of correspondence. These considerations have to be balanced against the need to protect the legitimate interests of the public, including the victims of crime. 13. The arrangements covering representatives of the media visiting prisoners and using the information obtained for professional purposes, such as in each of these cases where the two applicants sought to publicise their claims to be innocent of the offences of which they had been convicted, are designed to prevent gratuitous details of a prisoner's offence or his attitude towards the offence and/or the victim entering the public domain. If such safeguards are not maintained, the scope for abuse would be enormous, and consequently there would be serious risk of distress to victims and their families and general public outrage at the sight of prisoners and representatives of the media collaborating to publish details of any aspect of a prisoner's case.'

The affidavit goes on to deal with the situations which arise when, pursuant to para 37A of Standing Order 5A, a governor decides to allow a journalist or author to visit an inmate for professional purposes. We are not here dealing with such a case.

### (4) *Further evidence*

Before us Mr Kenneth Parker QC for the Secretary of State, sought leave to introduce a second affidavit from Audrey Wickington and an affidavit from Robert Thomas, and we granted that leave. In her further affidavit Audrey Wickington explains in more detail why the prison service takes the view that journalists cannot be admitted as friends unless they sign the undertaking sought. Steps are already taken to ensure that visitors do not introduce tape recorders or transmit during visits, but staff ratios are not such as to permit supervision of conversations on a one to one basis, so as to ensure that they are confined to serious representations about convictions or sentences, nor do staff have the

background knowledge and experience necessary to act as effective supervisors. Also it is the view of the prison service that the dramatic impact of an article or a documentary is increased if it is based upon a live interview, and yet the article or documentary may misrepresent a prisoner's point of view, or over emphasise it at the expense of the victim and of the conviction. Convicted prisoners whose cases attract press interest at the time of trial would be a particular focus of media attention, and any attempt to enforce a qualified undertaking would cast a considerable burden on the Prison Service, not least because it could be argued that such a recently convicted prisoner had serious comments to make about crime, justice and penal policy.

Robert Thomas is the Chief Press Officer for the Prison Service, and his affidavit underlines some of the points made by Audrey Wickington. He says that prison staff do not have the skills necessary to identify and deal with a trained journalist seeking information for a story so where, exceptionally, a journalist is admitted pursuant to para 37A of Standing Order 5A a professional information officer or someone with media training has to be in attendance. Robert Thomas points out that many journalists are capable of discussing a subject in general terms and then selecting a small part to sensationalise an interviewee's views. The misrepresented inmate, as well as the victim of the offence, can easily be left disenchanted and with little means of redress.

(5) *Legislative background*

Standing Order 5 is made pursuant to r 33(1) of the Prison Rules 1964, SI 1964/388, which is in a section of the rules headed 'Letters and visits'. Rule 33 provides:

*'Letters and visits generally*

(1) The Secretary of State may, with a view to securing discipline and good order or the prevention of crime or in the interests of any persons, impose restrictions, either generally or in a particular case, upon the communications to be permitted between a prisoner and other persons.

(2) Except as provided by statute or these Rules, a prisoner shall not be permitted to communicate with any outside person, or that person with him, without the leave of the Secretary of State or as a privilege under rule 4 of these Rules.

(3) Except as provided by these Rules, every letter or communication to or from a prisoner may be read or examined by the governor or an officer deputed by him, and the governor may, at his discretion, stop any letter or communication on the ground that its contents are objectionable or that it is of inordinate length.

(4) Every visit to a prisoner shall take place within the sight of an officer, unless the Secretary of State otherwise directs.

(5) Except as provided by these Rules, every visit to a prisoner shall take place within the hearing of an officer, unless the Secretary of State otherwise directs.

(6) The Secretary of State may give directions, generally or in relation to any visit or class of visits, concerning the days and times when prisoners may be visited.'

Rule 34, so far as is material, provides:

*'Personal letters and visits*

(1) An unconvicted prisoner may send and receive as many letters and may receive as many visits as he wishes within such limits and subject to such

conditions as the Secretary of State may direct, either generally or in a particular case. a

(2) A convicted prisoner shall be entitled—(a) to send and to receive a letter on his reception into prison and thereafter once a week; and (b) to receive a visit twice in every period of four weeks, but only once in every such period if the Secretary of State so directs ...

(8) A prisoner shall not be entitled under this Rule to receive a visit from any person other than a relative or friend, except with the leave of the Secretary of State ...' b

The Prison Rules were made pursuant to s 47(1) of the Prison Act 1952, which provides:

'The Secretary of State may make rules for the regulation and management of prisons, remand centres, young offender institutions or secure training centres respectively, and for the classification, treatment, employment, discipline and control of persons required to be detained therein.' c

(6) *The ultra vires argument* d

In *Raymond v Honey* [1982] 1 All ER 756, [1983] 1 AC 1 the House of Lords was concerned, amongst other things, with a governor's intervention to stop a prisoner's application to the High Court. Lord Wilberforce said:

'In my opinion, there is nothing in the Prison Act 1952 that confers power to make regulations which would deny, or interfere with, the right of the respondent, as a prisoner, to have unimpeded access to a court. Section 47, which has already been quoted, is a section concerned with the regulation and management of prisons and, in my opinion, is quite insufficient to authorise hindrance or interference with so basic a right.' (See [1982] 1 All ER 756 at 760, [1983] 1 AC at 12.) e

In *R v Secretary of State for the Home Dept, ex p Leech* [1993] 4 All ER 539, [1994] QB 198 the governor interfered with correspondence between a prisoner and his solicitor in relation to contemplated civil litigation. The interference was in accordance with r 33(3) of the Prison Rules as they then stood. The question therefore before this court was one of vires, whether the rule was within the scope of the rule-making power conferred by s 47(1) of the 1952 Act, or whether the rule was too wide (see [1993] 4 All ER 539 at 546, [1994] QB 198 at 208). Steyn LJ, giving the judgment of the court, said: g

'... a prisoner's unimpeded right of access to a solicitor for the purpose of receiving advice and assistance in connection with the possible institution of civil proceedings in the courts form an inseparable part of the right of access to the courts themselves.' (See [1993] 4 All ER 539 at 548, [1994] QB 198 at 210.) h

Having regard to what Lord Wilberforce had said in *Raymond v Honey* it followed that the rule went too far. Steyn LJ said ([1993] 4 All ER 539 at 555, [1994] QB 198 at 217–218): j

'By way of summary, we accept that s 47(1) by necessary implication authorises some screening of correspondence passing between a prisoner and a solicitor. The authorised intrusion must, however, be the minimum necessary to ensure that the correspondence is in truth bona fide legal



a correspondence ... r 33(3) is extravagantly wide. The very technique of dealing in one provision with ordinary correspondence and legal correspondence is flawed. In our view the Secretary of State strayed beyond the proper limits of s 47(1) when he made r 33(3).'

(7) *Before Latham J*

b Before Latham J Mr Owen, for Simms and O'Brien, deployed the ultra vires argument. He submitted, and the judge accepted, that the right of free speech includes a right of oral access to the media, and that a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication. It was accepted that s 47(1) of the 1952 Act, at least by c implication, authorised some curtailment of civil rights, but it was contended that if interference was more than the minimum necessary to achieve the objects of the statute then it could not be sustained. The judge accepted that as a correct approach in law. He then went on to find as follows.

d (1) The prohibition on communicating with the media by letter save where the inmate is making serious representations about his or her conviction or sentence or is otherwise making a serious comment about the crime, the processes of justice or the penal system, meets the *Ex p Leech* test of being the minimum interference necessary to achieve the statutory objectives.

e (2) The prison authorities have 'every opportunity to control a visit by way of ensuring that there are no tape recordings or transmissions from the visit, and, by listening to the visit, policing its content'. There was, he said, no evidence before him to justify the conclusion that visits would be incapable of appropriate control—an omission which the appellants have now sought to rectify by means of further evidence.

(3) Appropriate undertakings could be devised 'to restrict satisfactorily the topics for and ambit of discussions at any visits'.

f (4) 'The blanket prohibition on making use of material obtained in a visit is not ... justified as the minimum interference necessary with the *right of free speech* to meet the statutory objectives' (my emphasis).

(8) *Before the Court of Appeal*

g Before this court Mr Parker submitted that the vires approach adopted by the judge was misconceived. The relevant Prison Rules were plainly intra vires s 47(1) of the Act, and the relevant paragraphs of the standing orders, and in particular para 37 of Standing Order 5A, are no more than administrative decisions which may be challenged, if at all, on conventional *Wednesbury* h grounds. In support of that submission Mr Parker invited our attention to the decisions of in this court in *R v Secretary of State for the Home Dept, ex p Bamber* [1996] CA Transcript 120 and *R v Secretary of State for the Home Dept, ex p O'Dhuibir* [1997] CA Transcript 383. *Ex p Bamber* was the renewal of an application for leave to move for judicial review of a restriction on the telephone numbers which the applicant, a convicted murderer, could telephone from prison following his call i to a radio programme. This court found both the vires attack and the rationality attack to be unarguable. Aldous LJ said:

'It cannot be doubted that if it is justifiable for the Home Secretary to exercise restraint over written communications by prisoners, as is accepted in this case, it must be proper for him to exercise restraint over communications by telephone. In this respect the similarity between arts 8

and 10 ... are relevant. By the very nature of the telephone it is not practical that every telephone call made by a prisoner should be monitored. Therefore rules, along the lines suggested by the Home Secretary, had to come into force. Such rules amount to a restriction in the way the prisoner may express his views and feelings. However, I cannot see how they could be unlawful or unreasonable in circumstances where the prisoner can communicate his views and feelings in writing and can seek permission in writing in exceptional circumstances from the governor to enable a telephone call to be made.' a b

*Exp O'Dhuibhir* was concerned with an instruction by prison governors that for exceptional risk prisoners held in a special secure unit the closed visits would be the norm. That policy was said to be unlawful because of its effect on legal and family visits. The instruction to governors was pursuant to r 33(1) in that case. It seemed to me that r 33(1) of the Prison Rules was obviously *intra vires* s 47(1) of the 1952 Act, so the only remaining question was whether the instruction was unreasonable in a *Wednesbury* sense. Furthermore, as Peter Gibson LJ pointed out, the basic common law right for which the appellants contended, the right to an open interview with a lawyer, and the right to an open visit with one's immediate family, were not shown to exist. c d

Mr Owen submitted that Latham J was right to adopt the *vires* approach, and pointed out that *Exp Leech* was cited by both Lord Browne-Wilkinson and Lord Steyn in *Pierson v Secretary of State for the Home Dept* [1997] 3 All ER 577, [1997] 3 WLR 492, which concerned mandatory life sentences. Lord Browne-Wilkinson said ([1997] 3 All ER 577 at 592, [1997] 3 WLR 492 at 502): e

'A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.' f

However Lord Browne-Wilkinson did not accept the existence of the basic principle for which the appellant contended, and that, as it seems to me, is Mr Owen's principal problem here.

Mr Owen contends that the right which is in issue in the case of both Simms and O'Brien is the right of a prisoner (my emphasis) to freedom of expression as set out in art 10 of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969), which, he submits, reflects exactly the common law. Article 10 provides: g h

'(1) Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or similar enterprises. j

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the

a disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

This right, Mr Owen contends, includes a right to communicate with the media through a journalist and in turn the journalist to express his opinions more broadly to the public. He invited our attention to the decision of the European Commission in *Silver v UK* (1980) 2 EHRR 475 and to the decision of Dyson J in *R v Secretary of State for the Home Dept, ex p Norney* (1995) 7 Admin LR 861, but I need not dwell on either of those reports.

b (9) *Conclusion, re Simms and O'Brien*

c In my judgment a convicted prisoner has no right to communicate orally with the media through a journalist. The loss of that 'right', if it can properly be so described, is part and parcel of a sentence of imprisonment. He can no longer go where he wishes. He is confined. He can no longer speak to those outside prison or receive visits from anyone other than his lawyer and his relatives and friends. If one of his friends happens to be a journalist the Prison Service is entitled to require an undertaking in accordance with para 37 of Standing Order 5A, not least so as to ensure that parity as between one prisoner and another is maintained. I entirely accept that, in the language of art 10, the freedom 'to receive and impart information and ideas without interference by public authority' is curtailed by imprisonment but that is what imprisonment is all about, and that too is recognised by the European Convention.

d Lest it be thought that the efforts of Simms and O'Brien to establish their innocence are being some way unfairly curtailed it is worth remembering that they can still have access to lawyers and correspond with journalists, just like any other prisoner. I would therefore reject the vires argument which found favour with the judge and allow the appeal. In so far as Mr Owen sought to contend that the requirement of a written undertaking was and is irrational, disproportionate  
e or otherwise unjustifiable, I would reject that submission, particularly in the light of further evidence placed before us to which I have already referred.

f (10) *Facts of Main*

The facts in the case of Main are summarised at the start of this judgment, and the order from the governor of HM Prison Whitemoor to prison staff which set out the revised arrangements for cell searching is Governor's Order 36/1995 dated 21 June 1995. Annex A to the order sets out how cell searches are to be conducted after a prisoner has been taken elsewhere, and paras 3 and 6 of that annex read:

h '3. ... UNDER NO CIRCUMSTANCES must the prisoner be allowed to remain in the cell during the search. (Removing the prisoner from or near the cell area avoids attempts to intimidate or distract the Searching Officers) ...

j 6. Search the cell thoroughly including ventilators, ceiling, floor, walls, door, windows (inside and out), grilles and pipes and fittings. Correspondence, particularly that issued under Prison Rule 37A, is to be searched but not read.'

Rule 37A of the Prison Rules 1964 provides:

*'Correspondence with legal advisers and courts*

(1) A prisoner may correspond with his legal adviser and any court and such correspondence may only be opened, read or stopped by the governor in accordance with the provisions of this rule.



(2) Correspondence to which this rule applies may be opened if the governor has reasonable cause to believe that it contains an illicit enclosure and any such enclosure shall be dealt with in accordance with the other provisions of these Rules. a

(3) Correspondence to which this rule applies may be opened, read and stopped if the governor has reasonable cause to believe its contents endanger prison security or the safety of others or are otherwise of a criminal nature. b

(4) A prisoner shall be given the opportunity to be present when any correspondence to which this rule applies is opened and shall be informed if it or any enclosure is to be read or stopped ...'

On 22 June 1995 the governor of Whitemoor issued Notice to Inmates 77/1995 advising inmates of the latest developments in relation to cell searches. Under the heading 'Correspondence under Rule 37A' that notice reads: c

'All searching staff have been instructed to search all property in cells after you have been strip searched and located in a sterile area. This includes the searching of correspondence issued under Rule 37A. Staff have also been instructed that the purpose is to search and not read the correspondence. Supervisors and Managers will be carrying out checks to ensure that searches are being carried out to the required standards.'

d

(11) *The appellant's submissions*

Mr Owen pointed out that para 6 of Annex A does not leave the prison officer searching the cell any discretion. It applies to all closed prisons regardless of the category of the inmates. All correspondence has to be searched, but not read. If that injunction is carefully obeyed there will in most cases be no contravention of r 37A(1) even though prisoners will tend to believe that prison officers will read what they want to read, and Mr Owen reminds us that in *Solosky v R* (1979) 105 DLR (3d) 745 at 760 Dickson J said: e

'Nothing is more likely to have a "chilling" effect upon the frank and free exchange and disclosure of confidences, which should characterize the relationship between inmate and counsel, than the knowledge that what has been written will be read by some third person, and perhaps used against the inmate at a later date.'

f

Furthermore if a letter in a cell has just been received from a solicitor, but has not yet been opened by the prisoner, or is one written by the prisoner to a solicitor which he has sealed but not yet sent off, the prison officer would have to open the letter in order to search it, and such opening would not be in accordance with the provisions of r 37A because: (1) at least in most cases the governor would have no particular suspicions in relation to that letter (see r 37A(2) and (3)) and (2) in any event there would be no compliance with r 37A(4). g

In his affidavit of 23 August 1996 Mr A R Walker, acting Director General of the Prison Service explained why the procedure for searching cells was as set out by the governor of Whitemoor in the documents to which I have referred. In paras 14 and 15 of his affidavit he says: h

'14. Many items which could help a prisoner escape are capable of being secreted in legal papers. Drugs in powder or tablet form have been found stuck to or interleaved in papers. Records of drug dealing have also been i

a maintained on paper. In the case of maps and sketches, and lists of security details such as key codes and relevant measurement, these could be hidden by being interleaved in correspondence or could simply be recorded in note form on legal papers themselves. In the case of money, small bladed items such as razors and hacksaws, and keys, these could be stored within two sheets of paper glued together to form a closed pouch. Items of this sort could also be stored within envelopes. 15. The Prison Service took the view that it was necessary that the recommendation of Sir John Woodcock should apply to all property, including correspondence with legal advisers once it had been received, opened, and stored in the prisoner's cell. Rule 37A does not apply to such material, nor does it apply by way of analogy. Rule 37A deals with a wholly different category of material, namely correspondence in transit between a legal adviser and a prisoner. It is a rule designed to permit private communication, in writing, between prisoners and their legal advisers. By virtue of the fact, this material can be treated with a measure of confidence as to its contents, in view of the professional status and duties of the legal adviser. In addition such material is rarely bulky and may easily be searched in the presence of the prisoner.'

In a later affidavit of 29 April 1997 Mr Philip Wheatley, Director of Dispersal Prisons, said (para 6):

e '... It is not just articles which can be detected by x-ray technology, for example metal items and possibly larger quantities of drugs, that we have a security interest in finding, but also in finding many other items which can be recorded on paper. These include, for example: drawings of keys, escape plans of the prison and its constructions, detailed maps of the surrounding area, details of staff and their cars, records of debts owed by prisoners to prisoners, records of drugs transactions, betting slips and details of betting transactions, addresses of other prisoners, contact telephone numbers and addresses of criminals and associates outside etc. We also doubt the effectiveness of x-rays to detect smaller amounts of drugs or carefully hidden explosives. For example it may be possible to roll out Semtex so that it mimics in size and shape a page of A4 paper, which may make it hard to detect within a bundle of A4 sheets.'

g Mr Owen submits that if correspondence in transit is entitled to protection that protection cannot evaporate as soon as the letter is received. Such letters are protected by legal professional privilege, and that is not something which can easily be swept aside. Article 8(1) of the European Convention on Human Rights provides: 'Everyone has the right to respect for his private and family life, his home and his correspondence.'

h In *Campbell v UK* (1992) 15 EHRR 137 a prisoner serving a sentence in Scotland complained that the prison authorities had opened and read correspondence passing between himself and his solicitor, and had opened without reading some correspondence from the European Commission for Human Rights. Both types of interference were held to amount to a violation of art 8, and it is clear from the judgment, that the UK Government 'did not contest, that if correspondence relating to pending proceedings had been routinely opened, there would have been a breach of Article 8' (see at 160). The government did, as in the present case, point to the need to open letters to determine whether they can find prohibited material, and at para 48 the court set out its approach to

correspondence between prisoners and their legal advisers. That paragraph, so far as is material reads: a

‘Admittedly, as the Government pointed out, the border line between mail concerning contemplated litigation and that of a general nature is especially difficult to draw and correspondence with a lawyer may concern matters which have little or nothing to do with litigation. Nevertheless, the Court sees no reason to distinguish between the different categories of correspondence with lawyers which, whatever their purpose, concern matters of a private and confidential character. In principle, such matters are privileged under Article 8. This means that the prison authorities may open a letter from a lawyer to a prisoner when they have reasonable cause to believe that it contains an illicit enclosure which the normal means of detection have failed to disclose. The letter should, however, only be opened and should not be read. Suitable guarantees preventing the reading of the letter should be provided, e.g. opening the letter in the presence of the prisoner. The reading of a prisoner’s mail to and from a lawyer, on the other hand, should only be permitted in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature.’ (See (1992) 15 EHRR 137 at 161.) b  
c  
d

Mr Owen contends that r 37A of the Prison Rules reflects the decision in *Campbell’s* case. The protection afforded by the rule extends or ought to be held to extend to correspondence stored in a prison cell. Otherwise there would be a violation of art 8, and an unwarranted interference with legal professional privilege, which UK courts have always been and still are astute to protect (see *R v Derby Magistrates’ Court, ex p B* [1995] 4 All ER 526, [1996] AC 487). As Mr Owen points out, it was this right of confidentiality of correspondence which this court was considering in *Ex p Leech*, but in that case Steyn LJ said ([1993] 4 All ER 539 at 551–552, [1994] QB 198 at 213): e  
f

‘In our judgment s 47(1) must be interpreted as conferring by necessary implication a power to make rules to achieve the stated objectives. We are satisfied that this implied power is wide enough to comprehend rules permitting the examining and reading of correspondence passing between a prisoner and his solicitor in order to ascertain whether it is in truth bona fide correspondence between a prisoner and a solicitor and to stop letters which fail such scrutiny.’ g  
h

Mr Owen submits that read in context the passage which I have just cited was only intended to cover examination of documents where the prison governor had reasonable cause to suspect some form of abuse. Mr Owen also pointed out that in November 1996 the Prison Ombudsman, Sir Peter Woodhead, upheld a complaint in relation to the screening of legal correspondence as part of routine cell searching in the absence of the inmate. Sir Peter’s recommendation, which is of course in no way binding upon us, reads: ‘That prison service policy on cell searching be revised to allow the prisoner to remain in the cell whilst his/her legal papers are being searched, after which the documents are sealed in a box or bag.’ i



(12) *The respondent's submissions*

a Mr Parker invited us to follow the reasoning of the Divisional Court. He submitted that r 37A, which was drafted in the light of the decisions in *Ex p Leech* and *Campbell*, is not concerned with cell searches, of which Pill LJ said:

b 'I do not accept that the presence of the prisoner is the only way to give effect to legal professional privilege or that it necessarily provides complete protection. Indeed, the presence of the prisoner does not in itself prevent a prisoner officer from reading a document which, in the interests of security, he is entitled to examine. An attempt has been made in the relevant instructions to provide a safeguard and there must be a margin of appreciation in the governor when considering how searches are conducted.'

c Mr Parker further submitted that it would not be practicable to distinguish between different categories of prisoner if security is to be achieved, for the obvious reasons that anything which needed to be hidden would simply be passed to a prisoner in a lower category, and he pointed out that if a prisoner is present while his correspondence is being searched: '(1) he may intimidate or distract the searching officer, or observe his technique for use on another occasion; and (2) he cannot, in the last resort, prevent the officer from reading what he wants to read.'

d (13) *Conclusion*

e In my judgment legal professional privilege does attach to correspondence with legal advisers which is stored by a prisoner in his cell, and accordingly such correspondence is to be protected from any unnecessary interference by prison staff. Even if the correspondence is only inspected to see that it is what it purports to be that is likely to impair the free flow of communication between a convicted or remand prisoner on the one hand and his legal adviser on the other, and therefore it constitutes an impairment of the privilege. However, as the Whitemoor and Parkhurst escapes demonstrated, it is essential to maintain security in closed prisons, and to that end s 47(1) of the Prison Act 1952 permits rules requiring that periodically, and without prior notice, cells and everything therein be thoroughly searched. That necessarily involves examining correspondence so far as necessary to ensure that it is in truth bona fide correspondence between the prisoner and a legal adviser and does not conceal anything else. In the words of Steyn LJ in *Ex p Leech* [1993] 4 All ER 539 at 550, [1994] QB 198 at 212, there is a 'self-evident and pressing need' for that degree of scrutiny. That was not something which was being directly addressed in *Campbell's* case. It follows that in my judgment what is prescribed in the annex to the governor's order is no more than the minimum interference with the prisoner's rights which is necessary to ensure that security is maintained. Once it is accepted that there are powerful arguments for correspondence being examined in the absence of the prisoner, and in my judgment there are, the only remaining issue is how best to re-assure prisoners, and especially remand prisoners, that cell-searchers are not exceeding their instructions. That is obviously a difficult question, but it is not, in my judgment, a question for decision by this or any other court. I would therefore dismiss this appeal.

**JUDGE LJ.** When serving the custodial sentences imposed to punish them for their crimes, convicted criminals do not become outlaws, outside or beyond the protection of the law. It is axiomatic that 'a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication': see *Raymond v Honey* [1982] 1 All ER 756, [1983] 1 AC 1. a

Constant repetition of this principle may suggest that the restriction of the prisoner's rights is less extensive than in reality it is. Incarceration automatically means that the prisoner is deprived of his right to liberty and freedom of movement and association. Moreover he is locked up with other criminals in penal institutions for which the Home Secretary is responsible, and the administration of the prison system, with the need for proper security of the convicts as well as responsibility for providing every prisoner with a reasonably humane environment, inevitably curtails his rights yet further. b

Sometimes those in custody are unconvicted. Although they are presumed in law to be innocent, they too are deprived of many basic rights enjoyed by ordinary citizens. The administration of the prison system provides some small practical acknowledgement of the difference between the convicted and the unconvicted prisoner, but the harsh reality is that the vital rights of liberty and freedom of association and movement are removed for every prisoner, whether convicted or unconvicted. c

The regulation and management of prisons and similar institutions is based on s 47 of the Prison Act 1952, as amended, which provides: d

'The Secretary of State may make rules for the regulation and management of prisons ... and for the classification, treatment, employment, discipline and control of persons required to be detained therein.'

The relevant facts and regulatory framework are set out in the judgment of Kennedy LJ and I shall not repeat them. I merely observe that it is not the Secretary of State, nor the operation of powers granted by s 47 of the 1952 Act which deprives prisoners of their rights to liberty and freedom of movement and association. That is a consequence of the order of a court. e

There is no catalogue of civil rights which remain available to the prisoner. Some have been identified beyond argument by earlier decisions of the courts. Some are so obvious that they would immediately be included in a list if anyone for one moment doubted their existence, for example the right not to be subjected to physical or psychological assault or torture. As time goes by further rights will no doubt be recognised. In view of the axiomatic principle however the starting point is to assume that a civil right is preserved unless it has been expressly removed or its loss is an inevitable consequence of lawful detention in custody. f

In these appeals recognition is sought for two rights, not previously acknowledged. In the cases of *Simms* and *O'Brien* it is submitted that as a manifestation of the right to freedom of expression each prisoner is entitled to be visited by and to communicate orally about his case with a journalist who has shown an interest (whether out of friendship or a strictly professional interest in the case) and for the journalist to use material obtained in this way in the course of his profession. In *Main* it is contended that the prisoner's right to confidentiality of his legal correspondence extends to preclude the searching of his cell by prison officers in his absence. g

a The prisoner's right to untrammelled access to the courts was established in *Raymond v Honey* [1982] 1 All ER 756, [1983] 1 AC 1. Inseparable from this right is the further right to unimpeded access to legal advice: see *R v Secretary of State for the Home Dept, ex p Anderson* [1984] 1 All ER 920, [1984] QB 778.

b In *R v Secretary of State for the Home Dept, ex p Leech* [1993] 4 All ER 539, [1994] QB 198 the court was concerned with communications by a prisoner with his legal advisers. The issue was the censorship of the prisoner's correspondence with his solicitors in proceedings which were not then current but in contemplation. The principle of the confidentiality of such correspondence was upheld in relation to two separate administrative activities by the prison authorities. First, it was held that there was no power to stop or prevent such letters being sent and second, although the prison authorities were empowered c to examine such letters in order to check that they were what they purported to be, this power had to be deployed to the minimum extent necessary for the purpose. On analysis the decision was only indirectly concerned with the general right of a prisoner to communicate with those outside the prison. The focus was communication with his legal advisers: hence therefore the reference to the decision in *Campbell v UK* (1993) 15 EHRR 137, upholding in the context of art 8 of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) strictly limited circumstances in which a prisoner's correspondence to and from his lawyer could be read. Giving the judgment of the court and following the logical progress of the route charted by the decisions e in *Raymond v Honey* and *Ex p Anderson*, Steyn LJ observed ([1993] 4 All ER 539 at 546, 548, 549, [1994] QB 198 at 208, 209, 210):

f 'The question is whether s 47 by necessary implication authorises the making of a rule of the width and scope of r 33(3) ... By necessary implication s 47(1) confers a power of rule-making which may limit a prisoner's general civil rights in respect of the confidentiality of correspondence ... It ... does not authorise the making of any rule which creates an impediment to the free flow of communications between a solicitor and a client about contemplated legal proceedings.'

g Steyn LJ summarised the conclusion:

h '... s 47(1) by necessary implication authorises some screening of correspondence passing between a prisoner and a solicitor. The authorised intrusion must, however, be the minimum necessary to ensure that the correspondence is in truth bona fide legal correspondence.' (See [1993] 4 All ER 539 at 555, [1994] QB 198 at 217.)

j This decision served to underline that the court would not permit inappropriate interference with the rights of any prisoner unless expressly sanctioned or indisputably implied. Although *Ex p Leech* also provides plain authority for the proper general approach to rules and standing orders created under s 47 it cannot be used by straightforward analogy to evaluate the rights of the prisoner to communicate with those who are not his legal advisers. Nevertheless, stripped to its essentials, Mr Owen's argument in *Simms* and O'Brien is that the reasoning which prohibits limitations on the rights of the prisoner to access to legal advice would apply equally to restrictions on the right of freedom of expression, of which one manifestation is access to the media. His argument in *Main* involved



detailed analysis of the principles relating to legal correspondence to be found in *Ex p Leech* and *Campbell's* case. a

In *Ex p Leech* the court rejected in robust terms the suggestion that the prison authorities enjoyed an unrestricted right to read correspondence between the prisoner and his legal advisers. Any such power would constitute a 'considerable diminution' to or have a 'chilling effect' (see *Solosky v R* (1980) 105 DLR (3d) 745 per Dickson J) on the exercise of an essential right. In *Campbell's* case when such correspondence was 'opened as a matter of routine', the European Court of Human Rights concluded in the context of art 8 that such readings were permissible only in exceptional circumstances where there was reasonable cause to suspect abuse, an approach indorsed in *Ex p Leech* by approving reference to the 'concrete' points identified in *Solosky v R*. Furthermore, in *Campbell's* case the European Court of Human Rights was unimpressed by a series of arguments advanced to justify routine examination of correspondence. These included possible problems with the 'professional competence and integrity' of legal advisers, and risks attached to the misuse of unopened correspondence with solicitors to 'smuggle forbidden material into and out of prison'. However the court simultaneously recognised that 'some measure of control over prisoners' correspondence is called for and is not of itself incompatible with the European Human Rights Convention, regard being paid to the ordinary and reasonable requirements of imprisonment'. b  
c  
d

Two further significant decisions of this court require attention. In *R v Secretary of State for the Home Dept, ex p O'Dhuibhir* [1997] CA Transcript 383 the issue of communication was considered in the context of visits arranged for exceptional risk prisoners. Closed conditions for these visits were deemed necessary. A glass screen was placed between the prisoner and his visitor which created obvious practical difficulties of communication both between the prisoner and his legal advisers and, separately, between the prisoner and his family. The court concluded that the asserted right of unimpeded physical access to legal advisers had not been established. More important, notwithstanding the court's concern about the effect of the screen on family relationships, Peter Gibson LJ observed: e  
f

'As for the claimed basic right of a prisoner to an open visit with his immediate family, Mr Fitzgerald accepted that no authority established the existence of such a right. In this area there is of course the right recognised by art 8(1) of the European Convention on Human Rights, that is to say the right to respect for one's private and family life; but that is subject to the recognition in art 8(2) that there may be interference by a public authority with the exercise of that right if such interference is in accordance with the law and is necessary in a democratic society in the interest of national security and public safety and for the prevention of disorder or crime. There are also strong humanitarian and health reasons why it is desirable that prisoners should maintain relationships with their families ... Mr Fitzgerald is not complaining of a breach of the prison rules. He asserts a fundamental right of physical contact between prisoner and his family. In my judgment that right is not established ... r 33(1) does allow the imposition of restrictions upon communications between a prisoner and others.' g  
h  
i

In *R v Secretary of State, ex p Bamber* [1996] CA Transcript 120 the court concluded that it was permissible for the authorities to prohibit a convicted prisoner from making a telephone call to the media so that his spoken voice could

a be available for use in programmes prepared for the radio or television. It was  
not suggested that r 34(9)(c) was invalid. Plainly Bamber's freedom of expression  
was restricted. Nevertheless the restriction was upheld in the context of reliance  
on art 10(1) of the European Convention on Human Rights (the right to freedom  
of expression) and *Derbyshire CC v Times Newspapers Ltd* [1993] 1 All ER 1011,  
[1993] AC 534 (where freedom of expression was under consideration). The  
claim advanced on behalf of Bamber was that he was entitled to freedom of  
expression 'to rectify what he perceives to be a miscarriage of justice'. As  
Aldous LJ observed:

c 'Such rules amount to restriction in the way that a prisoner may express his  
views and feelings. However I cannot see how they could be unlawful and  
unreasonable in circumstances where the prisoner can communicate his  
views and feelings in writing and can seek permission in exceptional  
circumstances from the governor to enable a telephone call to be made.'

Therefore in *Ex p O'Dhuibir* the court concluded that communication between  
a prisoner and members of his immediate family could lawfully be restricted so  
as to prevent physical contact, and for speech to be permitted only through a  
screen, notwithstanding that these limitations constituted a huge interference  
with normal family life and the ability of members of the family to communicate  
with each other. In *Ex p Bamber* restrictions on the right of communication  
between a prisoner and representatives of the media outside the prison were  
upheld. *Ex p O'Dhuibir* also confirmed the principle applied in *Ex p Leech* and  
*Campbell's* case that in very limited circumstances some restriction in the  
communications between the prisoner and legal advisers has also to be accepted.  
Given the inevitable restriction on ordinary rights which follow incarceration  
identified earlier in this judgment, it follows that prisoners do not enjoy an  
absolute right to freedom of expression or communication. In my judgment if  
communications within the prison between the prisoner and his family and the  
prisoner and his legal advisers may properly be curtailed, journalists cannot  
possibly form a special category of visitors immune from restrictions. Indeed Mr  
Owen rightly conceded that freedom of expression in the form of unlimited  
entitlement to communicate with anyone as and when the prisoner wished was  
not absolute: some restrictions were inevitable.

g With the advantage of the judgments in *Ex p O'Dhuibir* (which were not  
available to Latham J) in my judgment the first question for decision is whether  
the restrictions now under consideration were ultra vires. In the cases of *Simms*  
and *O'Brien* the starting point is simple. Communications by prisoners,  
convicted or not, are seriously curtailed. To take a simple example, they cannot  
just pick up pen biro or pencil and paper and write letters at will to their families,  
and for many, this must come as a most serious deprivation, potentially  
damaging to the members of the prisoner's family as well as to the prisoner  
himself. Similarly, with family visits: it is enough to note that a prisoner's mother  
and father, or his wife and children cannot see him, nor he them, as and when any  
of them wishes. Again these are most serious deprivations, consequent on the  
order of imprisonment.

j There are separate rules governing arrangements for access to and  
communication with legal advisers and letters and visits of a personal nature, as  
well as visits by journalists. In relation to communications between the prisoner  
and the media these restrictions are expressly provided by paras 37 and 37A of  
section A of the standing orders which carefully distinguish between the visiting

journalist who is a friend and the journalist visiting in a professional capacity. Save in exceptional circumstances visits are restricted to relations and friends, and legal advisers. It therefore seems reasonable that the conditions for the visit by a journalist friend should be similar to those which apply to a visit by a friend in any other walk of life, and further, that the accident to friendship with a convicted prisoner should not create a professional advantage over a journalist who is not. The visit in a professional capacity is subject to control by the governor for powerful reasons of security and discipline, as well as the collective interests of the inmates, the risks to which may not be fully appreciated by even the most laudably motivated journalist. Even so the prison regime does not impose an absolute prohibition on such visits: in particular cases, and subject to stringent conditions, an exception may be made.

Both Simms and O'Brien are anxious to continue their contact with journalists who appear to be sympathetic to their contentions that they have been wrongfully convicted. Both appreciate the potential value of media support and neither enjoys the advantage of continuing legal advice.

Whenever the journalists visit these prisoners they are able to speak as they wish about their cases, to provide information, elucidate relevant facts and indeed to enlist support. Equally the prisoners are permitted to write to the journalists and convey the same information by letter. If they choose the journalists may discuss and highlight the cases in the media and campaign for the case to be referred to the Court of Appeal Criminal Division and for the convictions to be quashed. Therefore the single relevant restriction on the prisoner's freedom of expression is that although the prisoner may say what he likes to the journalist, the journalist is required to undertake not to use for professional purposes any material provided at the interview. This plainly creates some difficulties for the responsible journalist, particularly in relation to information provided and contentions advanced by the prisoner. It is argued that this regime interferes with the prisoner's fundamental right of freedom of expression, because faced with the restriction the journalist (not the prisoner) would be less enthusiastic about visiting the prisons and discussing the case orally with the prisoners. If the journalist in question is a genuine friend, and visiting as such, one wonders why. If he is visiting as a professional journalist, or intending to use the material obtained at interview in a professional capacity, it is difficult to accept that the limitation on the entitlement of the journalist to publish the contents of his communications with the prisoner infringes the prisoner's right of free expression, at any rate in any way which significantly increases the inevitable interference with that right which follows incarceration. As the prisoner's ability to communicate with journalists both orally and in writing is preserved, what in reality is at stake is the relationship between the journalist and those responsible for the secure administration of the prison. The potential for increased problems with security and discipline, staff, other inmates, and after conviction, with victims or their families, all underline the need for control of such visits to be vested in and exercised by the governor. This is what the regulatory framework is intended to achieve and in the circumstances I have concluded that the restriction currently under consideration is not ultra vires.

Having concluded that the restriction is not ultra vires, I have examined the question whether the required written undertaking could be described as irrational or disproportionate. The sensible reasons for these limited restrictions are summarised by Kennedy LJ in his judgment. Without repeating the salient



a features the arguments based on irrationality and lack of proportion are not sustained.

Some further support for this conclusion is founded in the decision in the United States Supreme Court in *Turner v Safley* (1987) 482 US 76, where in the context of the tension between the provisions of the First Amendment and the rights of prisoners as individuals the court concluded (at 89):

b ‘... when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if “prison administrators ... and not the courts, [are] to make the difficult judgments concerning institutional operations”’

c and continued by drawing attention to a relevant factor in the determination of the reasonableness of any restriction, touched on by Aldous LJ in *Ex p Bamber*:

d ‘Where “other avenues” remain available for the exercise of the asserted right ... courts should be particularly conscious of the “measure of judicial deference owed to corrections officials” ... in gauging the validity of the regulation’ (See 482 US 76 at 89.)

I therefore agree that the appeal by the Secretary of State in the cases of Simms and O’Brien should be allowed.

e Turning now to the case of Main and the search of his cell, the evidence which followed the Whitemoor and Parkhurst breakouts by dangerous convicts demonstrated an urgent need for random searching of occupied cells in closed prisons. The administrative framework was accordingly adapted. It is not intended that the prisoner’s correspondence with his lawyers should be bereft of safeguards. This correspondence should only be read to the limited extent necessary to check that it is what it purports to be and to ensure that illicit f material is not concealed. For that purpose the prisoner’s assertions are not, by themselves, sufficient and there are powerful reasons which require the search of the cell to take place in his absence. Quite apart from the significant risk of intimidation some prisoners would take full advantage of any knowledge of how the search is carried out to improve their efforts at concealment.

g That brings me to the prisoner’s letters. Many prisoners would greatly resent their personal letters being read by prison officers at least as much, if not more, than letters from their lawyers, many of whom will have ceased to correspond once the appeal system had been completed. The relevant provision is unequivocal. ‘Correspondence, particularly that issued under Prison Rule 37A, is to be searched but not read’ (Governor’s Order 36/1995 Annex A para 3).

h This arrangement adds to rather than substitutes for the continuing occasions when, subject to the limitations already acknowledged in the existing authorities, correspondence may be read. In my judgment these random cell searches in the absence of the prisoner are well within the powers of the prison authorities as part of the new arrangements for security currently forced on them, and are not ultra vires; and Mr Owen did not contend otherwise.

j Prisoners whose cells are searched in their absence will find it difficult to believe that their correspondence has been searched but not read. The governor’s order will sometimes be disobeyed. Accordingly I am prepared to accept the potential ‘chilling effect’ of such searches. I also note the recommendation by the Prison Ombudsman that the prisoner should be present while his legal papers are being searched, and would also be prepared to accept

that many prisoners would not abuse this arrangement. Unfortunately some, including the most dangerous would, and they would complain loudest about any selection system which involved the authorities choosing the prisoners who might be permitted to be present for any part of the search. Main of course is a convicted prisoner. The position of unconvicted prisoners remanded in custody and awaiting trial is very sensitive. Again however the problem is that if it is appropriate for them to be remanded in a closed prison at all, then their cells cannot realistically be exempted from random searches or they will become the collection point for illicit property, and open to abuse, if not by unconvicted prisoners themselves, by some of the other inmates. All these important considerations have to be set in the context of the expressed concerns of the prison authorities summarised by Kennedy LJ. In my judgment the administrative arrangements for the random search of prison cells in the absence of the prisoner are not a disproportionate or irrational response to the alarming problems of prison security demonstrated by the breakouts at Whitemoor and Parkhurst. The authorities themselves must do their best to ensure that those responsible for the searches obey the categorical instruction that the letters are not to be read, unless the particular case falls within the minimal interference accepted in *Ex p Leech*. No doubt too they will bear in mind the recommendation of the ombudsman and discontinue the present arrangements as soon as practicable either generally, or in those particular institutions where it is not essential.

I therefore agree that the appeal by Main should be dismissed.

**CHADWICK LJ.** I agree with the orders of Kennedy and Judge LJJ.

*Appeals allowed in Ex p Simms and anor. Appeal dismissed in Ex p Main.*

Dilys Tausz Barrister.

# a Limb v Union Jack Removals Ltd (in liquidation) and another and other cases

b COURT OF APPEAL, CIVIL DIVISION  
BROOKE, MUMMERY LJ AND SIR JOHN BALCOMBE  
17, 18, 19 DECEMBER 1997, 10 FEBRUARY 1998

c County court – Practice – Striking out – Striking out default action after 12 months where admission delivered but no judgment entered – Action for unliquidated damages – Whether court able to strike out action on expiry of 12-month period where defendant not admitting both liability and quantum – CCR Ord 9, r 10.

d In CCR Ord 9, r 10, the word ‘admission’ in para (ii) means an admission on Form N9. Accordingly, in cases where a defendant to an action for unliquidated damages does not admit both liability and the whole of the plaintiff’s money claim for damages against him, and so does not serve such an admission, the rule has no application (see p 522 d and p 527 e f, post).

Watkins v Toms (1996) [1998] 2 All ER 534, Parrott v Jackson [1996] PIQR P394 and Perrin v Short [1997] PIQR P426 considered.

## e Notes

For defence, counterclaim and admission in county court proceedings, see 10 Halsbury’s Laws (4th edn) paras 219–234.

## Cases referred to in judgment

- f Bannister v SGB plc [1997] 4 All ER 129, CA.  
Boys v Chaplin [1968] 1 All ER 283, [1968] 2 QB 1, [1968] 2 WLR 328, CA; *affd* [1969] 2 All ER 1085, [1969] 3 WLR 322, HL.  
Duke v Reliance Systems Ltd [1988] QB 108, [1987] 2 All ER 858, CA; *affd* [1988] 1 All ER 626, [1988] AC 618, [1988] 2 WLR 359, HL.  
Gale v Superdrug Stores plc [1996] 3 All ER 468, [1996] 1 WLR 1089, CA.  
g Heer v Tutton [1995] 4 All ER 547, [1995] 1 WLR 1336, CA.  
Langley v North West Water Authority [1991] 3 All ER 610, [1991] 1 WLR 697, CA.  
Morelle Ltd v Wakeling [1955] 1 All ER 708, [1955] 2 QB 379, [1955] 2 WLR 672, CA.  
Parrott v Jackson [1996] PIQR P394, CA.  
Perrin v Short [1997] PIQR P426, CA.  
h Watkins v Toms (1996) [1998] 2 All ER 534, CA.  
Webster v Ellison Circlips Group Ltd [1995] 4 All ER 556, [1995] 1 WLR 1447, CA.  
Welsh Development Agency v Redpath Dorman Long Ltd [1994] 4 All ER 10, [1994] 1 WLR 1409, CA.  
Williams v Fawcett [1985] 1 All ER 787, [1986] QB 604, [1985] 1 WLR 501, CA.  
j Young v British Aeroplane Co Ltd [1944] 2 All ER 293, [1944] KB 718, CA; *affd* [1946] 1 All ER 98, [1946] AC 163, HL.

## Cases also cited or referred to in skeleton arguments

- Alison (Kenneth) Ltd (in liq) v A E Limehouse & Co (a firm) [1991] 4 All ER 500, [1992] 2 AC 105, HL.  
Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd [1981] 3 All ER 577, [1982] QB 84, CA.



*Baker v Francis* [1997] CA Transcript 229.

*Blundell v Rimmer* [1971] 1 All ER 1072, [1971] 1 WLR 123.

*Cashmore v Blue Circle Plumbing Fixtures Ltd (t/a Qualcast Bathrooms)* [1996] CA Transcript 806.

*Demmel v Bullock* [1996] CA Transcript 440.

*Hadkinson v Hadkinson* [1952] 2 All ER 567, [1952] P 285, CA.

*Harding v Cartwright* [1997] CA Transcript 836.

*Isaacs v Robertson* [1984] 3 All ER 140, [1985] AC 97, PC.

*Keen v Holland* [1984] 1 All ER 75, [1984] 1 WLR 251, CA.

*M v Home Office* [1992] 4 All ER 97, [1992] QB 270, CA.

*Munday (J R) Ltd v London CC* [1916] 2 KB 331, [1916–17] All ER Rep 824.

*Pargeter v Bayliss* [1996] CA Transcript 325.

*Peters v Winfield, Churchill v Forest of Dean DC* [1996] 1 WLR 604, CA.

*Rankine v Garton Sons & Co Ltd* [1979] 2 All ER 1185, CA.

*Roebuck v Mungovin* [1994] 1 All ER 568, [1992] 2 AC 224, HL.

*Welch v Nagy* [1949] 2 All ER 868, [1950] 1 KB 455, CA.

*Williams v Globe Coaches (a firm), Darby v Ginsters Cornish Pasties Ltd* [1996] 1 WLR 553, CA.

*Wilson v Banner Scaffolding Ltd* (1982) Times, 22 June.

*Wilson v Church* (1878) 9 Ch D 552.

## Appeals and application

### *Limb v Union Jack Removals Ltd (in liq) and anor*

The plaintiff, Peter Limb, appealed with leave from the decision of Judge Wroath in the Portsmouth County Court on 11 August 1995 whereby he held that the plaintiff's action against the defendants, Union Jack Removals Ltd (in liq) and Jack Robert Honess, had been struck out pursuant to CCR Ord 9, r 10. The facts are set out in the judgment of the court.

### *McGivern v Brown*

The defendant, K Brown, applied for leave to appeal from the order of Judge Phipps in the Manchester County Court on 29 September 1997 whereby he allowed the appeal of the plaintiff, Stephen McGivern from the order of District Judge Beattie on 29 May 1997 declaring that the action had been struck out pursuant to CCR Ord 9, r 10. The facts are set out in the judgment of the court.

### *Partington v Turners Bakery*

The defendants, Turners Bakery, appealed with leave from the decision of Judge Charles James in the Manchester County Court on 27 June 1997 whereby he dismissed the defendants' appeal from the order of District Judge Freeman on 7 May 1997 dismissing an application made by the defendants, inter alia, that the plaintiff, Marie Partington repay the sum of £3000 paid by way of interim payment following a consent judgment, on the basis that the action should have been struck out under CCR Ord 9, r 10. The facts are set out in the judgment of the court.

### *Pyne-Edwards v Moore Large & Co Ltd*

The plaintiff, Daniel Pyne-Edwards, appealed with leave from the decision of Judge Styler in the Derby County Court on 22 November 1997 whereby he held that the plaintiff's action had been struck out under CCR Ord 9, r 10. The facts are set out in the judgment of the court.

*Smith v Brothers of Charity Services*

- a* The plaintiff, Pauline Smith, appealed with leave from the decision of Judge James in the Manchester County Court on 12 May 1997 striking out the action under CCR Ord 9, r 10. The facts are set out in the judgment of the court.

*Tomkins v Griffiths*

- b* The defendant, Rosemary Griffiths, appealed with leave from the decision of Judge Eaglestone in the Altrincham County Court on 25 April 1997 whereby he dismissed the defendant's appeal from the decision of a deputy district judge on 14 January 1997 dismissing her application for a declaration that the action of the plaintiff, Sharon Jane Tomkins was struck out under CCR Ord 9, r 10. The facts are set out in the judgment of the court.

*c*

Timothy Concannon (instructed by *Anderton & Co*, Portsmouth) for the appellant Limb.

Edward Bishop (instructed by *Pardoes*, Bridgwater) for the respondents Union Jack Removals Ltd and Honess.

- d* Norman A Wright (instructed by *Moss Mooneeram*, Sale) for the applicant Brown.  
John A Phillips (instructed by *Eden & Co*, Manchester) for the respondent McGivern.

Norman A Wright (instructed by *Moss Mooneeram*, Sale) for the appellant Turners Bakery.

- e* Andrew Grantham (instructed by *James Chapman*, Manchester) for the respondent Partington.

Richard Payne (instructed by *Timms*, Derby) for the appellant Pyne-Edwards.

Norman A Wright (instructed by *Moss Mooneeram*, Sale) for the respondent Moore Large & Co.

Nicholas Hinchliffe (instructed by *Thompsons*, Manchester) for the appellant Smith.

- f* Norman A Wright (instructed by *Moss Mooneeram*, Sale) for the respondent Brothers of Charity Services.

Norman A Wright (instructed by *Moss Mooneeram*, Sale) for the appellant Griffiths.

Andrew Grantham (instructed by *Mendelsons*, Altrincham) for the respondent Tomkins.

*g**Cur adv vult*

10 February 1998. The following judgment of the court was delivered.

**BROOKE LJ.***h**Introductory*

1. CCR Ord 9, r 10 provides:

*'Striking out default action after twelve months*

- j* Where 12 months have expired from the date of service of a default summons and—(i) no admission, defence or counterclaim has been delivered and judgment has not been entered against the defendant, or (ii) an admission has been delivered but no judgment has been entered under rule 6(1) or, as the circumstances may require, no notice of acceptance has been received by the proper officer, the action shall be struck out and no enlargement of the period of 12 months shall be granted under Order 13, rule 4.'

2. A rule of this type was first introduced into the County Court Rules in 1920 (see the new r 36 added by amendment to Ord VII of the County Court Rules 1903 by SR & O 1920/393). The purpose of the rule, when first introduced, was to limit the time in which a default judgment could be entered. In actions commenced by default summons or special default summons, if the defendant did not respond at all to the summons, the rule proscribed the entry of judgment, and provided that the action should be struck out, after the expiry of two months from the date of service of the summons notwithstanding anything contained in Ord LIV, r 12 (which related to extensions of time). After a minor amendment in 1930 designed to mitigate the extreme rigours of this rule, the two-month period was increased to 12 months in 1936, with the original rigidity reintroduced. See Ord X, r 2(1)(b) of the rewritten County Court Rules 1936, which still related to default actions only, and was expressed in terms that are almost identical to the present Ord 9, r 10(i). On the other hand Ord X, r 4 of the 1936 rules, which was concerned with interlocutory judgment on admissions, prescribed a procedure quite different from the present Ord 9, r 10(ii).

3. It was not until 1952 that a provision was introduced which proscribed that an action would be struck out after 12 months not only in the circumstances provided for in the present Ord 9, r 10(i) but also where a plaintiff had failed to serve notice of acceptance or non-acceptance in response to an admission by the defendant (see the new r 7 added by amendment to Ord X of the 1936 rules by SI 1952/2198). Until 1981 only liquidated money claims could be brought by default action, and there is no reason to suppose that the practical application of the rule created any difficulty. As Bingham MR suggested in *Heer v Tutton* [1995] 4 All ER 547, [1995] 1 WLR 1336, the rule is a response to the administrative burden which would be caused to county court offices if plaintiffs, having issued default summonses, failed to take further action, whether because they decided it was not worth doing so or because the debtor settled the debt out of court, with the result that inactive files would continue to accumulate. It has nothing to do with the modern case management principles which gave birth to the ill-starred CCR Ord 17, r 11 of the same rules (for which see *Bannister v SGB plc* [1997] 4 All ER 129).

4. When the County Court Rules were redrafted in 1981 the scope of the default summons was widened to include unliquidated claims for the first time, and the provisions concerned with admissions in response to default summonses (formerly contained in Ord X of the 1936 rules) were joined with those for fixed date summonses in Ord 9. The new rules also allowed a request to be made for a default judgment in the circumstances still provided for by Ord 9, r 6(1)(b) (where the defendant has delivered an admission of the whole of the plaintiff's claim unaccompanied by a counterclaim or request for time for payment), and what had now become Ord 9, r 10 was extended to cover cases in which a plaintiff had failed to make a request for such a judgment (when it was available to him) in addition to those cases where he had failed to serve a notice of acceptance or non-acceptance of an admission.

5. None of these changes appear to have given rise to any great difficulties in practice, and problems only began to emerge for the first time after 1991. In the course of that year the county court's jurisdiction over personal injuries actions was greatly increased (see art 5(1) of the High Court and County Courts Jurisdiction Order 1991, SI 1991/724), and significant changes were also made to the early part of Ord 9 to facilitate the entry of judgment on admissions by administrative officers on the staff of the court in appropriate cases (see the



a County Court (Amendment No 2) Rules 1991, SI 1991/1132). A spate of appeals and applications on different aspects of the rule then started coming to this court for determination. In May 1995 three such appeals were determined in *Heer v Tutton* [1995] 4 All ER 547, [1995] 1 WLR 1336, by a court presided over by the then Master of the Rolls, Sir Thomas Bingham, and during the next two years there were 11 further decisions on the rule, only one of which has found its way into the general law reports: two others appear in specialist reports.

b 6. Eight more such cases were originally listed before us for hearing in the final week of the Michaelmas Term, although in the event two of them were disposed of by agreement and a further one added. In the event five of these cases were concerned with a single aspect of the rule. This relates to the application of the second strand of Ord 9, r 10 to actions for unliquidated damages in which a defendant admits liability but not quantum. The sixth case was concerned with the application of the rule in a case where there is more than one defendant, and the seventh was *sui generis* and is the subject of a quite separate judgment. In the present judgment, therefore, we are concerned with the first six of these cases. We will set out the existing law on the topics covered by these cases, so that judges and practitioners will not have to search for the relevant law in a number of different places, not all of them very easy to find. When we have set out the relevant principles in the main text of the judgment, we will then apply them to the six cases with which we are now concerned. Our decisions in these cases will be found in the appendix to this judgment.

e CCR Ord 9, rr 1, 2, 3 and 6

f 7. Order 9 is headed 'Admission, defence, counterclaim and answer', and Ord 9, r 1 provides: 'Except as otherwise provided, the provisions of this Order relating to actions shall apply to both default and fixed date actions.' A fixed date action is an action in which a claim is made for any relief other than the payment of money. Every other action is a default action, except as otherwise provided for by the rules (Ord 3, r 2(2)). We are only concerned with the effects of this rule in default actions, in relation to those cases where the defendant does not deliver an admission, defence, counterclaim or answer when served with a summons or, alternatively, where he serves an admission of some kind.

g 8. Before 1991, the meaning of the words 'defence' and 'admission' was governed by Ord 9, r 17, which has always provided, so far as is material:

h 'In the foregoing provisions of this Order, unless the context otherwise requires, "defence", "admission" and "counterclaim" mean respectively any document which shows that the defendant desires—(a) to dispute the whole or any part of the plaintiff's claim, (b) to admit the whole or any part of the plaintiff's claim or ask for time for payment of the amount admitted and costs ...'

j 9. It is clear that one of the purposes of the 1991 amendments was to make it easier for the administrative staff of a court to enter judgment on admissions without the cost and delay involved in seeking a ruling from a district judge. For this reason, although Ord 9, r 17 remained unchanged, there was now inserted into Ord 9, r 2 a new r 2(2) which contained special meanings for the expressions 'a request for time for payment', 'admission', 'a statement of means', and 'defence', in rr 2, 3 and 6, which are the rules that contain the procedures for the administrative entry of default judgments and judgments on admissions. That the purpose of this new definitional paragraph was to ease the task of court staff

is signalled up by the fact that it also contains a special meaning for the word 'proper officer', an expression which for the purposes of these three rules is not to include the district judge (contrast, for a wider definition of the term, Ord 1, r 3).

10. Order 9, r 2(1) provides that two of the situations in which r 2 applies are where a defendant in any action admits his liability for the whole or part of the plaintiff's claim or where he desires time for payment of any sum admitted by him. Rule 2(2), first introduced in 1991, provides, in effect, that in rr 2, 3 and 6 'admission' means the relevant form appended to the summons completed according to the circumstances of the case. By r 2 of the County Court (Forms) Rules 1982, SI 1982/586, as amended, the relevant form in an action where the plaintiff's claim is not for a fixed amount is Prescribed Form N9 (Form N9) (see *The County Court Practice 1997* pp 1760–1761, for the present version of this form). The definition of 'defence' in Ord 9, r 2(2) is rather more generous and includes 'a defence otherwise than on that form'. As we have said, a special meaning is also given to the words 'a request for time for payment' and 'a statement of means'. The former means 'a request containing a proposal as to the date of payment or, if it is proposed to pay by instalments, the frequency and amount of the instalments'. The latter (like the word 'admission') means the 'relevant form appended to the summons completed according to the circumstances of the case'.

11. Form N9 is described as a 'Form for replying to a summons'. The description of the form which follows is of its amended form as it appears in the current *County Court Practice*. In some of the cases with which we are now concerned parts of it were expressed at the material time in slightly different terms. One of the early questions on the form reads 'How much of the claim do you admit?' If a defendant ticks the box against the words, 'All of it' he is directed to complete only sections 1 and 2 of the form, which are headed 'Offer of payment' and 'Income and outgoings'. If he ticks the box 'Part of it', he has to say what amount he admits, and is directed to complete all five sections of the form. If he ticks the box 'None of it', he is directed to sections 3, 4 and 5 only. Sections 3, 4 and 5 are headed, respectively, 'Defending the claim: defence Fill in this part of the form only if you wish to defend the claim or part of the claim', 'Making a claim against the plaintiff: counterclaim' and 'Arbitration under the small claims procedure'. In the present judgment we are not concerned with sections 4 and 5.

12. Before 1991 Ord 9, r 2 was in quite simple terms. Rule 2(1) provided that a defendant in any action who, inter alia, admitted his liability for the whole or part of the plaintiff's claim, desired time for payment of any sum admitted by him, or disputed his liability for the whole or part of the plaintiff's claim, should within 14 days after the service of the summons on him, deliver at the court office either the form appended to the summons completed according to the circumstances of the case or an admission, request for time for payment (an expression defined in r 2(4)) or defence otherwise than on that form, together with a copy for the plaintiff. Rule 2(2) required the proper officer to send a copy of such document to the plaintiff, and r 2(3) permitted the court at any time to allow a defendant to amend or withdraw an admission made by him under r 2 on such terms as might be just. In other words, an admission in any form contained in any type of document was acceptable, and the court had jurisdiction to allow a defendant to amend or withdraw such an admission, whether or not it was on a prescribed form.

a 13. Since 1991 the amended r 2 contains much more detailed provisions telling a defendant what he is to do in different circumstances. Unless the plaintiff is under a disability (for which see r 2(5)(a)), a defendant in an action for a liquidated sum who admits his liability for the whole of the plaintiff's claim, and desires time for payment of the admitted sum, is required within 14 days after the service of the summons upon him to deliver to the plaintiff a form of admission together with a statement of his means and a request for time for payment (r 2(3)). Since b the admission must be on Form N9, such a defendant will tick the box 'All of it' in response to the question 'How much of the claim do you admit?' If he does so, does not ask for time for payment, and does not counterclaim, the plaintiff will be entitled to enter judgment administratively under r 6(1)(b).

c 14. In an action for a liquidated sum, if the defendant admits liability for part of the plaintiff's claim, he is required within the same period to deliver at the court office (not, in this case, to the plaintiff) an admission of liability, together with, if he so wishes, a request for time for payment, and, where such a request is made, a statement of his means (r 2(5)(c)). In this case he will tick the box 'Part of it' in response to the question 'How much of the claim do you admit?' and state d the amount he admits. In section 3 of Form N9 he will again tick the box 'Part of it', this time in response to the question 'How much of the plaintiff's claim do you dispute?' He will then deduct the amount he admits from the total liquidated claim in order to identify the amount he disputes, and write that figure down on the form.

e 15. All the actions with which we are concerned, however, are actions for an unliquidated sum. Rule 2(5)(b) deals with such actions. It provides that a defendant who admits liability in such an action shall within the same period of 14 days—

f '(i) deliver at the court office an admission of liability together with, if he so wishes, a request for time for payment and, where such a request is made, a statement of means, and (ii) if he wishes to defend part of the plaintiff's claim or to make a counterclaim, comply with the requirements of paragraph (6).'

g 16. If, like all the defendants in the actions with which we are at present concerned, the defendant is only willing to admit liability, but not quantum (on the basis that he admits negligence and some resulting loss, as to the amount of which he makes no admissions), he will tick the box 'None of it' in response to the question 'How much of the plaintiff's claim do you admit?' in section 1 of Form N9, and the box 'All of it' in response to the question 'How much of the plaintiff's claim do you dispute' in section 3 where he will go on to make it clear h that he admits liability but puts quantum in all respects in issue.

j 17. A defendant in any type of action who disputes his liability for the whole or part of the plaintiff's claim, or desires to set up a counterclaim, is required during the same 14-day period, to deliver at the court office, in addition to any documents he may provide pursuant to r 2(5), a defence defending the whole or part of the claim, or, as the case may be, making a counterclaim (r 2(6)). In an action to which Ord 17, r 11 applies, the delivery of a defence in accordance with Ord 9, r 2 will trigger off the start of automatic directions 14 days later, and once an administrative officer of the court has recognised the document delivered by the defendant as a defence, he will send out Form N450 to the parties (see *Bannister v SGB plc* [1997] 4 All ER 129 at 148 (para 8.1)).



18. It is therefore clear that three different types of admission of liability are allowed for by r 2: (i) an admission of liability for the whole claim (r 2(3(a))), (ii) an admission of liability for part of the claim (r 2(5)(c)), and (iii) an admission of liability in an action for an unliquidated sum (r 2(5)(b)). In every case Form N9 must be used, since this will make it much easier for the court staff to enter judgment on such admissions where this is provided for in rr 3 and 6. a

19. On receipt of the admission or defence, the proper officer is required to send a copy of it to the plaintiff. If the defendant states in his defence that he has paid the amount claimed, the proper officer will request the plaintiff to confirm in writing that he wishes the proceedings to continue. In a case to which r 3(1) applies, the proper officer is also to send the plaintiff a notice of the requirements set out there (r 2(7)). b

20. Rule 3 is headed 'Admission of part or request for time in default action'. Rule 3(1) is concerned with a case in which the defendant admits part of the plaintiff's claim, or admits the whole or part of the plaintiff's claim and makes a request for time for payment. If the plaintiff accepts the amount admitted, sub-paras (a), (b) and (c) set out his possible courses of action. Rule 3(2) to (6) then prescribes different procedures depending on the course the plaintiff chooses to adopt. c

21. Rule 3(7) provides a special regime where the defendant to an unliquidated claim has used Form N9 to admit liability but puts quantum in issue: d

'Where the action is for unliquidated damages and the defendant delivers an admission of liability for the claim, but disputes or does not admit the amount of the plaintiff's damages, then—(a) if the defendant offers to pay in satisfaction of the claim a specific sum which the plaintiff accepts, the provisions of this rule shall apply as if the defendant had admitted part of the plaintiff's claim; and (b) in any other case, the plaintiff may apply to the court for such judgment as he may be entitled to upon the admission, and the court may give such judgment, including interlocutory judgment for damages to be assessed and costs, or make such other order on the application as it thinks just.' e

22. Except in the situation allowed for under para (7)(a), the matter is now placed in the hands of the district judge, as opposed to an administrative officer of the court, and if the contents of Form N9 lead the district judge to conclude that the plaintiff is entitled to some money judgment in addition to an interlocutory judgment for damages to be assessed, the rule gives him power to make an appropriate order. This is clearly a judicial as opposed to an administrative function. f

23. Rules 4, 4A and 5 are concerned with fixed date actions. These are not money claims, and there can be no question of judgment being entered administratively in such actions. Any application for judgment must be made to a judge of the court, and the special definitions contained in r 2(2) do not apply here. g

24. Rule 6 is headed 'Judgment in default or on admission in default action'. Rule 6(1) provides, for all purposes material to the present judgment: h

'... if the defendant in a default action—(a) does not within 14 days after service of the summons on him pay to the plaintiff the total amount of the claim and costs on the summons, (b) delivers an admission of the whole of the plaintiff's claim unaccompanied by a counterclaim or a request for time i

a for payment, or (c) does not deliver an admission of part of the plaintiff's claim, a defence or counterclaim, the plaintiff may upon fulfilling the requirements of paragraph (1A) have judgment entered against the defendant for the amount of the claim and costs (less any payments made); and the order shall be for payment forthwith or at such time or times as the plaintiff may specify.'

b 25. Rule 6(2) provides that if the plaintiff's claim is for unliquidated damages, any judgment entered under para (1) shall be an interlocutory judgment for damages to be assessed.

c 26. In an action for unliquidated damages, the only relevant requirement in r 6(1A) is that the plaintiff is to file a request for judgment. Where the action is for a liquidated sum, he has to certify that the defendant has not sent to him any reply to the summons, and in this context a written reply of a similar kind to a reply set out in Form N9 is expressed to be included in the meaning of the words reply to the summons.

d 27. Rules 2, 3 and 6 form, therefore, a self-contained code prescribing the occasions on which in a default action judgment may be entered administratively, on default of pleadings or on admissions, without any reference to a judge of the court, and a judgment under r 6(1), being an expression which features in r 10(ii), is an expression which refers to such a judgment. There are, of course, other rules which provide for the entry of an interlocutory judgment on the direction of a judge. Examples are to be found in Ord 9, rr 3(7) and 14, and e Ord 17, rr 6, 7(1) and 8.

#### *Order 9, r 10(i)*

f 28. This part of r 10 relates to circumstances in which an action may be struck out after 12 months where the defendant has taken no action in the case following the service of a default summons on him, and the plaintiff has taken no steps to have judgment entered against him. It has been considered on a number of occasions by this court, most notably in *Heer v Tutton* [1995] 4 All ER 547, [1995] 1 WLR 1336 and *Webster v Ellison Circlips Group Ltd* [1995] 4 All ER 556, [1995] 1 WLR 1447. The word 'judgment' is not limited to judgments entered under Ord 10, r 6(1), and the word 'admission' is not restricted to the narrower meaning g assigned to it by r 2(2), since there are other rules which permit a judge to direct that judgment be entered when no admission has been served, and the rule-makers were concerned to limit the striking out provision to those cases in which, although the defendant had made no response of any kind in the action, the plaintiff had likewise taken no steps of any kind to obtain any form of h judgment.

j 29. There was only one new point we had to decide on the meaning and effect of this part of the rule. In one of the appeals a judge had directed that an action should be struck out as against both the defendants, although one of them had in fact delivered a defence. It was conceded that this order was wrong, but it was argued that the court nevertheless had power to declare in such circumstances that the action has been struck out as against one of the defendants.

30. In our judgment this submission is misconceived. There are other rules which give the court power to strike out an action as against one party without striking out the entire action (for example, Ord 5, r 12(1) and Ord 15, r 1(1)(b)). To strike out one out of two defendants in an action would not achieve the purpose of the rule, which is to clear the court files completely of actions in which

the plaintiff has delayed for an unacceptable length of time in taking the administrative steps open to him to have judgment entered in the absence of any effective response to the summons by the defendant. In other words, effect must be given to the clear meaning of the rule, and if one of a number of defendants has delivered an admission, defence or counterclaim, there can be no question of the action being struck out under Ord 9, r 10(i).

#### *Order 9, r 10(ii)*

31. Rule 10(ii) is concerned with default actions in which an admission has been delivered. In this context it mentions two situations in which an action may be struck out where 12 months have expired from the date of service of a default summons. One is when an admission has been delivered, but no judgment has been entered under r 6(1). The other is when an admission has been delivered but no notice of acceptance or non-acceptance has been received by the proper officer. Notices of acceptance or non-acceptance are provided for in r 3(1) to (3) and (6). Both sub-sets of r 10(ii), therefore, are concerned with cases falling within rr 3 and 6, where the word 'admission' is defined to mean, in effect, an admission on Form N9.

32. In *Watkins v Toms* [1998] 2 All ER 534 at 536 this court said that in the language of Ord 9, r 17 the context seemed to require that the narrow definition of 'admission' in Ord 9, r 2(2) should be applied when Ord 9, r 10(ii) was under consideration. In *Perrin v Short* [1997] PIQR P426 the court applied *Watkins v Toms* and rejected a contention that that decision was made per incuriam. We have been strongly pressed to hold that both these decisions were made per incuriam.

#### *The doctrine of precedent*

33. Before considering the arguments which were addressed to us, it is necessary to say something about the doctrine of precedent, in so far as it relates to decisions of different divisions of the Court of Appeal. Different aspects of the doctrine have been considered by this court in *Young v British Aeroplane Co Ltd* [1944] 2 All ER 293, [1944] KB 718, *Morelle Ltd v Wakeling* [1955] 1 All ER 708, [1955] 2 QB 379, *Boys v Chaplin* [1968] 1 All ER 283, [1968] 2 QB 1, *Williams v Fawcett* [1985] 1 All ER 787, [1986] QB 604, *Duke v Reliance Systems Ltd* [1987] 2 All ER 858, [1988] QB 108, *Langlely v North West Water Authority* [1991] 3 All ER 610, [1991] 1 WLR 697 and *Welsh Development Agency v Redpath Dorman Long Ltd* [1994] 4 All ER 10, [1994] 1 WLR 1409.

34. From these authorities the following five principles can be derived.

(1) Where the court has considered a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a point of law.

(2) A decision of a two-judge Court of Appeal on a substantive appeal (as opposed to an application for leave) has the same authority as a decision of a three-judge or a five-judge Court of Appeal.

(3) The doctrine of per incuriam applies only where another division of the court has reached a decision in ignorance or forgetfulness of a decision binding upon it or of an inconsistent statutory provision, and in either case it must be shown that if the court had had this material in mind it *must* have reached a contrary decision.



a (4) The doctrine does not extend to a case where, if different arguments had been placed before the court or if different material had been placed before it, it might have reached a different conclusion.

b (5) Any departure from a previous decision of the court is in principle undesirable and should only be considered if the previous decision is manifestly wrong. Even then it will be necessary to take account of whether the decision purports to be one of general application and whether there is any other way of remedying the error, for example by encouraging an appeal to the House of Lords.

c 35. It appears that, in commenting on the authority of decisions of a two-judge division of this court in an interlocutory matter in modern conditions in the *Welsh Development Agency* case, Glidewell LJ did not have his attention drawn to the judgment of Lord Donaldson MR in *Langley's* case.

*The earlier decisions on Ord 9, r 10(ii)*

36. There are three earlier decisions of this court on the proper interpretation of Ord 9, r 10(ii) which fall to be considered.

d 37. In *Parrott v Jackson* [1996] PIQR P394 Hirst and Pill LJ held that a defence which admitted negligence but did not admit resulting damage did not constitute an admission within the terms of r 10(ii). Both members of the court went on to say, obiter, that for there to be an admission of the whole of a claim for the purposes of Ord 9, r 6(1)(b) there did not have to be an admission of every item and every sum claimed in a personal injury action.

e 38. In *Watkins v Toms* [1998] 2 All ER 534 Judge LJ, with whom Lord Woolf MR and Saville LJ agreed, made the observations to which we have referred in para 32 above. The ratio decidendi of that case, however, was that if a defendant admitted liability in an action for unliquidated damages but did not admit the amount of the damages, the plaintiff's entitlement to interlocutory judgment was f governed by Ord 9, r 3(7), which is not referred to in Ord 9, r 10(ii).

g 39. In *Perrin v Short* [1997] PIQR P426 Hirst, Swinton Thomas and Phillips LJ held that a defence which admitted negligence and some resulting damage, the nature and extent of which was not admitted, but otherwise denied the allegations in the particulars of claim, did not constitute an admission of the whole of the plaintiff's claim for the purposes of Ord 9, r 6(1)(b) so as to permit g interlocutory judgment to be entered under r 6(1).

*The terms of the defence in the five present cases*

h 40. We have had to consider the terms of the defence which was actually delivered in the context of four appeals and one application. In all these defences negligence was admitted. In one of them the relevant paragraph of the defence was in these terms:

j 'While it is admitted that the plaintiff sustained some personal injury, loss and damage, the extent thereof is not admitted and the plaintiff is put to strict proof.'

41. In the other four the relevant paragraph is in the following more or less identical terms:

'For the purposes of this action only it is admitted that the defendant is liable to compensate the plaintiff in respect of some loss or damage as a result of the defendant's negligence ... but the defendant denies that the plaintiff

has suffered injury, loss or damage to the extent set out in the particulars of claim.'

42. It is evident that in each case the plaintiff would have been entitled to apply to the court for interlocutory judgment for damages to be assessed pursuant to Ord 9, r 3(7) if the defendants solicitors had used Form N9, since the defendant had admitted negligence and some resulting damage. Since the admission was not on Form N9, they would have had to apply for summary judgment for damages to be assessed under Ord 9, r 14.

43. If the defendant's advisers had used Form N9, they certainly would not have ticked the box 'All of it' when asked 'How much of the claim do you admit?' The boxes in Form N9 do not make it easy for a defendant to say how much of an unliquidated claim he is disposed to admit, but no doubt he could get this message across under section 3b, 'What are your reasons for disputing the claim?' If he wished to say that he admitted that he was liable for certain sums against certain specific heads of damage he would be able to do so, and the total sum would be the figure he would put in the answer to the question at the start of the form 'How much of the claim do you admit?' Part of it [box ticked] Amount £ ... As it is, all these defendants have made no admissions at all. In those circumstances, although they have delivered an admission of liability for the claim (see Ord 9, r 3(7)) they have not delivered an admission of the whole of the plaintiff's claim (see Ord 9, r 6(1)(b)) any more than the defendant did in *Perrin's* case.

44. As we have said, in *Parrott's* case Hirst and Pill LJ suggested, obiter, that Ord 9, r 6(1)(b) did not require an admission of the whole of the claim, including the quantum of damages claimed, in an action for an unliquidated sum. There is no evidence, however, that they had their attention drawn to the different definitions of 'admission' in Ord 9, or to the paramountcy of an admission in the prescribed form in rr 2, 3 and 6. Since these were in any event obiter observations, they are not binding on us. They are clearly wrong, and should not be followed.

45. Five substantial reasons were advanced in support of the proposition that the decision of this court in *Watkins v Toms* was made per incuriam. We can disregard the contention that it was decided wrongly because Judge LJ, by a slip, referred to the forms of Notice of Acceptance and Non-Acceptance as prescribed forms whereas they are in fact practice forms (see Form N225 in *The County Court Practice* 1997 p 1956), and the contention that the County Court Procedural Tables (and in particular Table 4 notes b and c, *The County Court Practice* 1997 p 523) are more consistent with a situation in which the Ord 9, r 17 definition of admission applies concurrently with the Ord 9, r 2(2) definition. It does not matter in the present context whether the procedure prescribed by Ord 9, r 3 was taken forward by a prescribed form or a practice form, and the contents of the informal commentary in a Procedural Table composed by the editors of *The County Court Practice* cannot govern the proper interpretation of the rules. We turn, therefore, to the more substantial arguments.

46. First, it is said that since failure to enter judgment under Ord 9, r 10(i) is a failure to enter judgment under Ord 9, r 6(1)(c), 'admission' should have the same meaning in both r 10(i) and (ii). In his judgment in *Watkins v Toms* Judge LJ had said that it was a surprising conclusion that Ord 9, r 10 might have the effect that the word attracted a wider meaning in para (i) but a narrower meaning in

a para (ii). It is therefore argued that since both paragraphs lead back to r 6(1), the word should have the same, wider, meaning throughout r 10.

b 47. The answer to this point is that we are not at all surprised that the word 'admission' has a wider meaning in r 10(i) than it has in r 10(ii), in the light of the much greater opportunity afforded to us to consider these rules in their full context. As we have said in para 28 above, r 10(i) is concerned with cases in which a plaintiff has taken no steps to enter any form of judgment (whether under r 6(1) or otherwise) in the face of complete inaction by a defendant. There would be no reason to limit the word 'admission' to an admission on Form N9 when drafting a rule concerned with total inactivity of any kind.

c 48. Next, it is said that Judge LJ failed to consider the repercussions of attaching a narrow definition to the word 'admission' in r 6(i). For instance, it is said to be illogical and absurd that the court cannot use its power under r 2(4) to allow a defendant to amend or withdraw an admission which is not contained on a Form N9 on such terms as it thinks just, even though it could do so prior to the introduction of the r 2(2) definition (by the County Court Amendment (No 2) Rules 1991) in 1991. Similar alleged illogicalities are said to derive from the fact d that the obligation of the proper officer to send a copy of an admission to the plaintiff would be limited to Form N9 admissions, and from the fact that the whole machinery of interlocutory judgments on full or partial admissions since 1991 could only be brought into play in relation to admissions on Form N9 if Judge LJ is right.

e 49. In our judgment Judge LJ was clearly correct in his belief that a narrow definition should be afforded to the word 'admission' in r 6(1). As we have already observed, the 1991 amendments were designed to facilitate the entry of judgments administratively. Even if the court no longer has the power under r 2 to allow a defendant to amend or withdraw an admission which is not contained on Form N9, appropriate powers are contained elsewhere in the rules: see f Ord 15, r 1 and, more generally, *Gale v Superdrug Stores plc* [1996] 3 All ER 468, [1996] 1 WLR 1089. It is certainly surprising that the previous regime for seeking interlocutory judgments from a district judge on admissions (see Ord 9, r 3(11) as it was prior to the 1991 amendments, which provided a regime similar to that afforded in the High Court by RSC Ord 27, r 3) is now restricted in actions for unliquidated damages to cases in which an admission of liability has been g delivered in Form N9. We can, however, see no way of escaping from the clear logic of the 1991 rule-change, and if in future a plaintiff is confronted with an informal admission of liability in such an action we see no reason why recourse may not be had, pursuant to s 76 of the County Courts Act 1984, to a procedure analogous to that provided in the High Court by RSC Ord 27, r 3, if for any reason h recourse to Ord 9, r 14 is considered inappropriate.

i 50. The third criticism of *Watkins v Toms* was that Judge LJ failed to consider the impact of his decision on Ord 9, r 9, to which the r 17 definition of 'admission' is said to apply. It is argued that the words, 'and if time permits the same procedure shall be followed as if the admission ... had been delivered within the said period of 14 days' effectively equate an admission other than on form N9 with an admission on Form N9.

j 51. The trouble with this argument is that it attaches a rigidity to the r 17 definition which it does not possess. In the circumstances provided for by r 9(1), the rule assimilates the procedure to be followed where there has been delivery of an admission out of time to the procedure to be followed where there has been delivery of an admission within 14 days under Ord 9, r 2, by the adoption of the



expression 'as if the admission ... had been delivered within the said period of 14 days'. This context therefore requires that the word 'admission' should be accorded the meaning afforded to it by r 2, so that it is wrong to suggest that the r 17 definition must be applied here. No anomaly will therefore arise.

52. Fourthly, it is said that Judge LJ failed to consider that the r 17 definition of 'admission' has existed in its current form since 1951 and that accordingly it was not part of a comprehensive scheme whereby the r 2(2) and r 17 definitions worked in tandem created by the design of the rule-makers.

53. Whatever may have been the position between 1951 and 1991, it is completely clear, in our judgment, that in 1991 the rule-makers decided to create a new scheme to facilitate the entry of judgments administratively, wherever this was appropriate, and to that extent from that year onwards they intended that the two definitions should work alongside each other, although the r 2 definition would hold sway within the rules for which it was expressly prescribed.

54. Finally, it was said that, if the 1991 amendment rules were to create a new regime where form was to triumph over substance, then this would have been expressly spelt out. In particular it was argued that the new narrow definition of 'admission' would have also applied to rr 9 and 10; that there would have been new rules to deal with the disposal of admissions otherwise than on form N9; that there would have been a new rule giving the court power to amend or withdraw admissions which were not on Form N9; and that the 1991 rules would have contained transitional provisions to save a plaintiff from being struck out where it would have been unjust to allow this to happen.

55. It is true that the rule-makers would have avoided the present difficulties if they had explained clearly what their intention was in 1991, but this court has been able to identify that intention six years after the new rules came into effect and it is misleading to use the pejorative expression that form is now being allowed to triumph over substance. It is in the interests of all litigants that the administrative costs of running the courts should be reduced, and that the time of district judges should not be taken up with deciding matters judicially when the nature of a defendant's response to a default summons leaves nothing on which an adjudication has to be given. The purpose of the 1991 amendments was to reduce court costs (paid by litigants through court fees) and to reduce court delays. The rule-makers appreciated that it would only be safe to allow the 'narrow' r 2 meaning of 'admission' to be given exclusively to the activities covered by rr 2, 3 and 6. They must have realised that in other parts of Ord 9 allowance would have to be made for cases in which an informal admission (which could lead to the entry of interlocutory judgment otherwise than under r 6) had been delivered, and that the language of r 17 would allow the attribution of the appropriate meaning to the word 'admission' in other parts of the rule, depending on the context. The fact that no transitional provisions were introduced, or that no other express rules were introduced to deal with admissions which a defendant chose to deliver otherwise than on Form N9, despite the directory requirements of r 2, cannot change the clear meaning of the rule.

56. A necessary concomitant to all these challenges to the authority of *Watkins v Toms* was the argument that, although the decision in *Perrin's* case was correct on the facts of that case (and in particular the double-barrelled wording of the defence), the court was in error in that case when it concluded that the relevant part of Judge LJ's judgment was a clear part of the ratio decidendi of *Watkins v Toms*. In this context reliance is placed on the fact that, after Judge LJ had

a expressed a provisional interpretation of the meaning of the word 'admission' in r 10(i), he then went on to consider an alternative free-standing ground for his decision, namely that that case fell squarely within Ord 9, r 3(7). It is pointed out that in that context he failed to observe that if the narrow definition of 'admission' was to be applied exclusively in rr 2 and 3, the case did not fall within r 3(7) at all, since no Form N9 admission had been delivered.

b 57. It is certainly correct that the court in *Watkins v Toms* failed to spot that judgment cannot be entered under Ord 9, r 3(7) in the absence of an admission on Form N9, and to that extent its reasoning can be faulted. The underlying logic of the decision, that r 6(1)(b) has nothing to do with judgments in actions for unliquidated sums when quantum is put fully in issue, was, however, soundly based, and the court in *Perrin's* case considered the matter de novo, in the context, c it is true, of much stronger language in the defence than is present in our group of cases, and came to the same, correct, conclusion.

58. We have now had the opportunity to reconsider the matter afresh with the assistance of much wider argument than was available to the court in the two earlier cases we have mentioned. Even if there is nothing in those two decisions d which is binding on us (since the first expression of view in *Watkins v Toms* was provisional, and *Perrin's* case was concerned with a defence framed in rather different terms), we share the opinion of those two courts that the r 2 definition of admission prevails throughout rr 2, 3 and 6, as indeed r 2(2) expressly provides.

59. The effect of this judgment is that Ord 9, r 10 has no application at all in cases in which a defendant to an action for an unliquidated sum does not admit e both liability and the whole of the plaintiff's money claim for damages against him. If the defendant makes no admissions as to quantum, as in all the five cases before us in which these points arose, he must take such alternative steps as may be available to him under the rules if he wishes of his own motion to bring the proceedings to a premature end before trial.

f

#### APPENDIX

##### (1) *Limb v Union Jack Removals Ltd (in liq) and anor*

1. This personal injuries action in the Portsmouth County Court arises out of an accident on 24 August 1990. The plaintiff, Mr Peter Limb, suffered injuries g when, in the course of his employment by the first and/or second defendant, he fell off a plate at the back of his employer's lorry at warehouse premises in Okehampton, Devon.

2. A default summons was served on the first defendants, Union Jack Removals Ltd, by the middle of January 1994. A summons had already been h served on the second defendant, Mr Honess, on 21 November 1993. The solicitors for Union Jack Removals Ltd gave notice of acting on 11 January 1994. In a document called 'Defence', dated 7 February 1994, which was delivered by those solicitors who were then calling themselves 'Solicitors for the Defendants' it was admitted that Union Jack Removals Ltd were the plaintiff's employers and j asserted that Mr Honess was only a director of the company. Negligence on the part of the defendants was denied, and contributory negligence was alleged.

3. On 13 April 1995 the plaintiff issued an application for an extension of time generally for setting down the action as against both defendants. On 27 April 1995 a deputy district judge made no order on this application as against Union Jack Removals Ltd, but ordered that the time for setting down as regards Mr Honess be extended to 30 September 1995.

4. Mr Honess's appeal against this order was heard by Judge Wroath on 11 August 1995. The judge was satisfied that the summons was served on Union Jack Removals Ltd on 21 November 1993; that no admission, defence or counterclaim had been delivered by Mr Honess within 12 months of the date of service; and that no judgment had been entered against him within the same period. In those circumstances he held that the whole action was struck out as a consequence of Ord 9, r 10.

5. Mr Limb now appeals to this court. He seeks an order rescinding the declaration that the action has been struck out. The main submission that was made on his behalf was that the situation provided for by Ord 9, r 10(i) had not arisen. A defence had been delivered on behalf of both defendants dated 7 February 1994. The judge had wrongly held that that was not a defence on behalf of Mr Honess, but at the very least the defence had been delivered on behalf of Union Jack Removals Ltd with the consequence that Ord 9, r 10 was inapplicable. It was also argued that the judge was wrong to hold that the rule applied when a defence had been delivered by only one of two (or more) defendants, and that he had confused the power to strike out an action under Ord 9, r 10 with the power to strike out a party. He had also acted wrongly in striking out the whole action when the complaint was only made on behalf of and only affected Mr Honess.

6. The main submissions made on behalf of Mr Honess may be summarised as follows.

(1) The defence in the action was served by solicitors acting only for Union Jack Removals Ltd. This is clearly stated in the notice of acting served on Mr Limb, and that does not constitute the service of a defence by Mr Honess. Order 9, r 10 applies to the claim against Mr Honess. (It was conceded that the judge was wrong to strike out the whole action).

(2) Order 9, r 10 applies to individual defendants in a multi-defendant action, which was in substance a collection of separate actions joined together and which should be treated as separate as long as they proceed. Mr Honess was a separate defendant and was served with the default summons. He did not enter a defence. Mr Limb did not enter judgment within 12 months of the date of the service of the summons. Order 9, r 10 applied in such a case. The action was correctly declared to have been struck out.

7. For the reasons given in the main judgment, although we accept that Mr Honess had not delivered a defence, we consider that the judge was wrong to hold that the action was struck out in consequence of Ord 9, r 10. Mr Limb's appeal should be allowed. Mr Honess is ordered to pay the costs of this appeal and the costs below (scale 2), but, as he is legally aided, the costs orders against him are not to be enforced without the leave of the court. There will be a legal aid taxation of Mr Honess's costs. Application for further directions in the action should be made to the district judge as soon as possible.

## (2) *McGivern v Brown*

1. This personal injuries action was commenced by a default summons issued in the Manchester County Court on 31 August 1993. The defendants did not complete Form N9. Instead, they delivered to the court a one-paragraph defence in the following terms:

'For the purposes of this action only it is admitted that the Defendant is liable to compensate the Plaintiff in respect of some loss and damage arising as a result of the Defendant's negligent driving on 17th August 1992 but the



a defendant denies that the plaintiff has suffered personal injury, loss or damage to the extent set out in the Particulars of Claim.'

2. On receipt of the defence in this form, the court office sent out Form N450 to the parties, presaging the start of automatic directions. On 21 January 1994 the district judge made a consent order for the payment of £2,500 interim damages. On 8 December 1994 another district judge made an order extending the time for setting the action down for trial until 20 March 1995, and a further such order, extending the time to 20 June 1995, was made by consent on 10 March 1995. On 8 June 1995 judgment was entered for the plaintiff for damages to be assessed. Although the court nominated 5 October 1995 for the assessment of damages, this date was not convenient for the defendant's consultant witness, and 25 February 1997 was eventually refixed as the date for the assessment. Just before that date, when both parties were preparing their evidence for the hearing, the defendant's solicitors raised for the first time the question whether the action had been struck out pursuant to Ord 9, r 10 in about September 1994. The hearing of the assessment was accordingly vacated, and on 29 May 1997 District Judge Beattie made a declaration that the action was indeed struck out. Judge Phipps allowed the plaintiff's appeal against this order. He did not give a reasoned judgment, but said that he was bound by authority to hold that since the defence was not on Form N9, the provisions of Ord 9, r 6 (and hence r 10(ii)) did not apply.

3. The defendants made a renewed application for leave to appeal to this court, leave having been refused by Sir Anthony McCowan on the basis that the judge's decision was in line with authority, the rules and the justice of the case. The application was listed for hearing inter partes with the other appeals which raised the same issue, with the appeal to follow if leave was granted.

4. For the reasons set out in our main judgment the judge was correct in holding that the provisions of Ord 9, r 10(ii) did not apply in this case. It is therefore unnecessary for us to consider the other interesting contentions put forward by counsel for the plaintiff in resisting this application. The renewed application for leave to appeal will therefore be dismissed with costs.

### (3) *Partington v Turners Bakery*

g 1. This personal injuries action was commenced by a default summons issued in the Manchester County Court. It was served on 8 June 1994. The defendants did not complete Form N9, and on 20 June 1994 they served a one-paragraph defence in the following terms:

h 'For the purpose of this action only it is admitted that the Defendant is liable to compensate the Plaintiff in respect of some loss or damage as a result of the Defendant's negligence and/or breach of statutory duty, but the Defendant denies that the Plaintiff has suffered injury, loss or damage to the extent set out in the Particulars of Claim.'

j 2. On 1 August 1995 an order was made by consent entering interlocutory judgment against the defendants with damages to be assessed. Over 12 months had by then expired from the date of the service of the default summons.

3. In November 1995 the defendants paid £9,000 into court, in addition to the sum of £3,000 already paid to the plaintiff by way of interim payment.

4. On 18 April 1997, over a year and a half after the consent judgment, the defendants issued an application for an order that the sum of £9,000 held in court

be paid out, together with accrued interest, to the defendants' solicitors; that the plaintiff repay to the defendants the sum of £3,000 paid by way of interim payment; and that the plaintiff should pay the defendants' costs of the action, including the costs of the application. The application was made on the basis of the defendants' contention that the action should have been struck out as at 8 June 1995 under Ord 9, r 10.

5. On 7 May 1997 District Judge Freeman dismissed the defendants' application, and on 27 June 1997 Judge Charles James dismissed the defendants' appeal from the order of the district judge. He found against the defendants for the following reasons:

'(1) After 8 June 1995 the action was in a state in which the defendants could have issued an application and obtained an order to have it struck out under Ord 9, r 10, but instead they consented to an order for interlocutory judgment. (2) The defendants had never made an application to have that judgment set aside on the ground of lack of jurisdiction, mistake or otherwise, nor had they issued fresh proceedings to have the judgment set aside or quashed. (3) The general rule is that an order made without jurisdiction remains valid unless and until set aside. (4) The agreement made between the plaintiff's solicitors and the defendants' solicitors to interlocutory judgment being entered on 1 August 1995 was a contract between the parties. The defendants had not made an application for rectification of that contract or to have it set aside on the ground of mutual or some other kind of mistake or for other reasons. That was a binding contract and, consistently with it, the defendants had paid into court the sum of £9,000 on 17 November 1995. (5) The defendants remained bound by the contract into which they had entered when they consented to the interlocutory judgment and had taken no steps to have it set aside.'

6. The defendants' main submissions on the appeal may be summarised as follows.

(1) The plaintiff's action was automatically struck out at the conclusion of the 12-month period on 8 June 1995. The interlocutory judgment entered on 1 August 1995 had no effect, as the action in which it was entered no longer subsisted after it had been automatically struck out. The consent judgment was an irrelevance to Ord 9, r 10, as it had been entered after the expiration of the 12-month period.

(2) Alternatively, the judge should have set the judgment aside as neither party was aware at the time when it was entered into that the action was liable to be struck out. Their consent to judgment had been given in ignorance of the applicability of Ord 9, r 10.

7. The plaintiff submitted in response that it was within the jurisdiction of the county court to make the interlocutory judgment. This judgment conferred rights on the plaintiff, and was binding until it was set aside. The defendants had never sought to have it set aside, and it therefore remained in force.

8. By a respondent's notice the plaintiff seeks to have the judge's decision affirmed on the additional grounds that the defendants did not deliver an admission in Form N9. Arguments were advanced in support of this submission along the lines we have set out in the main judgment, and the defendants riposted with the counter-arguments we have also set out there.

a 9. For the reasons set out in the main judgment, Ord 9, r 10 does not apply to this case. A defence was delivered within 12 months of the service of the default summons, but no 'admission' was delivered within the meaning of r 10(ii). The defendants were not entitled to the return of the £12,000. The district judge rightly dismissed the defendants' application. The appeal in this court fails on the admission point raised by the respondent's notice. The action was not automatically struck out and it is not liable to be struck out by order of the court under Ord 9, r 10. The consent judgment point raised on the appeal does not arise for decision. This appeal is dismissed with costs. There will be a legal aid taxation of the plaintiff's costs.

b 10. We have set out the judge's reasons, and the arguments on the appeal, in this case quite fully just to show how much expense and delay is still being caused to litigants because the rule-makers did not signal up their intentions more clearly when they made the 1991 rule changes. A completely new set of civil procedure rules is due to come into force next year, and it will be most important that lawyers and judges will be able to discern the purpose of the new rules with greater ease than was possible in the case of this particular rule change, which has given rise to a large amount of wholly avoidable litigation.

c (4) *Pyne-Edwards v Moore Large & Co Ltd*

d 1. This personal injuries action was commenced by a default summons issued in the Derby County Court on 25 October 1994. The summons was served on 7 November 1994. The defendants did not complete Form N9 and on 17 November 1994 they served a two-paragraph defence in the following terms:

f '1. For the purposes of this action and for these purposes alone, it is admitted that the Defendant is liable to pay the Plaintiff compensation for personal injury, loss and damage. 2. Whilst it is admitted that the Plaintiff sustained some personal injury, loss and damage, the extent thereof is not admitted, and the Plaintiff is put to strict proof.'

2. On 28 November 1994 the county court issued Form N450, presaging the start of automatic directions.

g 3. The parties thereafter prepared for trial. On 20 March 1995 an order was made by consent for an interim payment of damages, and on 2 May 1995 the district judge made an order by consent enlarging the number of medical experts the plaintiff might call. Interrogatories were served upon and answered by the defendants, lists of documents were exchanged, and on 13 December 1995 the plaintiff's solicitors requested a date for trial, within the 15 months period permitted by Ord 17, r 11. It was at the hearing of a pre-trial review on 2 May h 1996 that the defendants' solicitors raised for the first time the question whether the action had been struck out the previous November pursuant to Ord 9, r 10, and the district judge directed that this issue be determined by a circuit judge. It was in this way that the issue came before Judge Styler for decision on 22 November 1996.

j 4. Judge Styler considered the obiter dicta of Hirst and Pill LJ in *Parrott v Jackson* [1996] PIQR P394. Although he appreciated they were not binding on him, he said that he felt duty bound to apply them to the facts of this case. In these circumstances he was satisfied that the defence made an admission of liability in the sense of both breach of duty and damage, and that the admission of some damage amounted to an admission of the whole of the plaintiff's claim for the purposes of Ord 9, r 6(1)(b).



5. The judge's decision predated *Watkins v Toms* [1998] 2 All ER 534 and *Perrin v Short* [1997] PIQR P426 and he held that an admission for the purposes of Ord 9, r 6 did not have to be on Form N9. He said he felt it alarming to believe that the intent of the rules could be torpedoed by the form as opposed to the content of a document purporting to be an admission. a

6. For the reasons set out in our main judgment the judge was wrong in holding that the provisions of Ord 9, r 10(ii) applied in this case, although we sympathise with him for applying the obiter dicta in *Parrott's* case, which we have now held to be wrong. We have explained in para 54 of our main judgment why the form of an admission is so important in the regime introduced in 1991. The intent of the rule-makers in 1991 was to make it easier to detect the cases in which judgment on an admission could be entered administratively, and it is this intent which would be torpedoed if we were to uphold the decision of the judge in this case. b  
c

7. The appeal will therefore be allowed with costs here and below. There will be a declaration that the action has not been struck out pursuant to Ord 9, r 10. The costs below will be on county court scale 2, with a certificate for counsel. There will be an order for legal aid taxation of the plaintiff's costs in this court. d

(5) *Smith v Brothers of Charity Services*

1. This personal injuries action was commenced by default summons in the Manchester County Court. The default summons, accompanied by the particulars of claim, was issued and served on 8 April 1994. No admission or defence in Form N9 was served, but on 29 April 1994 a defence in the following terms was delivered on behalf of the defendants: e

'For the purpose of this action only it is admitted that the Defendants are liable to compensate the Plaintiff in respect of loss or damage arising as a result of the Defendant's negligence and/or breach of statutory duty but the Defendant denies that the Plaintiff has suffered injury loss and damage to the extent set out in the Particulars of claim.' f

2. The court granted several extensions of time for requesting a trial date pursuant to Ord 17, r 11, the last extension expiring on 12 November 1996. The plaintiff set the action down for trial on 11 November 1996. On 12 December 1996 the defendants applied to strike out the action under Ord 9, r 10, and this application succeeded before the deputy district judge on 30 January 1997 and on appeal before Judge James on 12 May 1997. The judge gave a reserved judgment: (1) (purporting to follow the dicta of *Hirst and Pill LJ* in *Parrott's* case) that the defence amounted to an admission of the whole of the plaintiff's claim; and (2) following the judgment of Judge Styler in *Pyne-Edwards v Moore Large & Co*, that the failure to serve an admission in Form N9 was irrelevant. Leave to appeal to this court was given to the plaintiff by the single Lord Justice on 30 July 1997. g  
h

3. As there was no admission in Form N9, and since the defence delivered on behalf of the defendants was not an admission of the whole of the plaintiff's claim, for the reasons we have given in the main judgment this appeal is allowed with costs here and below. There will be a declaration that the action as not been struck out pursuant to Ord 9, r 10. The costs below will be on county court scale 2, with a certificate for counsel. j

*(6) Tomkins v Griffiths*

- a 1. On 29 September 1994 the plaintiff was injured, and her car was damaged, in a road traffic accident. The defendant was the owner and driver of the other car involved in the accident. On 1 February 1995 a default summons against the defendant was issued in the Altrincham County Court and this, with particulars of claim, was served on the defendant on 13 February 1995. No admission or  
b defence in Form N9 was served, but on 15 February 1995 a defence in the following terms was delivered on behalf of the defendant:

c 'For the purpose of this action only, it is admitted that the Defendant is liable to compensate the Plaintiff in respect of some loss or damage, arising as a result of the Defendant's negligence on 29th September 1994, but the Defendant denies the Plaintiff has suffered injury or loss and damage to the extent set out in the particulars of claim.'

- d 2. On 15 February 1995 the court issued a notice that the automatic directions under Ord 17, r 11 were applicable to the proceedings. On 3 March 1995 the defence was amended to include an allegation that the plaintiff had failed to mitigate her loss. On 9 December 1996 the defendant applied for a declaration that the plaintiff's claim was struck out under Ord 9, r 10. The deputy district judge dismissed the application on 14 January 1997 and on 25 April 1997 Judge Eaglestone dismissed the defendant's appeal. The judge held: (1) that the defence delivered did amount to an admission of the whole of the plaintiff's claim; but (2) the failure by the defendant to complete Form N9 was fatal to her claim that the  
e action had been struck out under Ord 9, r 10. The judge's reasoning on the second point anticipated with some prescience our own judgment on this issue.

3. Leave to appeal was given to the defendant by the single Lord Justice on 14 August 1997.

- f 4. For the reasons given in the main judgment the judge was wrong on the first point, but correct in her second finding. Accordingly this appeal is dismissed with costs.

*Appeals allowed in Limb v Union Jack Removals and anor, Pyne-Edwards v Moore Large & Co Ltd and Smith v Brothers of Charity Services; appeals dismissed in Partington v Turners Bakery and Tomkins v Griffiths; application dismissed in McGivern v Brown.*

g

Dilys Tausz Barrister.

## Note

### Watkins v Toms

COURT OF APPEAL CIVIL DIVISION

LORD WOOLF MR, JUDGE AND SAVILLE LJJ

31 JULY 1996

*County court – Practice – Striking out – Striking out default action after 12-months where admission delivered but no judgment entered – Meaning of admission – CCR Ord 9, r 10.*

#### Cases referred to in judgments

*Heer v Tutton* [1995] 4 All ER 547, [1995] 1 WLR 1336, CA.

*Parrott v Jackson* [1996] PIQR P394, CA.

#### Cases referred to in skeleton arguments

*Gardner v Southwark London BC* (19 April 1994, unreported).

*Rankine v Garton & Sons Co Ltd* [1979] 2 All ER 1185, CA.

*Webster v Ellison Circlips Group Ltd* [1995] 4 All ER 556, [1995] 1 WLR 1447, CA.

#### Notes

For defence, counterclaim and admission in county court proceedings, see 10 *Halsbury's Laws* (4th edn) paras 219–234.

#### Appeal

The plaintiff appealed with leave granted by the Court of Appeal (Russell LJ and Hale J) from the decision of Judge Morgan made on 31 May 1995 dismissing the plaintiff's appeal from the order of District Judge Rachel Evans made on 3 May 1995 that the action had been struck out, on the defendant's application, by virtue of CCR Ord 9, r 10. The facts are set out in the judgment of Judge LJ.

*David Balcombe* (instructed by *Ray Lewis Jones & Bracey*, Newport) for the plaintiff.  
*Thomas McDermott* (instructed by *Rausa Mumford*, Cardiff) for the defendant.

**JUDGE LJ** (giving the first judgment at the invitation of Lord Woolf MR). On 30 May 1989 the plaintiff was travelling as a passenger in a car driven by the defendant in Cwbran, Gwent, when it collided with a car travelling in the opposite direction. On 29 May 1992 by issuing a default summons (amount not fixed) the plaintiff began proceedings in the Newport County Court for damages for injuries and loss sustained in the accident. On 28 July 1992 the defence was filed. Liability to the plaintiff was expressly admitted. No admissions were made as to the injuries, loss and damage alleged in the particulars of claim. The plaintiff was put to strict proof of these matters.

Subsequently, the defendant voluntarily made a number of interim payments, naturally indicating that they would be offset against the plaintiff's claim when it was finalised. At least one was made after 30 May 1993. Subsequently, consent orders were made for lists of documents and the schedule of special damage to be supplied. On 4 October 1994 a payment into court was made which, with the



a interim payments to date, was stated to be sufficient to satisfy the plaintiff's entire claim, including interest.

b On 9 February 1995 the defendant applied that the action should be struck out for non compliance with CCR Ord 9, r 10 and for failure to set the action down for hearing in accordance with the automatic directions procedure under Ord 17, r 11. The plaintiff immediately applied for judgment and an order that damages should be assessed.

c On 3 May 1995 District Judge Rachel Evans concluded that the action had been struck out by virtue of Ord 9, r 10. The plaintiff's appeal against this decision was dismissed by Judge Glyn Morgan on 31 May 1995. The application under Ord 17, r 11 remained in abeyance. The plaintiff now appeals with the leave of this court.

The appeal is concerned with the proper construction and effect of CCR Ord 9, r 10, which provides:

d 'Where 12 months have expired from the date of service of a default summons and—(i) no admission, defence or counterclaim has been delivered and judgment has not been entered against the defendant, or (ii) an admission has been delivered but no judgment has been entered under rule 6(1) or, as the circumstances may require, no notice of acceptance or non-acceptance has been received by the proper officer, the action shall be struck out and no enlargement of the period of 12 months shall be granted under Order 13, rule 4.'

e The 12-month period in this case expired on 30 May 1993. The provision is draconian. If the case falls within its ambit, the order for striking out follows automatically on the making of an application. Even if the parties agree, retrospective extension of the 12-month period is precluded (*Heer v Tutton* [1995] 4 All ER 547, [1995] 1 WLR 1336). For present purposes it is unnecessary to consider further the questions raised in that decision about the very limited circumstances in which there may be a prospective extension by consent or, possibly, an application by the plaintiff under Ord 13, r 4 before the expiry of the 12-month period.

f As a defence had been served, the application under Ord 9, r 10 depended on the second of the alternative grounds that, notwithstanding the delivery of an admission, no judgment had been entered by the plaintiff. In order to assist in the analysis of this ground counsel on each side helpfully drew attention to a number of the provisions in Ord 9 to support their rival contentions that an admission had or had not been delivered. 'Admission' is defined in Ord 9, r 2(2), but only for the purposes of Ord 9, rr 2, 3 and 6 and, therefore, not r 10 itself, as 'the relevant form appended to the summons completed according to the circumstances of the case'. 'Admission' is further defined for the purposes of the Order, '... unless the context otherwise requires', in much wider terms in Ord 9, r 17 as meaning:

g 'any document which shows that the defendant desires ... (b) to admit the whole or any part of the plaintiff's claim or ask for time for payment of the amount admitted and costs ...'

j The respective arguments focused closely on these distinctions. Whatever else it was, the defence served by the defendant was not the relevant form, N9. On that basis the provisions of Ord 9, r 6 did not arise. Equally, if in deciding whether the plaintiff's claim was admitted in whole or in part, any document or documents could be considered, the defendant drew attention to the letters

passing between solicitors referring to the arrangements for voluntary interim payments which it is argued plainly amount to an admission. a

The difficulty created by these inconsistent definitions is that Ord 9, r 10(ii) takes effect when the plaintiff has failed to enter judgment, not generally but expressly, under Ord 9, r 6(1) in which 'admission' is subject to the narrow definition in Ord 9, r 2(2). One consequence is that Ord 9, r 10 may have the effect that 'admission' in para (i) may attract the wider meaning while that in para (ii) is limited to the narrow one, a surprising conclusion but one reinforced by the reference in that paragraph to the absence of a notice of acceptance or non acceptance which only arises in the context of a prescribed form. In the language of Ord 9, r 17 the context therefore seems to require that the narrow meaning should be applied when Ord 9, r 10(ii) is under consideration. b

In any event, this particular case falls squarely within Ord 9, r 3(7). It is an action for unliquidated damages. The defendant has admitted liability for the claim. He does not admit the amount of the damages and puts the plaintiff to proof. As he did not make an offer to pay a sum acceptable to the plaintiff, the plaintiff was entitled to apply for judgment with damages to be assessed. These provisions are not referred to in Ord 9, r 10 and if it had been intended that they should fall within its ambit the rule would have been drafted accordingly. c

In my judgment, this particular claim was not liable to be struck out merely because the 12-month period referred to in Ord 9, r 10 had elapsed because however 'admission' is defined, the provisions of Ord 9, r 10 did not apply to this case. d

This conclusion is reinforced by the decision of this court in *Parrott v Jackson* [1996] PIQR P394. The court concluded that a defence that pleaded that the relevant road traffic accident with which the litigation was concerned 'was caused by the negligence of the defendant', but made 'no admission in respect of the alleged or any injury, loss and damage', nevertheless did not amount to an admission within the terms of the order. In my judgment, despite Mr McDermott's efforts, it is not possible to distinguish the principle applied in that case or the reasoning behind the decision. e

'... one of the ironies of this case is that the defendant was trying to foist on the plaintiff an alleged outright admission on their own part, which it seems to me the draftsman of the defence was careful not to make unreservedly ... there is no admission here by the defendants within the terms of Ord. 9, r. 10(2) and consequently no basis for a striking-out order under that rule.' (See [1996] PIQR P394 at P399-P400 per Hirst LJ.) f

'A statement of non-admission is no different from a denial in this context.' (See [1996] PIQR P394 at P401 per Pill LJ.) g

For the same reasons the plaintiff's action in this case does not fall within the ambit of the strike out provisions of Ord 9, r 10. h

I should add that in a case where there is some doubt as to the precise effect of the pleaded defence, the same result may be achieved by the plaintiff making an application in an appropriate case either under Ord 9, r 3(7) or Ord 9, r 14. i

This judgment is confined to the issue raised in this particular case. Although it is now stale and should have been resolved much earlier this was a case in which liability was admitted and interim payments were being made to the plaintiff on a voluntary basis. The litigation was being approached with a great deal of realism and common sense by both sides some time after the 12-month j

*a* period had elapsed and when, if the defendant's contentions were right, it was already liable to be struck out. That would have been an unsatisfactory outcome. I should also emphasise that my conclusion is not intended to excuse inefficient and dilatory conduct of litigation. The discretion of the court to strike out such claims in accordance with well-known principles remains undiminished.

*b* **SAVILLE LJ.** I agree.

**LORD WOOLF MR.** I also agree.

*Appeal allowed.*

*c* Dilys Tausz Barrister.



## Chamberlain v Lindon

QUEEN'S BENCH DIVISION

ROSE LJ AND SULLIVAN J

18 MARCH 1998

*Criminal law – Damage to property – Damage to property with intent to damage it – Defence – Lawful excuse – Appellant obstructing respondent's right of way by erecting wall – Respondent demolishing wall – Appellant preferring information against respondent charging him with criminal damage – Whether respondent having lawful excuse – Criminal Damage Act 1971, ss 1(1), 5(2)(b).*

In 1988 C agreed to sell part of his land to L. In 1991, following proceedings for specific performance, C granted L by deed of transfer a right of way over a parcel of land on his property so that L could reach his land from the highway. L considered that that right entitled him to cross the land in whatever direction he chose, and took to driving diagonally across it. C objected, and in July 1995 in order to prevent L from doing so erected a wall along the south-western boundary of the land. In April 1996, after lengthy correspondence between the parties, and after warning C that he would do so, L demolished the wall. C thereupon preferred an information against L, charging him with criminal damage contrary to s 1(1)<sup>a</sup> of the Criminal Damage Act 1971. The justices dismissed the information, holding that L had a lawful excuse under s 5(2)(b)<sup>b</sup> of the 1971 Act because he had destroyed the wall in order to protect a right or interest in his property, and he had honestly believed that the right or interest was in immediate need of protection and that the means adopted were reasonable, having regard to all the circumstances of the case. C appealed by way of case stated, contending, inter alia, (i) that L's act of destroying the wall was not done in order to protect property but for the purpose of avoiding litigation, and (ii) that the justices could not properly come to the conclusion that L's right or interest in property was in immediate need of protection, since the wall had stood for nine months.

**Held** – (1) In determining for the purposes of s 5(2)(b) of the 1971 Act whether a person's act of destruction or damage was done in order to protect his right or interest in property, which included a right of way, the court had to decide, firstly, what was subjectively in that person's mind, and then, secondly, whether objectively on those facts as believed by him that act could amount to something done to protect that right or interest. In the instant case, L's act of demolishing the wall could, on the facts as believed by him, amount to something which was done to protect his right of way, and was therefore his purpose. The fact that he chose abatement to protect his right of way because he hoped to avoid litigation did not convert the avoidance of litigation into his purpose (see p 543 d to g and p 546 g, post); *R v Hill*, *R v Hall* (1989) 89 Cr App R 74 applied.

a Section 1(1) provides: 'A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.'

b Section 5(2)(b), so far as material, is set out at p 540 b c, post

- a (2) Since, on the facts as believed by him, L's right of way was actually being obstructed by the wall, there was a present need to remove it. Moreover, the longer the wall remained, the more urgent was the need to remove it, from L's point of view, to avoid any suggestion of acquiescence in the obstruction. It followed that for the purposes of s 5(2)(b)(i) of the Act L's right of way was in immediate need of protection. The justices had, therefore, been entitled to find that L had a lawful excuse and to acquit him. Accordingly, the appeal would be dismissed (see p 544 c to f and p 546 fg, post).
- b

### Notes

For the offence of damaging property, see 11(1) *Halsbury's Laws* (4th edn reissue) para 594.

- c For the defence of lawful excuse, see *ibid* para 598.

For the Criminal Damage Act 1971, ss 1, 5, see 12 *Halsbury's Statutes* (4th edn) (1992 reissue) 537, 539.

### Cases referred to in judgments

- d *Burton v Winters* [1993] 3 All ER 847, [1993] 1 WLR 1077, CA.  
*Johnson v DPP* [1994] Crim LR 673.  
*Lagan Navigation Co v Lambeg Bleaching, Dyeing and Finishing Co Ltd* [1927] AC 226, [1926] All ER Rep 230, HL.  
*Lane v Capsey* [1891] 3 Ch 411.
- e *Lloyd v DPP* [1992] 1 All ER 982, DC.  
*Moffett v Brewer* (1848) Iowa Rep (1 Greene) 348, SC.  
*R v Hill, R v Hall* (1989) 89 Cr App R 74, CA.  
*R v Hunt* (1977) 66 Cr App R 105, CA.  
*Stear v Scott* [1992] RTR 226, DC.

### f Case stated

Conrad Joseph Chamberlain appealed by way of case stated by the justices sitting at Nuneaton Magistrates' Court from their adjudication on 4 December 1996, whereby they dismissed an information preferred by the appellant against the respondent, Colin Earnest Lindon, alleging that the respondent had, without

- g lawful excuse, destroyed a garden wall belonging to the appellant contrary to s 1(1) of the Criminal Damage Act 1971. The questions for the opinion of the High Court were: (i) whether on the facts found proved the justices were entitled to find that the respondent had a lawful excuse for the purposes of s 5(2)(b) of the Criminal Damage Act 1971, and (ii) whether on the facts found proved the
- h justices were entitled to acquit the respondent. The facts are set out in the judgment of Sullivan J.

*Brian Dean* (instructed by *Willson Hawley & Co*, Nuneaton) for the appellant.  
*Martin Forde* (instructed by *Newsome Vaughan*, Coventry) for the respondent.

- j **SULLIVAN J** (giving the first judgment at the invitation of Rose LJ). Mr Chamberlain appeals by way of case stated against a decision of Nuneaton Magistrates' Court dismissing an information preferred by him against the respondent, Mr Lindon, alleging that the respondent had, without lawful excuse, destroyed a new garden wall belonging to the appellant, contrary to s 1(1) of the Criminal Damage Act 1971.

After a five-day hearing the magistrates dismissed the information because they were of the opinion that the respondent had a lawful excuse under s 5(2)(b) of the 1971 Act. a

Section 5 applies to offences under s 1(1) and so far as material provides:

‘... (2) A person charged with an offence to which this section applies shall, whether or not he would be treated for the purposes of this Act as having a lawful excuse apart from this subsection, be treated for those purposes as having a lawful excuse ... (b) if he destroyed ... the property in question ... in order to protect property belonging to himself ... or a right or interest in property which was or which he believed to be vested in himself ... and at the time of the act or acts alleged to constitute the offence he believed—(i) that the property, right or interest was in immediate need of protection; and (ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all of the circumstances. b

(3) For the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held. c

(4) For the purposes of subsection (2) above a right or interest in property includes any right or privilege in or over land, whether created by grant, licence or otherwise ...’ d

The magistrates concluded that the respondent had a lawful excuse under s 5(2)(b) because—

‘(a) he had destroyed the wall in order to protect a right or interest in his property which he had believed to be vested in himself; (b) he had honestly believed that the right or interest was in immediate need of protection; (c) he had honestly believed that the means adopted were reasonable, having regard to all the circumstances of the case.’ e

The magistrates pose two questions for the opinion of this court: f

‘(i) Were we on the facts found proved entitled to find that the Respondent had a lawful excuse for the purposes of s 5(2)(b) of the Criminal Damage Act 1971? (ii) Were we on the facts found proved entitled to acquit the Respondent?’ g

Although, as a matter of form, this appeal comes before the court by way of case stated from the magistrates in a criminal matter, it is in substance a dispute between two neighbours as to their respective rights under the civil law and should have been resolved, in so far as litigation was required at all, in the county court. h

A criminal prosecution was, in my view, a manifestly inappropriate procedure to adopt in the circumstances which I will now describe by way of summarising the very detailed findings of fact made by the magistrates. i

Mill Farmhouse and the Mill are two adjacent properties in Mill Lane, Fillongley. Both had been in the appellant’s ownership since the mid-1980s. He agreed to sell the Mill to the respondent in 1988. To obtain access to the Mill from the highway it is necessary to cross a parcel of land measuring 26 feet by 12 feet, which was retained as part of Mill Farmhouse. j

The parcel of land is shown coloured brown on the plan before the court and was referred to by the magistrates as the ‘brown land’.

Following proceedings for specific performance, the appellant, by deed of transfer, in May 1991 granted the respondent the right to pass and repass over and



a along the roadway shown coloured brown on the said plan, ie over the brown land.

Since 1988 the respondent had used the brown land to gain both pedestrian and vehicular access to the Mill. The brown land is aligned roughly along a north-west south-east axis.

b The respondent had taken to driving diagonally across the brown land (that is to say in approximately an east to west direction) to gain access to his property. Because of landscaping work undertaken by him on his own land it was not possible for him to drive into the Mill from the north-western end of the brown land.

c The appellant formed the view that the respondent was not entitled to gain access to the Mill by driving diagonally over the brown land. Extensive correspondence ensued and in July 1995 the appellant laid the foundations of a wall along the south-western boundary of the brown land which would have the effect of preventing the respondent from driving diagonally over it. The respondent promptly drove his vehicle over the foundations and parked it on land belonging to the Mill immediately behind where the wall would be, so it d would be trapped if the wall was built.

The wall was built and was completed in July 1995 at a cost of £1,800 leaving the respondent's vehicle trapped behind it.

e The respondent complained to the appellant, contending, inter alia, that he had a right of access in whatever direction he chose across the full width of the brown land. The wall not merely prevented him from gaining access to the Mill in a diagonal direction across the brown land, it also reduced the width of the brown land by some 2 foot 9 inches to 9 foot 3 inches since it was built wholly upon the brown land.

f There were also discussions and correspondence with the council as to the effect of the wall on a public footpath. Those discussions are not relevant for present purposes.

Following extensive correspondence the respondent gave notice that he would demolish the wall unless the appellant did so. The appellant did not and so the respondent was as good as his word and demolished the wall on 20 April 1996.

The magistrates found the following facts:

g '(w) The Respondent in destroying the wall did so in order to protect a right or interest in property that he believed to be vested in himself, namely his right to pass at a tangent by vehicle from the boxed brown area on the Plan onto his own adjoining land and also to use the full width of that area. (x) At the time of destroying the wall, the Respondent believed:—(i) That the right or interest was in immediate need of protection and; (ii) That the means of protection adopted were reasonable having regard to all the circumstances. (y) Both the above beliefs were honestly held by the Respondent in that at the time of demolishing the wall the respondent believed:—(a) that his right or interest was in immediate need of protection—that if he did not take immediate action he would be seen as accepting the situation which could ultimately lead to the relinquishing of part or all of his rights of access. j The Respondent had entered into correspondence with the Appellant and his solicitors regarding the matter which lasted for almost a year and which was ongoing at the time of the incident. The Respondent could see no end to the dispute. This view was based on his experience of 8 years protracted, continuing and expensive litigation with [the appellant] ...'

Mr Dean, on behalf of the appellant, originally challenged the magistrates' decision on four grounds. He no longer pursues the first of those grounds and puts forward the fourth as being simply supportive of the third ground. a

By way of background I mention that the first ground was a contention that the respondent's right to pass over the brown land onto his own land was not a right that he was entitled to protect under s 5(2)(b). Mr Dean's concession that he can no longer pursue that ground is plainly correct in view of the provisions of s 5(4), which I have already read and which provides that a right or interest in property for the purpose of s 5(2)(b) includes: '... any right or privilege in or over land, whether created by grant, licence or otherwise.' As Mr Forde's skeleton argument for the respondent submits: a right of way falls squarely within that definition. b

Although this court is concerned with matters of civil law only to the extent that it is necessary to decide whether the magistrates were justified in their conclusion that the respondent had a lawful excuse, one does not have to conduct a very elaborate investigation into the civil law to appreciate that obstructing a right of way is a nuisance and that the dominant owner, in this case the respondent, may in principle enter the land of the servient owner, the appellant, to abate the nuisance by removing the obstruction: see 14 *Halsbury's Laws* (4th edn) para 134 and *Gale on Easements* (16th edn, 1997) para 14-02ff. c

In *Lloyd v DPP* [1992] 1 All ER 982 at 989 Nolan LJ referred to the judgment of Kerr LJ in *Stear v Scott* [1992] RTR 226 in which the latter said that the ancient remedies of self-help should be carefully scrutinised in the present day and certainly not extended. d

It requires no extension of the remedy of abatement to say that a person who finds his right of way obstructed may in principle remove that obstruction. I say 'in principle' because of certain observations of the Court of Appeal in *Burton v Winters* [1993] 3 All ER 847, [1993] 1 WLR 1077, which was also referred to by Mr Dean and to which I will turn when I consider his fourth ground of challenge. e

Under s 5(2)(b) one is entitled to protect not merely property but a right or interest in property. Since a person entitled to the benefit of a right of way may, as a matter of civil law, remove any obstruction to the way, it would indeed have been surprising if he did not have the protection of s 5(2)(b) if, in so doing, he necessarily destroyed or damaged the obstruction. f

I turn to the second ground of challenge to the magistrates' decision. Mr Dean submits that the respondent's act of destroying the wall was not done in order to protect property but was done for the purpose of avoiding litigation. g

He submits that the question whether a particular act of destruction was done in order to protect property, must be answered by reference to an objective test. In his skeleton argument he referred to a number of cases in support of that proposition. h

In *R v Hunt* (1977) 66 Cr App R 105 at 108 Roskill LJ said:

'... we have to ask ourselves whether, whatever the state of this man's mind and assuming an honest belief, that which he admittedly did was done in order to protect this particular property, namely the old people's home in Hertfordshire?' j

In that case the appellant had been charged with arson contrary to s 1(1) of the 1971 Act. On his own case he had set fire to a room in an old people's home to draw attention to a defective fire alarm system. The judge withdrew the defence

a of lawful excuse from the jury. The Court of Appeal held that he was right to do so.

b In *R v Hill, R v Hall* (1988) 89 Cr App R 74 the appellants had hacksaw blades which were intended to be used to cut a chain link fence which surrounded a United States defence establishment. Their 'lawful excuse' was that this would encourage the United States authorities to withdraw from the base, that removal of the base would reduce the risk of a nuclear attack and hence protect their homes. The Court of Appeal concluded that the objective of protection was far too remote from the intended damage to the defence establishment.

c In his skeleton argument Mr Dean also cited *Johnson v DPP* [1994] Crim LR 673 where the Divisional Court of the Queen's Bench Division decided that a squatter's purpose in chiselling the locks off a door and replacing them with his own locks, was not to protect the squatter's own belongings, but to enable him to gain access to the premises and to bring his bed into the premises.

I have mentioned the facts of those cases to show how very far removed they are from the facts of the present case.

d In *R v Hill, R v Hall* Lord Lane CJ clarified the nature of the two stage test in cases such as this. First one decides what was in the respondent's own mind; the subjective stage. Second one decides, objectively, whether it can be said that on those facts, as believed by the respondent, demolishing the wall could amount to something done to protect his right of way. Mr Dean concedes that demolishing the wall was capable of protecting property, but he says it was done for an additional purpose, to avoid litigation and if there is a dual purpose then the objective test is not met.

e I agree with Mr Forde that it is plain, on the facts as found by the justices, that what the respondent did, namely demolishing the wall, could on the facts, as believed by him (namely that he was entitled to exercise a right of way which was being obstructed by the wall) amount to something which was done to protect his right of way: see in particular finding of fact (w).

f No doubt he hoped to avoid litigation. He could have sought to protect his right of way either by recourse to litigation or by way of abatement. The fact that he chose the latter does not mean that his act of destroying the wall was not done to protect his right of way on the facts as he saw them. His purpose was to protect the right of way. He chose the means of abatement because he hoped to avoid litigation. That does not convert the avoidance of litigation into his purpose.

g I turn then to the third ground of challenge raised by Mr Dean, which he put forward as his primary ground.

h He submits that the justices could not properly come to the conclusion that the respondent's right or interest in property was in immediate need of protection, as required by s 5(2)(b)(i).

He referred the court to dicta of Lord Lane CJ in *R v Hill, R v Hall* (1988) 89 Cr App R 74 at 79–80. Having dealt with the subjective test Lord Lane CJ went on to say:

j "The second half of the question was that of the immediacy of the danger. Here the wording of the Act, one reminds oneself, is as follows: She believed that "the property ... was in immediate need of protection." Once again the judge had to determine whether, on the facts as stated by the applicant, there was any evidence on which it could be said that she believed there was a need of protection from immediate danger. In our view that must mean evidence that she believed that immediate action had to be taken to do something



which would otherwise be a crime in order to prevent the immediate risk of something worse happening. The answers which I have read in the evidence given by this woman (and the evidence given by the other applicant was very similar) drives this Court to the conclusion, as they drove the respective judges to the conclusion, that there was no evidence on which it could be said that there was that belief.' a

Those observations were of course entirely appropriate in the circumstances of that case. They should not be taken out of that context and construed as though they were within an enactment of general applications. b

The appellants in those cases had professed to be concerned as to the potential consequences of a possible nuclear attack in the future. Here, on the facts, as believed by the respondent, his right of way was actually being obstructed. As Mr Forde points out it was not a case of a risk of there being an obstruction at some future speculative date, there was a present need to remove the obstruction. The respondent was not destroying or damaging property as some sort of pre-emptive strike to prevent some future obstruction. c

Mr Dean submits that the wall had stood for nine months, and asks rhetorically, 'why then was there an immediate need to destroy it in April 1996?' In my view the respondent is not to be penalised for his attempt, through correspondence, to persuade the appellant to remove the wall. So long as the wall remained it was, on the facts as believed by the respondent, an obstruction to his right of way, and so there was an immediate need to remove it. d

The magistrates found that he took the view, based on his experience with the appellant, that litigation would be protracted, and whilst it lasted the obstruction would remain. e

As Mr Forde points out, for the reasons given in para 2(y)(a) of the case stated (which I have already read), the longer the wall remained the more urgent the need, from the respondent's point of view, to remove it, to avoid any suggestion of acquiescence in the obstruction. f

Finally I turn to Mr Dean's fourth ground of challenge, which he advances not as a separate ground but in support of his third ground. He submits that at the worst the respondent had suffered a civil wrong and what he should have done is pursue a civil remedy in the civil courts, as Nolan LJ said in *Lloyd v DPP* [1992] 1 All ER 982 at 992: 'That is what they are there for. Self-help involving the use of force can only be contemplated when there is no reasonable alternative.' g

Mr Dean accepts that it is not necessary in order to establish a defence under s 5 for the respondent to have exhausted all his civil remedies, but he refers by way of analogy to the Court of Appeal decision in *Burton v Winters* [1993] 3 All ER 847, [1993] 1 WLR 1077. In that case a garage wall had been built along the boundary between the plaintiff's and the defendants' properties so that half of it was on the plaintiff's land. She tried to get a mandatory injunction requiring the defendants to demolish the wall which would of course have had the effect of demolishing the garage also. h

Her claim was dismissed by the courts but she refused to take no for an answer. She tried to obstruct the defendants' access to the garage by building a wall in front of it on the defendants' side of the boundary line. When that failed she repeatedly damaged the garage. The defendants were granted an injunction restraining her from such conduct, which she repeatedly flouted. Eventually she was committed to prison for two years for contempt. I mention those facts to j

a show that it was something of an extreme case, even in the context of boundary disputes between neighbours.

Lloyd LJ ([1993] 3 All ER 847 at 851, [1993] 1 WLR 1077 at 1081) with whom Connell J agreed, said:

b 'Ever since the assize of nuisance became available, the courts have confined the remedy by way of self-redress to simple cases such as an overhanging branch, or an encroaching root, which would not justify the expense of legal proceedings, and urgent cases which require an immediate remedy. Thus, it was Bracton's view that where there is resort to self-redress, the remedy should be taken without delay. In 3 Bl Com (17th edn, 1830) p 5 we find: "And the reason why the law allows this private and summary method of doing one's self justice, is because injuries of this kind, c which obstruct or annoy such things as are of a daily convenience and use, require an immediate remedy; and cannot wait for the slow progress of the ordinary forms of justice."'

d Lloyd LJ ([1993] 3 All ER 847 at 852, [1993] 1 WLR 1077 at 1081) referred to a number of academic writers, specifically *Prosser and Keeton on the Law of Torts* (5th edn, 1984) p 641, which says:

e 'Consequently the privilege [of abatement] must be exercised within a reasonable time after knowledge of nuisance is acquired or should have been acquired by the person entitled to abate; if there has been sufficient delay to allow resort to legal process, the reason for the privilege fails, and the privilege with it.'

Lloyd LJ ([1993] 3 All ER 847 at 852, [1993] 1 WLR 1077 at 1081) went on:

f 'The authority cited for this proposition is *Moffett v Brewer* (1948) Iowa Rep (1 Greene) 348 at 350 where Greene J said: "This summary method of redressing a grievance, by an act of an injured party, should be regarded with great jealousy, and authorised only in cases of particular emergency, requiring a more speedy remedy than can be had by the ordinary proceedings at law."'

g He then applied that stream of authority to the facts of the case before him, making the point that not only was there ample time for the plaintiff to wait for the slow process of the ordinary course of justice, she actually did so. He then referred to the House of Lords decision in *Lagan Navigation Co v Lambeg Bleaching, Dyeing and Finishing Co Ltd* [1927] AC 226 at 244, [1926] All ER Rep 230 at 238 per h Lord Atkinson. That was authority for the proposition that the law does not favour the remedy of abatement. In conclusion he said:

j 'In my opinion, this never was an appropriate case for self-redress, even if the plaintiff had acted promptly. There was no emergency. There were difficult questions of law and fact to be considered and the remedy by way of self-redress, if it had resulted in the demolition of the garage wall, would have been out of all proportion to the damage suffered by the plaintiff. But, even if there ever had been a right of self-redress, it ceased when Judge Main refused to grant a mandatory injunction. We are now in a position to answer the question left open by Chitty J in *Lane v Capsey* [1891] 3 Ch 411. Self-redress is a summary remedy, which is justified only in clear and simple cases, or in an emergency. Where a plaintiff has applied for a mandatory

injunction and failed, the sole justification for a summary remedy has gone. The court has decided the very point in issue. This is so whether the complaint lies in trespass or nuisance.' (See [1993] 3 All ER 847 at 852, [1993] 1 WLR 1077 at 1082).

It will be noted that the final matter referred to by Lloyd LJ in that case would have been sufficient to dispose of the appeal. The plaintiff had sought and had been refused a mandatory injunction. She could not thereafter resort to self-help. That circumstance does not apply here.

I find it unnecessary to decide whether, as a matter of civil law, the present case is properly described as a clear and simple case. Demolishing a garage which projects very slightly into one's land may well be a very different matter on the facts from demolishing a wall if it obstructs a right of way.

It is unnecessary to reach a conclusion as to whether the respondent's self-help was justified as a matter of civil law on the facts of this case, because the appellant chose to take proceedings in the criminal courts. Rather than suing the respondent for trespass he preferred an information charging the respondent with criminal damage. I have already indicated that, in my view, criminal proceedings were inappropriate. At worst a civil wrong had been committed, either nuisance by the appellant or trespass by the respondent. It should have been for the civil courts to decide which.

In the criminal context the question is not whether the means of protection adopted by the respondent were objectively reasonable, having regard to all the circumstances, but whether the respondent believed them to be so, and by virtue of s 5(3) it is immaterial whether his belief was justified, provided it was honestly held.

On the facts found by the justices there can be no doubt that the respondent honestly believed that the means he adopted were reasonable in all of the circumstances of this case.

For these reasons I would answer each of the two questions posed by the justices in the affirmative and would dismiss this appeal.

**ROSE LJ.** I agree with both Sullivan J's conclusions and his process of reasoning in reaching those conclusions. Accordingly, this appeal is dismissed.

*Appeal dismissed.*

Dilys Tausz Barrister.



## a Edge and others v Pensions Ombudsman and another

CHANCERY DIVISION

SIR RICHARD SCOTT V-C

b 10, 11 NOVEMBER, 5 DECEMBER 1997

*Pension – Pension scheme – Maladministration of pension scheme – Jurisdiction of Pensions Ombudsman – Exercise of jurisdiction of Pensions Ombudsman – Trustees of pension scheme amending rules by deed of amendment – Pensions Ombudsman holding that trustees had acted in breach of trust and directing deed of amendment to be set aside – Deed of amendment depriving members who were not parties to proceedings of proprietary rights to which they were entitled – Whether ombudsman having jurisdiction to set aside deed of amendment – Whether trustees under duty to act impartially when exercising discretionary powers between various beneficiaries – Whether trustees who were members in service accountable for any benefit resulting from exercise of discretion because of conflict of interest – Pension Schemes Act 1993, s 146.*

By deed dated 17 August 1993 the trustees of the pension scheme, under which contributions were payable both by the employers and the employee members, made certain amendments to the rules, reducing the contributions to be paid by members and providing an additional pension for the members in service at 1 April 1994. A number of pensioners complained that the amendments were unjust and took their complaint to the Pensions Ombudsman, inviting him to exercise his powers under Pt X of the Pension Schemes Act 1993. There was no oral hearing. An adequate opportunity to comment on the complaints was duly given to the trustees but not to anyone else. On 14 July 1997 the ombudsman gave a written determination of the complaint: he held that the trustees had acted in breach of trust in making the amendments in question and that the additional pension benefit and the reductions in members' contributions had not been validly introduced; and he directed that the scheme should be administered on the basis of the rules as they stood prior to the deed of amendment, effectively depriving members who were not parties to the proceedings and were not bound by the determination of proprietary rights to which they were apparently entitled. The trustees appealed, contending that the long and careful consideration they had given to the amendments to the rules had been appropriate and proper and that their decision, taken on 30 April 1993, was within their powers and validly reached. They also appealed against the ombudsman's determination that the trustees who were members in service were accountable for any benefits to which they had already or might in future become entitled under the deed of amendment, since they would be benefiting from a conflict of interest and duty.

*Held* – (1) By virtue of s 146(1) and (2)<sup>a</sup> of the Pension Schemes Act 1993, the Pensions Ombudsman had jurisdiction to entertain any complaint of maladministration and to determine any dispute of fact arising out of any such complaint. However, he should not entertain a complaint or a dispute of fact or law except in circumstances in which those whose proprietary interest would be

a Section 146, so far as material, is set out at p 551 b c, post

adversely affected by his determination of the issues had had a fair opportunity to make representations in defence of their interests and where they would be bound by his determination. Accordingly, the ombudsman had no power, in a case of alleged breach of trust, to direct remedial steps to be taken that were not steps that a court of law could properly have directed to be taken. In the instant case, having regard to the respective positions of the employee members and the employers, the ombudsman had no power to order the deed to be set aside or direct the trustees to take steps that could only be justified on the basis that it had been set aside (see p 554 a to e, p 555 a to f and p 575 g to p 576 c, post); *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862 applied.

(2) Moreover, references to a duty of impartiality were inapposite where what was at issue was a discretionary power to choose between different beneficiaries. Although a judge might disagree with the manner in which the trustees had exercised their decision, he could not interfere unless they had taken into account irrelevant, improper or irrational factors, or their decision was one that no reasonable body of trustees properly directing themselves could have reached. In the instant case, the Pensions Ombudsman's findings did not justify the conclusion that the trustees' decision was taken in breach of trust (see p 567 j to p 568 c g to j, p 569 h j, p 570 a to c, p 571 e to j, p 572 c and p 576 c, post); *Re Londonderry's Settlement*, *Peat v Walsh* [1964] 3 All ER 855 considered.

(3) Furthermore, in circumstances where the rules contemplated that, as trustees, the employee members would from time to time have to exercise discretion in which their duty and interest might conflict, there was no rule of equity which required them to account for the benefits that a proper exercise of discretionary powers might produce for them. Accordingly, the member trustees were not accountable for benefits accruing to them, whether in respect of reduced contributions or the additional service benefit as a result of their decision taken on 30 April 1993 (see p 573 d to h, p 575 f and p 576 c, post); *Sargeant v National Westminster Bank plc* (1990) 61 P & CR 518 applied.

## Notes

For occupational pension schemes generally, see 33 *Halsbury's Laws* (4th edn) para 973.

For the Pension Schemes Act 1993, s 146, see 33 *Halsbury's Statutes* (4th edn) (1997 reissue) 758.

## Cases referred to in judgment

*Cowan v Scargill* [1984] 2 All ER 750, [1985] Ch 270, [1985] 3 WLR 501.

*Drexel Burnham Lambert UK Pension Plan*, Re [1995] 1 WLR 32.

*Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862.

*Kirkness (Inspector of Taxes) v John Hudson & Co Ltd* [1955] 2 All ER 345, [1955] AC 696, [1955] 2 WLR 1135, HL.

*Londonderry's Settlement*, Re, *Peat v Walsh* [1964] 3 All ER 855, [1965] Ch 918, [1965] 2 WLR 229, CA.

*Miller v Stapleton* [1996] 2 All ER 449.

*Sargeant v National Westminster Bank plc* (1990) 61 P & CR 518, CA.

*Westminster City Council v Haywood* [1996] 2 All ER 467, [1996] 3 WLR 563.

*Wild v Pensions Ombudsman* (1996) Times, 17 April.

## Cases also cited or referred to in skeleton arguments

*Bray v Ford* [1896] AC 44, [1895–9] All ER Rep 1009, HL.

*Courage Group's Pension Schemes*, Re [1987] 1 All ER 528, [1987] 1 WLR 495.

- a* *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 2 All ER 597, [1991] 1 WLR 589.  
*Kerr v British Leyland (Staff) Trustees Ltd* [1986] CA Transcript 286.  
*Lloyds Bank plc v Duker* [1987] 3 All ER 193, [1987] 1 WLR 1324.  
*Lock v Westpac Banking Corp* [1991] 1 PLR 167.  
*LRT Pension Fund Trustee Co Ltd v Hatt* [1993] PLR 227.
- b* *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513, [1990] 1 WLR 1587.  
*Portland (Duke) v Topham* (1864) 11 HL Cas 32, 11 ER 1242.  
*Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378, [1967] 2 AC 134, HL.  
*Stannard v Fisons Pensions Trust Ltd* [1991] IRLR 27, CA.  
*Target Holdings Ltd v Redferns (a firm)* [1995] 3 All ER 785, [1996] AC 421, HL.  
*Taylor v Lucas Pensions Trust Ltd* [1994] PLR 9.
- c* *Thrells Ltd (in liq) v Lomas* [1993] 2 All ER 546, [1993] 1 WLR 456.  
*Vyse v Foster* (1874) LR 7 HL 318.

### Originating motion

- By originating motion dated 8 August 1997 the trustees of the ITB Pensions Funds (the ITB trustees) appealed from the decision of the first respondent, the Pensions Ombudsman, made on 14 July 1997, whereby: (i) he held that the decision of the ITB trustees at their meeting of 9 July 1993, confirmed at their meeting of 30 April 1993 and given effect by a deed of amendment date 17 August 1993 to amend the scheme rules to reduce the contributions to be paid by members and to provide an additional pension benefit for members in service at
- e* 1 April 1994 was a breach of trust and an act of maladministration, because, in making the amendments, the ITB trustees had acted with undue impartiality, they had not acted in the best interests of the beneficiaries as a whole, and they had exercised their power for an improper purpose; (ii) even if the amendments would otherwise be valid, in view of the rule against conflict of interest, the ITB
- f* trustees themselves would not be entitled to the increased benefits payable to them; and (iii) directed that the scheme should be administered on the basis of the rules as they stood prior to the deed of amendment and that the ITB trustees should seek payment of full contributions due from the employers and from members during the period between the date of amendment and the date of his determination. The second respondent, Eric Nicholson, was a pensioner of the
- g* scheme and was treated by the Pensions Ombudsman as lead complainant. He was not represented and took no part in the proceedings. The facts are set out in the judgment.

- David Unwin QC and James Clifford* (instructed by *Richards Butler*) for the ITB
- h* trustees.  
*Tess Gill* (instructed by *John Yolland*) for the Pensions Ombudsman.

*Cur adv vult*

- j* 5 December 1997. The following judgment was delivered.

**SIR RICHARD SCOTT V-C.** The ITB Pension Funds are administered by trustees under scheme rules which came into effect as from 1 April 1975. Under the scheme contributions are payable both by the employers and by the employee members. By deed dated 17 August 1993 the trustees made certain amendments to the rules. The amendments reduced the contributions to be paid by members and provided an additional pension benefit for members in service



at 1 April 1994. A number of pensioners, who were no longer liable to pay contributions and so did not benefit from the reduction in contributions and who, being no longer in service, did not qualify for the additional pension benefit, complained that the amendments were unjust. In February 1994, after representations to the trustees and in various other quarters had failed to achieve anything, they took their complaints to the Pensions Ombudsman and invited him to exercise his powers under Pt X of the Pension Schemes Act 1993. The Pensions Ombudsman took up the complaints, treating Mr Eric Nicholson as the lead complainant. This was in November 1994. On 14 July 1997 the Pensions Ombudsman gave a written determination of the complaint. He held that the trustees had acted in breach of trust in making the amendments in question to the rules and that the additional pension benefit and the reductions in members' contributions had not been validly introduced. He held, too, that consequential reductions in the contributions payable by the employers had not been validly introduced. He directed that the scheme should be administered on the basis of the rules as they stood prior to the deed of amendment and that the trustees should seek payment of the full contributions due, both from employers and from members, during the period between the date of the amendment and the date of his determination. None of the employers nor any of the members was a party to the proceedings before the Pensions Ombudsman. No comment from any of the employers or any of the members on the substance of the complaint or on the relief that might be granted was sought by the Pensions Ombudsman or given. The Pensions Ombudsman was meticulous in inviting comment by the trustees on the complaint, in putting the trustees' responses before the complainant, Mr Nicholson, and in putting Mr Nicholson's responses before the trustees. But the Pensions Ombudsman did not seek or allow the opportunity for comment by anyone else. None the less his determination and the directions he has given, in setting aside as invalid the deed of amendment of 17 August 1993, have purported to deprive an unrepresented class of members of a benefit apparently validly given to them by the deed of amendment and to impose on the employee members and on the employers, all unrepresented, obligations to pay contributions at a level higher than those appearing from the scheme rules, as amended, to be applicable.

The trustees have appealed. Their main contention is that the long and careful consideration they gave to the amendments to the rules was appropriate and proper and that their decision was within their powers and validly reached. There is a subsidiary point. The Pensions Ombudsman has held also, that, because some of the trustees were employee members who would benefit both from the reduction in contribution levels and from the additional pension benefit, they, the trustees in question, would, even if the deed were otherwise valid, have to account to the pension funds for those benefits.

The trustees have appealed against the Pensions Ombudsman's determination. It is that appeal that is before me. The respondents to the appeal are the Pensions Ombudsman and Mr Nicholson. Mr Nicholson, however, has taken no active part. It will have become apparent already that, in addition to the important issues as to the propriety of the trustees' decision to bring into effect the amendments and as to the legal consequence of the conflict of interest attaching to the employee trustees to which the Pensions Ombudsman has drawn attention, the case raises, in my opinion, important and difficult questions as to the scope of the Pensions Ombudsman's jurisdiction and the nature of the

a proceedings he conducts when investigating complaints under Pt X of the 1993 Act. Let me start with those questions.

Section 145 of the 1993 Act provides for the office of Pensions Ombudsman and s 146 empowers him to deal with complaints and disputes:

b '146.—(1) The Pensions Ombudsman may investigate and determine any complaint made to him in writing by or on behalf of an authorised complainant who alleges that he has sustained injustice in consequence of maladministration in connection with any act or omission of the trustees or managers of an occupational pension scheme or personal pension scheme.

c (2) The Pensions Ombudsman may also investigate and determine any dispute of fact or law which arises in relation to such a scheme between—(a) the trustees or managers of the scheme, and (b) an authorised complainant, and which is referred to him by or on behalf of the authorised complainant ...'

d These two subsections and other provisions in Pt X of the 1993 Act have been replaced by provisions contained in the Pensions Act 1995 with effect from an appointed day. The appointed day is, I understand, a date in April 1997. However the provisions substituted by the 1995 Act do not apply to the present case nor do the contents of those provisions cast any light on the jurisdictional problems arising out of the original provisions.

e The breadth of the words in s 146(1) and (2), 'any complaint' and 'any dispute of fact or law', would appear to enable the Pensions Ombudsman to entertain any complaint of maladministration and to determine any dispute of fact or law arising out of any such complaint. This impression is fortified by s 146(6)(c), which provides:

f 'The Pensions Ombudsman shall not investigate or determine a complaint or dispute ... (c) if and to the extent that the complaint or dispute, or any matter arising in connection with the complaint or dispute, is of a description which is excluded from the jurisdiction of the Pensions Ombudsman by regulations under this subsection',

g and by the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1991, SI 1991/588, which have effect as if made under s 146. The regulations specifically exclude certain complaints from those which the Pensions Ombudsman may entertain. None of the exclusions applies to the present case.

Section 146 must be construed in the context of Pt X of the Act taken as a whole but I move on from s 146 with a predisposition to conclude that the Pensions Ombudsman can, subject to the exclusions, entertain 'any complaint'.

h I would add, before leaving s 146, that there is no doubt but that Mr Nicholson, a pensioner member of the scheme, was an 'authorised complainant'.

Section 149 deals with the procedure on an investigation by the Pensions Ombudsman. Subsection (1) requires him—

j '[to] give—(a) the trustees and managers of the scheme concerned, and (b) any other person against whom allegations are made in the complaint or reference, an opportunity to comment on any allegations contained in the complaint or reference.'

Mr Nicholson's complaint made allegations only against the trustees. As I have said an adequate opportunity to comment was duly given to the trustees. It was not given to anyone else.

Section 149(2) empowers the Secretary of State for Social Services to make rules 'with respect to the procedure which is to be adopted in connection with the making of complaints, the reference of disputes, and the investigation of complaints made and disputes referred, under this Part'. Procedural regulations have been made by the Secretary of State under s 149(2) (see the Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053, and the Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Amendment Rules 1996, SI 1996/2638). None of the procedural regulations makes any provision for the joinder or the participation in the investigation of other parties who may have an interest in the complaint and its determination. Regulation 10 of the 1995 regulations enables the Pensions Ombudsman to convene an oral hearing. There was no oral hearing in the present case.

Section 150 includes provisions enabling the Pensions Ombudsman to obtain relevant information and documents from anyone who can supply them. The powers are those which one would expect to find associated with the carrying out of investigations into factual issues that might from time to time be of a complex character.

Section 151 deals with 'Determinations of the Pensions Ombudsman'. Subsection (1) requires a written statement of his determination of a complaint or a dispute and the reasons for it to be sent '(a) to the authorised complainant in question; and (b) to the trustees or managers of the scheme in question'. Subsection (2) empowers the Pensions Ombudsman, where he has made a determination, to 'direct the trustees or managers of the Scheme concerned to take, or refrain from taking, such steps as he may specify in his written statement referred to in subsection (1) or otherwise in writing'. Subsection (3) provides that, subject to an appeal to the High Court on a point of law (see sub-s (4)):

'... the determination by the Pensions Ombudsman of a complaint or dispute, and any direction given by him under subsection (2), shall be final and binding on—(a) the authorised complainant in question; (b) the trustees or managers of the scheme concerned; and (c) any person claiming under them respectively.'

And sub-s (5) provides:

'Any determination or direction of the Pensions Ombudsman shall be enforceable—(a) in England and Wales, in a county court as if it were a judgment or order of that court ...'

Finally, I should refer again to the 1991 regulations, which have effect under s 146. Regulation 2 of these regulations provides:

'(1) The Pensions Ombudsman may ... investigate and determine any complaint or dispute involving an authorised complainant and the employer to which the scheme relates or has related.

(2) Where the Pensions Ombudsman commences an investigation under paragraph (1), the provisions of [Part X of the 1993 Act] shall apply in relation to the employer as they would apply in relation to the trustees or managers of such a scheme.'

So reg 2(2) of the 1991 regulations enables a complaint to be made against an employer, together with or instead of a complaint against the scheme trustees, and enables the Pensions Ombudsman to investigate that complaint. Where that



a happens, the Pensions Ombudsman's determination will be as binding and final against the employer as against the trustees and the complainant (see s 151(3)).

b The problem with the provisions of Pt X of the 1993 Act taken as a whole is that they do not cater at all for a case in which a complaint is made against, say, trustees but in which the remedial steps to be taken if the complaint is well founded will prejudice the position of some third party or parties. Thus, in the present case, the deed of amendment, which on its face appears entirely regular, purports to reduce the contributions to be paid by scheme members who are still in service. It purports to make available to members in service on 1 April 1994 a particular additional benefit. There is no evidence as to whether new employees joined the scheme between 1 April 1994 and 14 July 1997, the date of the determination. But there are likely to have been a number that did. They would c have joined on the basis of an obligation to pay contributions at the reduced level. Existing members of the scheme became, on 1 April 1994, apparently entitled to the additional pension benefit and became, as from 1 October 1993 apparently relieved of the burden of paying contributions at the pre-amendment higher level. If the deed of amendment is valid, these employee members are entitled to d require the trustees to administer the scheme under the rules as amended. The Pensions Ombudsman's determination is not binding on them. It has not been suggested by Ms Gill, counsel for the Pensions Ombudsman, that they fall within s 151(3)(c) as being persons 'claiming under' the trustees. They claim an interest in the scheme funds in their own right as members under the rules. So they are not bound by the determination.

e Consider also the position of employers. If a complaint is made against an employer, the employer will be a party to the investigation by the Pensions Ombudsman. But what is the position in a case in which the complaint is made only against the trustees but the steps to be taken if the complaint succeeds will adversely affect the employer? It is possible to take the view, as a matter of f construction of reg 2(2) of the 1991 regulations, that, provided the complaint is one 'involving' the employer and whether or not the complaint is *against* the employer, the employer will be bound by the determination? I have had no submissions made to me on this point, and indeed neither side referred at all to the 1991 regulations. So it may be common ground that reg 2(2) of the regulations does not apply so as to bind the employers in the present case. But, g in any event, the Pensions Ombudsman has not in his investigation treated the employers as parties. They were not provided with any opportunity to comment on the complaint and details of the complaint were not supplied to them. In short, they were not in any respect treated as respondents to the complaint. Their position is different from that of the employee members in that there is no h route at all, so far as I can see, whereby the Pensions Ombudsman's determination and directions can, in this case or in any other case, be made binding on scheme members other than the complainant; whereas there is, I think, a fair argument, based on reg 2(2) of the 1991 regulations, for the view that if an employer, whether or not the object of a complaint, is 'involved' in the complaint and is treated as a respondent, the Pensions Ombudsman's i determination and directions would be binding on the employer. But that argument does not bite in the present case.

I return to the issue of jurisdiction. Jurisdiction in relation to courts or tribunals can have two alternative meanings. In its strict sense a reference to the jurisdiction of a court or tribunal is a reference to the type of case that the court or tribunal is capable of entertaining. A reference to the jurisdiction of a court or

tribunal is, however, often a reference to the circumstances in which it is proper for a tribunal to entertain a case or to make a particular order. In the strict sense there is, in my opinion, no limit, save such limits as are imposed by regulations made under s 146 of the Act, to the type of complaints of injustice sustained by maladministration or as to the type of disputes of fact or law which arise in relation to a scheme that the Pensions Ombudsman may entertain under s 146(1) and (2). 'Any complaint' presumably means what it says. So does 'any dispute of fact or law'.

On the other hand it would not, in my opinion, be proper for the Pensions Ombudsman to entertain a complaint or a dispute of fact or law except in circumstances in which those whose proprietary interests would be adversely affected by his determination of the issues had a fair opportunity to make representations in defence of their interests and in which they would be bound by his determination. That this should be so follows, both, in my opinion, from an application of ordinary principles of natural justice and also as a matter of construction of the statutory provisions in Pt X of the Act. Since the Pensions Ombudsman's determination is only made binding on those specified in s 151(3), as supplemented by reg 2(2) of the 1991 regulations, Parliament cannot have intended to give him power to determine disputes which involve the rights of others or to direct steps to be taken which adversely affect anyone else. It must follow, in my opinion, that Parliament could not have intended the Pensions Ombudsman to entertain complaints which could only be remedied by such steps or to determine disputes in circumstances in which his determination could not be effective.

Difficulties of this sort received judicial attention from Knox J in *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862. The case arose out of fairly complex arrangements which had been put into effect in order to enable part of the surplus of a pension fund to be transferred to the employer company. A pensioner had made a complaint of maladministration both against the trustees and against the employer company. So both were respondents and there was no problem as to whether the Pensions Ombudsman's determination would bind the employer. It would plainly do so. The Pensions Ombudsman found the complaint to be justified. He held that the steps taken by the trustees to transfer the surplus funds to the employer were in breach of trust and he ordered the employer to repay the transferred funds. He referred in his judgment to two jurisdictional questions that had been raised. The second of them is relevant in the present case. Knox J (at 869) described the question as follows:

'The second question argued was whether the Pensions Ombudsman was limited in his choice of steps which he could lawfully direct to be taken, notably by an employer, to those which that person could be compelled to take by legal proceedings brought by the complainant and other persons (if any) for whose benefit steps could, pursuant to the answer to the first question above, be directed to be taken.'

The question was dealt with by Knox J towards the end of his judgment. He referred to some difference of opinion between two other Chancery judges (see *Miller v Stapleton* [1996] 2 All ER 449 at 465, *Westminster City Council v Haywood* [1996] 2 All ER 467, [1996] 3 WLR 563 and *Wild v Pensions Ombudsman* (1996) Times, 17 April) and then said (at 898):

a     'My own view, in the different context of a complaint against an employer  
in respect of maladministration causing injustice to members in participation  
in a transaction involving the improper payment out of sums which in large  
measure found their way, as they were from the outset intended to do, into  
the employer's hands, is that it would not be permissible for the Pensions  
b     Ombudsman to require the employer to refund the sums it received unless  
the court would be in a position to make such an order.'

I respectfully agree with this approach. In a case in which the  
maladministration complained of consists of an alleged breach of trust, the  
Pensions Ombudsman has no power, in my judgment, to direct remedial steps to  
be taken that are not steps that a court of law could properly have directed to be  
c     taken.

The steps directed to be taken by the trustees in the present case must have  
been based on the premise that the deed of amendment was being set aside. But  
the beneficiaries under the deed, namely the employee members, were not  
parties to the proceedings. The deed could not be set aside as against them. The  
d     setting aside of the deed would increase (subject to a point that I will mention  
later) the amount of the contributions to be paid by the employers. The  
employers, whether or not they might have been treated as parties pursuant to  
reg 2(2) of the 1991 regulations, were given no opportunity to make  
representations. The Pensions Ombudsman did not treat them as parties. In  
e     these circumstances, and having regard to the respective positions of the  
employee members and the employers, a court could not, in my judgment, have  
ordered the deed to be set aside. A court could not have directed the trustees to  
take steps that could only be justified on the footing that the deed had been set  
aside. Nor, in my judgment, could the Pensions Ombudsman do so.

The conclusion expressed above does not, however, dispose of this appeal.  
f     The Pensions Ombudsman has found the trustees guilty of breach of trust. They  
are bound by that finding and have appealed against it. They contend that the  
Pensions Ombudsman so misdirected himself in law that the finding cannot  
stand. There is also his finding regarding the accountability of the trustees who  
are employee members. In order to deal with these issues I must describe the  
facts of the case in much greater detail than has so far been necessary.

g     *The ITB pension scheme and rules*

The scheme was established under a definitive deed dated 20 July 1979. It was  
intended to provide benefits for employees of Industrial Training Boards (ITBs)  
which had been set up under the Industrial Training Act 1964. The ITBs had  
h     charitable status.

Considerable changes were brought about by the government in 1983. Sixteen  
ITBs were abolished and there were many redundancies. One of the effects of  
these changes was that the ITB pension fund was split into a closed fund and an  
open fund with the assets apportioned between the two. The closed fund took  
on liability for the pension benefits of members who left service before 31 March  
j     1982 and of all members leaving service after that date as a result of the 1983  
changes. The open fund took on liability for all other members, namely existing  
employees remaining in service and also new employees. This case is concerned  
only with the open fund.

By the date of the 1993 deed of amendment there were 14 separate employers  
(the employers) participating in the ITB pension scheme. They included private



companies as well as statutory training boards. Under the definitive trust deed the open fund was held by the trustees upon trust to 'hold apply and dispose of the same in accordance with the provisions of this Definitive Trust Deed and the Scheme Rules'. The scheme rules were defined as the 'rules referred to in the Second Schedule hereto as amended from time to time'.

Several of the rules are relevant to the issues raised in the present case, some critically so. The rules in force at the date of the deed of amendment of 17 August 1993 included the following.

(i) Rule 3 provides:

'The main purpose of the Scheme is the provision of retirement and other benefits for employees of Training Boards and Successor Bodies who are Members of the Scheme. The Trust Fund is to be constituted and maintained by means of periodical and other contributions to be made by the Members and by the Employers in accordance with the Rules.'

(ii) Rule 10 deals with employers' contributions:

'10.1 Each of the Employers shall contribute to the Trust Fund within 7 days of the end of each monthly or other accounting period after the Operative Date and whilst it remains one of the Employers such sum as the Actuary shall certify to be the amount which is required in addition to all other contributions of the Employer and the Members in the employment of the Employer, by way of "Employer's Ordinary Contribution" for such month or other period in order to make due provision for the benefits secured by the Scheme in respect of such Members ...'

(iii) Rule 10.1 must be read in conjunction with rr 506 and 602, which deal with members' contributions. Rule 506 applied to new members. Rule 602 applied to members in service on 31 March 1983.

'506.1 ... each Member shall in each contribution year until his service ceases or he has completed 40 years of contribution or he attains his normal retirement date (whichever shall first happen) pay Members' contributions to the Trust Fund at the rate from time to time prescribed by the Managing Trustees and in accordance with this Rule. Until otherwise prescribed as aforesaid, the rate, shall be 6 percent of pensionable salary ...'

Rule 602.1 was in identical terms save that the prescribed rate was 5% of pensionable salary.

'506.4 For the purposes of this Rule (a) the Managing Trustees shall prescribe the contribution rates for each contribution year prior to the commencement thereof; and (b) the Managing Trustees shall in so prescribing act under the advice of the Actuary who shall in the absence of special circumstances preserve such a ratio between the contributions to be made by the Members and those to be made by the Employers' as will ensure that the Employers' contributions will at all times be equal or greater than the contributions to be made by the Members.'

Rule 602.4 was in identical terms.

Rule 10.1 is in terms that are typical of so-called 'balance of cost' schemes under which the employer's contribution liability is to top up the employees' contributions so as to keep the scheme solvent. If and for as long as the scheme is solvent and the members' contributions can keep it so, the employer does not

a have to make any contributions. But r 506.4 (and r 602.4) prevent this scheme from being a true balance of cost scheme. The employers' periodic contributions must at all times be at least equal in amount to the members periodic contributions. If the members, or some of them, are contributing at a rate of 6% of salary, so too must the employers contribute at least at that rate.

b It should be noticed, also, that the rates of contribution depend upon the actuary. The actuary must certify the amount of the contributions required to be paid by the employers in order to make due provision for the scheme liabilities (r 10.1). In calculating the requisite amount the actuary must, obviously, take into account the contributions to be made by the members and that the employers' contributions must be at least as much as the members' contributions. Hence the necessity for rr 506.4 and 602.4, which require the  
c managing trustees to act on the advice of the actuary when prescribing the members' contribution rate for the forthcoming year.

(iv) Rule 203 deals with what is to happen if the trust fund is in surplus or deficit.

d 'If any periodic valuation by the Actuary shall disclose any surplus, deficiency or anticipated deficiency in the Trust Fund, the Managing Trustees shall, having regard to the recommendations of the Actuary under Rule 227.2 and the adoption of the Actuary's report by the Employers ...  
e under Rule 227.5 and with the purpose of maintaining the amount in the Trust Fund in reasonable balance with the liabilities under the Scheme, request the Actuary to make certification under Rule 10 regarding the rate of Employers' Ordinary Contributions to be payable to the Trust Fund.'

f I draw attention to the mandatory 'shall'. The trustees are obliged to request the actuary to certify appropriately under r 10. If the fund is in deficit, the certificate will, presumably, increase the employers' contributions to a figure that at least will render the fund actuarially solvent. If the fund is in surplus, the solution is more complicated. The actuary cannot certify a level of employers' contribution which is lower than the level fixed for members' contributions for the year. He can bring the employers' contributions down to parity with the  
g members' contributions but no lower. Any greater reduction would have to await the next financial year when a lower members' contribution rate for the forthcoming year could be prescribed and, consequently, a lower employers' contribution rate could be certified.

(v) Rule 227 deals with the actuary.

h '... 227.2 The duties of the Actuary shall be: (a) to make such determinations, furnish such certificates and give such advice as are provided for by the Rules; (b) to determine the contributions to be made to the Trust Fund; (c) from time to time at the request of the Employers or the Managing  
j Trustees and in any event not less frequently than three and a half years ... from valuation to valuation to make an actuarial valuation of and report to the Employers and the Managing Trustees upon the Scheme ... together with such recommendations as he may think fit ...

227.4 Every certificate of the Actuary shall be conclusive and binding on all persons interested under the Scheme.'

(vi) Rules 210, 211 and 213 deal with the trustees of the scheme. In r 5 the expression 'the Managing Trustees' is defined as meaning 'the Trustees or Trustee for the time being of the Scheme'.

210.1 The Trustees of the Scheme shall consist of the persons from time to time appointed and holding office as below provided.

210.2 Each of the Boards for the time being participating as an Employer in the Scheme may nominate one individual for appointment as "Board's Trustee" of the Scheme ...

210.3 One individual may also be nominated as below provided from among the Members in the employment of each of the Boards ... as a "Members Trustee" of the Scheme ...

210.8 ... the Management and administration of the Scheme shall be vested in and effected by the Managing Trustees ...

211.2 No person who is not a past or present (i) chairman or (ii) other member of a Board shall be eligible to serve as a Board's Trustee.'

Rules 211.3 and 211.4 provide, in effect, that each members' trustee either is to be nominated by the trade union or unions recognised by the employer in question or, if none is recognised, is to be selected by the members in service with the employer in question.

Under r 213.1, a board's trustee vacates office if, inter alia, the employer who nominated him ceases to participate in the scheme or requires him to vacate office; a members' trustee vacates office if, inter alia, he ceases to be a member of the scheme, or his employer ceases to participate in the scheme or he ceases to be employed by the employer. These vacation of office provisions are of particular relevance to the conflict of interest issue. They show that it is not possible for a member's trustee to be other than an employee member of the scheme. And a board's trustee will hold office only so long as he retains the confidence of the board (or board of directors) that nominated him.

It is apparent, therefore, that the constitution of the scheme contemplated that the scheme would be managed and that the discretions of the trustees would be exercised by senior executives of the participating employers (board's trustees) and by members in service with the participating employers (members' trustees). At present, there are twenty trustees. Nine of these are appointed by employers, nine are appointed by members in service and two are appointed by deferred or pensioner members of the closed fund. Deferred or pensioner members of the open fund play no part in the selection or appointment of trustees.

(vii) Rule 220 provides the familiar protection for the trustees against liability for any mistake or forgetfulness or for any breach of duty or trust unless committed in 'personal conscious bad faith'.

(viii) Rule 208 deals with the winding-up of the scheme. After provision has been made for all liabilities of the scheme and in the event of there being a residual surplus, r 208.6 requires the surplus to be paid out to the employers. There is no power for the trustees to apply any part of the surplus in augmenting the benefits to which members are entitled under the rules.

(ix) Rule 205 provides for amendments to the rules:

205.1 Subject to prior written notification to the Employers the Managing Trustees may from time to time during the Trust Period alter, modify or add to all or any of the provisions of the Definitive Deed or the Rules Provided Always that no such alteration modification or addition shall be made as



a will:—(a) vary the main purpose of the Scheme as declared in r 3; or (b) result in the payment of any part of the Trust Fund to any of the Employers otherwise than on a dissolution of the Scheme (as regards such Employer or generally); or (c) ...

b 205.2 The consent of three-quarters in number of the Employers ... shall be obtained where in the opinion of the Managing Trustees (whose decision shall be final) any benefit liability power or advantage of Employers, Members or Beneficiaries are likely to be materially affected.'

c It is common ground that the rule amendments with which this case is concerned fell within r 205.2. And it is of some importance that these rules do not, save on a dissolution, permit the payment of any part of the trust fund to any of the employers and that the rules cannot be amended so as to alter that state of affairs.

*The events leading up to the deed of amendment*

d An actuarial valuation of the open fund, carried out as at 31 March 1989, revealed an actuarial surplus of £9.2m. Later in the year, as a consequence of the adoption of a common retirement age of 65 for men and women the surplus rose to £14.2m. The surplus was reduced by the introduction of two improvements to the scheme's benefits and by an adjustment to the level of employers' contributions. First, the reduction in normal benefits occasioned by voluntary early retirement between the age of 60 and 65 was reduced from 4% to 2% per year. Second, the lump sum payable on death in service where a spouse's pension was not payable was increased from twice to four times pensionable pay. It may be noticed that these increased benefits provided nothing to those who were no longer in service at the time they were introduced. There was no augmentation of pensions in payment or of lump sum payments that had already been made. Third, employers' contributions were fixed by the actuary at 12½% of pensionable e salaries but with a reduction to 6% until April 1994.

f Towards the end of April 1993 the actuary presented to the trustees his report on the financial position of the open fund as at 31 March 1992. His actuarial valuation of the open fund as at that date showed a surplus of £29.9m. It is of some relevance to the rule amendments subsequently made by the trustees to notice the valuation method adopted by the actuary. He described his valuation g method thus:

h '4.2 The liabilities under the Scheme have been valued by a "prospective benefits" method. Under this method, all prospective benefits in respect of Scheme members in post at the valuation date are taken into account. For former members the value of pensions in payment and of preserved and contingent pensions allows for future increases in these pensions in accordance with Scheme rules. For members still employed by a Training Board, benefits in respect of service, both before and after the valuation date are valued allowing for future increases in earnings up to the assumed exit date and for pension increases thereafter.

j 4.3 Set against this value of the liabilities are the value of the assets. The value of the members' and employers future contributions (allowing again for future increases in earnings to assumed exit dates) is then brought into consideration to assess what rates of contribution are required in future to achieve the funding objective. This process reviews the dynamic position of the Scheme ...'

The valuation was based upon employers' contributions to be paid at a rate of 6% of pensionable salaries until 1 April 1994 and at a rate of 12½% thereafter and upon members' contributions to be paid at a rate of 6%.

The figures set out by the actuary in his valuation are of interest. They are as follows:

<i>Capital value of liabilities</i>	<i>£ m</i>
Pensions in payment	82.5
Preserved pensions	15.8
Future benefits to existing members and their dependants	<u>138.1</u>
<i>Total</i>	<u>236.4</u>
Provision for expenses	<u>13.0</u>
	249.4
 <i>Capital value of assets</i>	
Value of investments in fund	211.4
Value of future contributions:	
Members' contributions	24.3
Employers' contributions at 6% of pay until April 1994, then 12½% of pay	<u>46.6</u>
<i>Total</i>	<u>282.3</u>
Balance of assets less liabilities	32.9

The actuary, in para 6.4 of his report, explained why the £32.9m became reduced to £29.9m:

'Assuming that active membership of the Scheme remains at broadly its March 1992 level, the admission of new entrants over the expected future working lifetime of the current membership would be expected to reduce the surplus by about £3m. There, therefore, remains an overall surplus of £29.9m on that basis.'

It is apparent that the actuary's valuation of the fund was based on forward projections as to the contributions that would in the future be coming in from employers and from in service members and as to the future benefits to which existing employees and new employees and their respective dependants would become entitled.

The actuary made also a 'discontinuance valuation'. In para 6.9 of the report he said:

'On the basis of the actuarial assumptions made for this valuation, the assets held at the valuation date would have been sufficient to cover the liabilities under the scheme arising in respect of pensions in payment and preserved benefits for former members and in respect of benefits accrued up to the date of valuation for active members.'

No figures were given to illustrate this discontinuance valuation. There may or may not have been a significant surplus of assets over liabilities. Of more importance is the £29.9m surplus produced by the valuation of the fund on an ongoing basis.

a Pension fund surpluses have taxation implications. Under the Income and Corporation Taxes Act 1988, and regulations made thereunder, if on a 'prescribed' valuation the assets of the fund have a value exceeding 105% of its liabilities, the trustees can be required to reduce the surplus. If they do not do so, the fund may, pro tanto, lose its exempt status.

b The actuary's report of April 1993 included a valuation of the open fund on the prescribed basis. The valuation disclosed a surplus of £32m. The actuary made these comments:

c '7.4 The excess over the 105% permitted margin at this valuation is effectively 12.8% of the liabilities, and this may be compared with the corresponding figure at the 1989 valuation of 13.3% of the liabilities. Actions were taken following the 1989 valuation with the intention of eliminating the statutory excess by means of a confirmation of benefit improvements and contribution reductions over a five year period. Although this period has not yet expired, the favourable investment performance since 1989 means that it is now unlikely that the surplus would be reduced to 105% of the liabilities within the prescribed period. 7.5 The Trustees will need to consider what further action should be taken to eliminate the excessive surplus. It should be noted that a combination of the Employers' contribution reductions at the rate of 6% of pensionable pay for a further five year period, would not, by itself, be sufficient to eliminate the excess. It would be appropriate to consider whether further contribution reductions or benefit improvements should be implemented at this stage in order to avoid a possible tax charge.'

The actuary then made the following recommendations:

f '8.1 The result of the valuation shows that the fund is in a good financial position, with the assets being sufficient to meet the accrued and future liabilities and with a surplus of some £29.9m being available. The bulk surplus can be considered as available for contribution reductions, or benefit improvements, although it may be prudent ... to carry forward some portion as a margin for possible adverse experience. 8.2 The Employers' contribution reduction already made is unlikely to be sufficient to conform with the Inland Revenue requirements under the Finance Act 1986. The Employers and Managing Trustees should consider taking further steps to reduce the surplus.'

h The recommendations and the question of what to do about the open fund surplus had been a subject of discussion between the actuary and the director of the fund prior to the date of the 1993 report. In early 1993 the director had commenced soundings with the employers in order to gauge their reaction to proposals that might be put forward. At a meeting of the trustees held on 26 March 1993 the director was asked to obtain from the actuary indications of the cost of various reductions in contributions and the cost of various benefit improvements.

j On 14 April 1993 a seminar took place at which the actuary made a comprehensive presentation to the trustees of the ways in which the surplus might be dealt with. These included a percentage uplift for pensioners. On 30 April 1993, following the presentation of the actuary's report, the trustees held a meeting. The actuary was present. He addressed the trustees on the various kinds of benefit improvements that might be introduced in order to reduce the



surplus. A full discussion followed after which the trustees resolved to adopt the actuary's report. The report was dated 30 April 1993 but was not signed by the actuary until a few days later. a

The minutes of the 30 April meeting include the following passage:

'All the options were considered and, in particular, the option of granting an increase to pensions in payment. After substantial discussion it was unanimously agreed that no increase should be granted to pensions in payment apart from the cost of living increases already being paid. It was also agreed that the following action should be taken: (i) an additional service credit be given to all members in service on 1st April 1994. This service credit would be two years for members who had then ten or more years' pensionable service with a proportionate amount of credit for members with less than ten years service. The cost of this improvement would be £6.6m. (ii) Members' contributions should be reduced by 1% of pensionable salary from 1st April 1994 to 31 March 2004. This reduction would cost £2.8m. (iii) Employers' contributions should be reduced to 5% of members pensionable salaries from 1st April 1994 to 31 March 1999, at a cost of £10.8m. In line with the Actuary's recommendation there would remain a sum, of £9.7m, to be retained as a reserve. Employers would now be asked to adopt the Actuary's Report and approve the Rule amendments which would be necessary to implement the Trustee's decision.' b  
c  
d

After the meeting had taken place the actuary advised the trustees that the combined package was not quite sufficient to comply with revenue requirements for the reduction of the surplus. He proposed that the effective date for the payment of the reduced contributions should be 1 October 1993, instead of 1 April 1994. The trustees agreed to this change. e

On 13 May 1993 the actuary wrote to the trustees setting out the effect of the proposed steps on the fund. His letter said: f

'3. It was agreed at the Trustees' Meeting that a package of benefit improvements and contribution reductions would be laid before the employers for their agreement. My understanding of the agreed position is as follows: Firstly, there is to be a benefit improvement for members in post which is effectively to increase their past reckonable service by 20% with a maximum increase in reckonable service of two years. I confirm that the cost of this improvement on the Scheme's normal valuation basis is £6.6m. This cost is based on the assumption that the benefit improvement would be applied to members in post at the valuation date of 31 March 1992 and the 20% increase would be related to reckonable service prior to that date. In practice, you may wish to adopt a different date for administrative convenience, but I confirm that the costs should not change significantly in the short term.' g  
h

As can be seen from the terms of the resolution passed at the 30 April meeting, the trustee had already decided to adopt 1 April 1994 as the critical date for the purpose of qualifying for the increase in reckonable service. i

The steps agreed on by the trustees for the reduction of the £29.9m surplus were estimated by the actuary to have the following effect:

a	(i) reduction in employers' contributions	£10.9m
	(ii) reduction in members' contributions	£2.9m
	(iii) additional service credit for members employed on 1 April 1994	<u>£6.6m</u>
	<i>Total</i>	<u><u>£20.4m</u></u>

b The balance of the surplus, about £9.5m was left as a buffer against future contingencies.

c The implementation of the 30 April 1993 resolution required three steps to be taken. First, the rules had to be amended so as to fix the rate of members' contribution at the desired reduced level for the desired period and so as to authorise the award of the increased reckonable service to those in service on 1 April 1994. Second, at least three-quarters of the employers had to agree to the amendment (since r 205.2 applied). Third, the actuary had to give a certificate under r 10.1 certifying the reduced level of contributions to be paid by the employers.

d All these three things were done. On 17 August 1993 the requisite deed of amendment was executed by the chairman of the trustees (having been duly authorised by the trustees to do so). The necessary employers' consents had by then been obtained. All of the employers consented. The deed reduced members' contributions by 1% (amending rr 506.1 and 602.1) and introduced new rr 511.2 and 607.2, providing for the extra period of pensionable service to be awarded to members in service on 1 April 1994. And the actuary duly certified the new, reduced rate of employers' contributions.

#### *The events after the deed of amendment*

f It is to be inferred from the documentary evidence before the Pension Ombudsman and from his findings that payment of contributions has been made at the new rates as from 1 October 1993 and that the additional pensionable service was credited to members in post on 1 April 1994. There was no evidence as to whether any of these members have since then retired or left their employment. But it is highly likely that some have done so and that benefits, enhanced under r 511.2 or r 607.2, have been and are being paid to them.

g It is the trustees' decision, taken at their meeting on 30 April 1993 and implemented as I have described, that has been found by the Pensions Ombudsman to have constituted a breach of trust. It is not said, and could not be said, that the decision itself was outside their powers. It is accepted that it was within the trustees' powers to amend the rules in the manner provided for by the deed of 17 August 1993. But it is said that the trustees, in reaching their decision, 'breached their duty of impartiality ... did not act in the best interest of all the beneficiaries, and ... exercised their power for an improper purpose' (para 54 of the determination). In reaching this conclusion the Pensions Ombudsman paid considerable attention to explanations of the trustees' decision that were published by the chairman of the trustees in response to various criticisms that were being made. The criticisms came, understandably, from the members of the scheme who were either pensioners already or who would become so before 1 April 1994. The package adopted by the trustees for dealing with the surplus offered nothing to them. Mr Nicholson was one, perhaps the leading one, of these critics.

The chairman's explanations were incorporated into PEN letters. These are letters sent at regular intervals by the trustees to the members of the ITB scheme keeping them (the members) abreast of developments. a

In the August 1993 PEN letter the chairman referred to the actuary's recent valuation of the open fund and to the £29.9m surplus. He said, *inter alia*:

'The Trustees considered very carefully the question of how the surplus should be used and details are given later in this PEN letter. The Trustees have persuaded Employers that a substantial part of this surplus amounting to £9.4m should be used for the benefit of members. Future investment conditions are by no means clear and the Trustees hope that their decisions in relation to the surplus will encourage all employees to become and remain members of the Open Fund and support Employers to continue to provide continued employment for their current staff.' b

The letter went on to give details of the additional pensionable service benefit and of the reductions in members' contributions and employers contributions.

In the October 1993 PEN letter the chairman referred to the criticisms that had been coming in and then said: c

'When deciding how to deal with the surplus, the main purpose of the Trustees' policy was to maintain the viability of the funds which depends to a large extent on the number of members who contribute to the scheme. This Section of the membership has fallen by over 700 since March 1990. Against the background of recession some assistance to Employers which would enable them to retain staff and plan their budgets in the medium turn was essential. The only way open to the Trustees to give such assistance was to further reduce the Employers contributions. As the Funds' rules contain a provision which prevents Employers' contributions being reduced below members' contributions, members' contributions were also reduced.' d

Later in the letter he said: e

'The Trustees have to act in the best interests of everyone involved with the Funds. They have a balancing act to perform—instigating improvements to the fund while not burdening Employers with unacceptable expense.' f

Over the page, the letter sought to answer two specific questions that the critics had posed. The first question was: g

'Why are pensioners and their dependants, and also former members with preserved pensions, not benefiting from the surplus?' h

The answer given in the letter was as follows:

'The Trustees gave careful consideration to both these groups of members. However all pensioners have gained from the benefit improvements which were granted during the time they were in service. These improvements have taken place at almost every previous valuation. In addition all pensions are already index-linked and the funds' records of pension increases is well above the average for even good occupational pension schemes. Our track record is detailed in the Trustees' Report which you receive each year. Over the past 15 years the accumulated increases have had the effect of increasing pensions three-fold. Members' pensions will be increased in any event from j



a     1st April 1994 to reflect the annual rise in the Index of Retail Prices to October 1993.'

The second question was:

'The service credit is a generous improvement, but I miss out through leaving the company before the improvement becomes effective next April.  
b     Can the cut-off date be brought forward?'

The answer was:

'The Trustees carefully considered the timing of the introduction of the Service Credit benefit as fixing a cut-off date is always difficult. There are bound to be winners and losers. In deciding the operative date financial factors had to be taken into account. Many of the additional members who would gain from an earlier operative date would be those who began to draw their pension before 1 April 1994. The additional benefit for those members is the most costly and backdating would have meant the formula for the service credit would have been less generous. In addition some members have left, or are about to leave, through redundancy and Employers would have been called on directly to meet the additional cost of the increased redundancy pension. This would be an unbudgeted financial burden on the Employers concerned. So for all these reasons the Trustees did not favour backdating. Instead they agreed that the operative date should be 1st April 1994 and this is in line with the operative date of the previous grant of service credit made in 1988.'

The chairman's reference to the additional financial burden that would fall on employers if employees who had already left through redundancy were given the additional service benefit seems to be correct (see rr 10.2 and 518.3).

f     *Mr Nicholson's complaint*

Mr Nicholson's complaint to the Pensions Ombudsman was made by letter dated 7 February 1994. The Pensions Ombudsman's decision to entertain the complaint and to conduct an investigation was communicated to Mr Nicholson on 21 September 1994. It is interesting, however, that in a letter dated 23 May 1994, the Pensions Ombudsman's predecessor in office had informed Mr Nicholson that he did not consider there was any evidence of a breach of trust or maladministration and that he did not propose to investigate the complaint. The present incumbent took a different view. The trustees were informed by a letter dated 16 January 1995 of the Pensions Ombudsman's decision to investigate the complaint. A document entitled 'Summary of Complaint' and a number of supporting documents accompanied the letter.

The summary complaint had been prepared with Mr Nicholson's assistance and had been approved by Mr Nicholson before it was sent. It set out the reasons why Mr Nicholson regarded the trustees' decision as to how to reduce the surplus as unjust. It referred to the written explanations given by the chairman in the PEN letters of August and October 1993. In so far as the summary of complaint put the trustees on notice of the allegations of breach of trust they had to deal with, the allegations seem to have been these.

j     (i) All members must be treated equitably and it was inequitable to use the surplus so as to benefit members who might have contributed next to nothing to the surplus and to exclude others whose contributions had in part provided it.

(ii) Administrative convenience was not an acceptable criterion for deciding the cut-off date for the purposes of the additional service benefit. a

(iii) The trustees were not empowered under the rules to create different classes of members with different rights from one another.

(iv) The amendments were invalid in that the trustees could not by amendment 'vary the main purpose of the Scheme as declared in Rule 3' (see proviso (a) to r 205.1). b

(v) The majority of the trustees were themselves contributing members in service and so would benefit personally from the amendments.

(vi) The effect of the amendments and the change in the level of employers' contributions had led to the employers' contributions in 1991, 1992 and 1993 respectively being less than those of the members and, accordingly, in breach of rr 602.4 and 506.4. c

(vii) £10.8m (it was in fact £10.9m) of the surplus had been applied so as to benefit the employers via a reduced contribution rate. The trustees had no power under the definitive deed or the rules to do this or to decide to credit any part of the surplus to the employers.

Of these allegations, those referred to in paras (iii), (iv), (vi) and (vii) raised what I would describe as vires points. Did or did not the trustees have power under the definitive trust deed and the rules to do what they had done? The para (v) allegation raised a discrete conflict of interest point. The paras (i) and (ii) allegations challenge the fairness of the trustees' decision and the matters taken into account in reaching it rather than their power to reach it. d

#### *The conduct of the investigation* e

I have already remarked that the investigation was conducted entirely on paper.

(i) The trustees responded to the summary of complaint by submitting a written response dated 9 March 1995. The Pensions Ombudsman sent a copy to Mr Nicholson. In the response the trustees denied the validity of the vires points, justified the factors they had taken into account in reaching their decision and concluded by saying: f

'G8 The Managing Trustees' part in these decisions was reached—as described in Section C—after detailed consideration and discussion of fact, factors and issues. They had the benefit of detailed actuarial information, advice and suggestions from a highly experienced actuary and extensive consultations both within the trustee body and with employers. The ultimate decisions were arrived at by the managing trustees *nem. con.*' g

(ii) Mr Nicholson sent the Pensions Ombudsman a reply dated 18 April 1995 to the trustees' response. The reply, which ran to 18 pages, dealt by argument with the points made in the response. There were no new allegations or charges against the trustees. h

(iii) A copy of the reply was sent by the Pensions Ombudsman to the trustees. Their comments were invited. After some correspondence with the Pensions Ombudsman as to the points on which further comments might be helpful to him, the trustees sent their further comments on 2 June 1995. No new facts of any relevance emerged. j

(iv) In December 1995, according to a letter of 13 December 1995 from a member of the Pensions Ombudsman's staff, work on the drafting of a provisional determination began. It took until June 1997 before the provisional

a determination was completed. By a letter of 5 June 1997 a copy was sent to the trustees and to Mr Nicholson. Their comments were invited before the final determination was issued. A few minor comments were made by Mr Nicholson and by solicitors on behalf of the trustees. The final determination was dated 14 July 1997.

b *The determination*

c The Pensions Ombudsman accepted that the trustees had power to do what they had done. He held that there had been no breach of r 602.4 or by implication, r 506.4 (para 62 of the determination). He held that there had been no breach of r 205(1)(b) (para 63). He accepted that the trustees could, if they went about it properly, confer greater benefits on one class of members than on another or provide benefits to one class to the exclusion of others (para 41). All the vires points, therefore, were answered in favour of the trustees (subject to the conflict of interest point which I will return to later). In para 29 of his report he formulated the issues he had to determine:

d 'Did the Trustees breach their duties or commit maladministration in the manner in which they dealt with the actuarial surplus? In particular: (a) Did they breach their duty to act impartially as between the different classes of beneficiaries? (b) Did they breach the duty not to put themselves in a position of conflict of interest?'

e In paras 30 to 54 the Pensions Ombudsman dealt with 'The trustees' duty to act impartially'. He proceeded on the footing that the trustees were under a duty to act impartially as between the various beneficiaries. This proposition requires, in my opinion, some examination.

f In *Cowan v Scargill* [1984] 2 All ER 750 at 760, [1985] Ch 270 at 286–287 Megarry V-C referred to 'the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries'. This passage was cited by the Pensions Ombudsman in para 39 of his determination. But Megarry V-C was dealing with an issue regarding the exercise by pension fund trustees of an investment power. He was not dealing with the exercise of a discretionary power to choose which beneficiaries, or which classes of beneficiaries, should be the recipients of trust benefits. In relation to a discretionary power of that character it is, in my opinion, meaningless to speak of a duty on the trustees to act impartially. Trustees, when exercising a discretionary power to choose, must of course not take into account irrelevant, irrational or improper factors. But, provided they avoid doing so, they are entitled to choose and to prefer some beneficiaries over others. The Pensions Ombudsman recognised that that was so for, in para 41 of the determination, he said:

j 'The Trustees' duty to act impartially between the different beneficiaries does not equate with a duty to exercise their discretion on all occasions in such a way as to produce equal benefits of equal value to all beneficiaries. Nor does it even require that all beneficiaries receive some benefit from an exercise of a discretion. It is permissible to exercise a discretion in such a manner as to omit particular beneficiaries, or a class thereof. But the discretion to exclude those beneficiaries must not be the result of undue partiality towards the interests of the preferred beneficiaries.'



Bar the final sentence, I would fully agree with everything in para 41. The last sentence, however, distorts, in my opinion, what has gone before. What is 'undue partiality'? The trustees are entitled to be partial. They are entitled to exclude some beneficiaries from particular benefits and to prefer others. If what is meant by 'undue partiality' is that the trustees have taken into account irrelevant or improper or irrational factors, their exercise of discretion may well be flawed. But it is not flawed simply because someone else, whether or not a judge, regards their partiality as 'undue'. It is the trustees' discretion that is to be exercised. Except in a case in which the discretion has been surrendered to the court, it is not for a judge to exercise the discretion. The judge may disagree with the manner in which trustees have exercised their discretion but, unless they can be seen to have taken into account irrelevant, improper or irrational factors, or unless their decision can be said to be one that no reasonable body of trustees properly directing themselves could have reached, the judge cannot interfere. In particular he cannot interfere simply on the ground that the partiality shown to the preferred beneficiaries was in his opinion undue.

The extent to which trustees exercising discretionary powers can be called upon to account for the exercise of those powers was considered by the Court of Appeal in *Re Londonderry's Settlement, Peat v Walsh* [1964] 3 All ER 855, [1965] Ch 918. It seems to have been common ground that 'trustees exercising a discretionary power are not bound to disclose to their beneficiaries the reasons actuating them in coming to a decision'. Harman LJ ([1964] 3 All ER 855 at 857, [1965] Ch 918 at 928–929) explained why that was so:

'This is a long standing principle and rests largely, I think, on the view that nobody could be called on to accept a trusteeship involving the exercise of a discretion unless, in the absence of bad faith, he were not liable to have his motives or his reasons called in question either by the beneficiaries or by the court. To this there is added a rider, namely, that if trustees do give reasons, their soundness can be considered by the court.'

Salmon LJ added ([1964] 3 All ER 855 at 862, [1965] Ch 918 at 936):

'Whether or not the court, if it knew all the facts known to the trustees, would have acted as they did, again I do not know—nor is it material. The settlement gave the absolute discretion to appoint to the trustees and not to the courts. So long as the trustees exercise this power ... and exercise it bona fide with no improper motive, their exercise of the power cannot be challenged in the courts—and their reasons for acting as they did are accordingly immaterial.'

These principles are, in my judgment, applicable in the present case.

In para 42, the Pensions Ombudsman said: 'The duty of impartiality would be breached where the trustees could be shown to have no concern for the interests of the excluded beneficiaries.'

For the reasons given, I do not regard the present case as one which can usefully be approached by asking whether the trustees were in breach of a duty of impartiality nor am I able to accept the postulated test. But, even if the postulated test were applied in the present case, it could not have resulted in a finding against the trustees. It is clear from the documentary evidence that the trustees did consider the position of the pensioner members and did consider whether some part of the surplus might be applied to pensioners who had ceased

a to be in service before 1 April 1994. They were addressed on the topic by the actuary at the 14 April 1993 seminar. The minutes of the 30 April 1993 meeting record the options that were considered. They included the option of increasing pensions in payment. If the trustees' decision is to be criticised it cannot be on the footing that they showed no concern for the interests of the excluded beneficiaries.

b In para 43 the Pensions Ombudsman said:

c 'As partiality towards a group of beneficiaries can be the result not only of lack of regard towards other beneficiaries, but preferring one group for the wrong reasons, there is an overlap between the duty of impartiality, the duty to act in the best interests of all the beneficiaries and the duty to exercise a discretion fairly and honestly and for the purposes for which they are given and not so as to accomplish any ulterior purpose.'

d Neither a duty to act impartially nor a duty to act in the best interest of all the beneficiaries describes, in my judgment, the nature of the duty on the trustees when considering what steps to take to deal with the surplus. They had a discretionary power to make amendments to the rules in order to provide additional benefits to members, whether pensioners or still in service. It was within their discretion to provide benefits to members in service to the exclusion of members no longer in service. They certainly had a duty to exercise their discretionary power honestly and for the purposes for which the power was given and not so as to accomplish any ulterior purposes. But they were the judges of whether or not their exercise of the power was fair as between the benefited beneficiaries and other beneficiaries. Their exercise of the discretionary power cannot be set aside simply because a judge, whether the Pensions Ombudsman or any other species of judge, thinks it was not fair.

e The Pensions Ombudsman went on to cite the passages from the PEN letter of October 1993. He noted the statement that 'the main purpose of the Trustees' policy was to maintain the viability of the funds' and that the chairman had sought to justify excluding the member pensioners from benefit increases on the basis that their existing benefits were index-linked and adequate. He then said:

f 'This is not a valid reason to exclude pensioners and deferred members from benefit increases. All members enjoy a right to indexed benefits in retirement. Nor would past general improvements to scheme benefits, enjoyed by pensioners and active members alike, seem to provide a good reason to exclude all but the active members from benefit improvements on this occasion.'

g In this passage the Pension Ombudsman was putting himself in the position of the trustees. He was endeavouring himself to assess the fairness of the trustees' decision to confer additional benefits on members in service and none on member pensioners. This was not, in my judgment, his role. He was not entitled to substitute his own opinion for the opinion of the trustees themselves on what was fair or what was a valid reason for the decision.

j The reason given by the chairman in the PEN letter of October 1993 cannot, in my judgment, be categorised as irrelevant or irrational or in any other respect improper to be taken into account.

The Pensions Ombudsman went on, in para 47, to refer to the need for three-quarters of the employers to consent to the proposed amendment. This, he

said, was 'the reason which comes closest to justifying the Trustees' decision to exclude those who were not in service on 1 April 1994'. This passage, too, seems to me to demonstrate the error in the Pensions Ombudsman's approach. He was entitled, and bound, to ask himself whether the trustees had taken a decision that it was within their power to take. He was entitled, also, to question whether the trustees had taken into account irrelevant, improper or irrational factors or had come to a decision to which no reasonable body of trustees could have come. But he was not, in my judgment, entitled to require the trustees to justify their decision in any other respect. He was not entitled to require to be satisfied that their decision was 'fair' or that they had observed a 'duty of impartiality'. See Salmon LJ in *Re Londonderry's Settlement* ([1964] 3 All ER 855 esp at 862, [1965] Ch 918 esp at 936).

The Pensions Ombudsman accepted, of course, that it had been necessary for the trustees to obtain the employers' approval to the proposed amendments. But he appears to have taken the view that the trustees did not negotiate hard enough with the employers in order to obtain their agreement to additional benefits being provided to pensioners.

This, too, in my judgment, is not a basis on which the trustees' decision could be held to have been taken in breach of trust.

Paragraphs 49, 50 and 51 contain the Pensions Ombudsman's critical findings of fact. These, provided always there was some evidence to support them, cannot be challenged on appeal. They were these.

(i) The trustees' main purpose in deciding to concentrate all benefit improvements on those members in service on 1 April 1994 was 'to ensure that the Scheme was as attractive as possible to the current work force of the Employers, particularly those who escaped the impending wave of redundancies and might therefore be expected to give significant future service' (para 49).

(ii) The date of 1 April 1994, as the date on which members had to be in service, was not chosen simply as a matter of administrative convenience. The main reason for the choice of that date was—

'the desire to concentrate benefit increases on those who offered most future service to the Employers and to avoid increasing the Employers' liability to make additional contributions under r 518 in respect of those members who were made redundant in the period up to April 1994' (para 50).

(iii) A collateral purpose of the trustees was 'to provide financial assistance to the Employers, which they achieved by reducing the members' contribution rate, which in turn allowed the employers' contribution rate to be lowered' (para 51).

Do these findings justify or require the conclusion that the trustees' decision was taken in breach of trust? In my judgment, they do not.

First, the proposition that the trustees were not entitled, when deciding how to reduce the £29.9m surplus, to take any account of the position of the employers is one with which I emphatically disagree. The employers play a critical part in this pension scheme. They have to pay contributions sufficient to keep the scheme solvent. They have to employ employees who are willing to join the scheme and pay contributions. The £29.9m was an actuarially calculated figure based on future projections and estimates of the sums that would be coming into the open fund from employers' contributions and from members' contributions. It seems to me obvious that the continued viability of the



a     respective employers was something that, in the interests of the pension scheme and its members as a whole, the trustees were entitled to want to promote. Otherwise, if one or more of the employers went into decline or collapsed, the financial projections, on the basis of which the actuarial calculations had been made, would become invalidated.

b     Ms Gill submitted that in a case such as this, where the amendments could not be implemented without the consent of three-quarters of the employees, the trustees' role was to try to promote the interests of the members to the exclusion of the employers, who were in a position to look after themselves. If the trustees had chosen to adopt such a starkly confrontational role as is suggested by the submission, they would have been entitled to do so. But their failure to do so did not, in my judgment, take them outside the spectrum of possible stances that a reasonable body of trustees could properly adopt. They were not obliged to deal with the employers at arms length as if bargaining over some commercial deal. The Pensions Ombudsman concluded that the trustees had 'attempted to represent both sides of the negotiations at the same time, and make only such recommendations as they felt to be fair to everyone involved with the Funds', c     including the employers (para 53). I would, for my part, have thought that such an attempt as that would have been beyond reproach and exactly what responsible pension fund trustees ought to have done. But the Pensions Ombudsman held that 'in doing so they created a situation in which their conflicts of interest overwhelmed their duty to be impartial and represent all classes of beneficiaries'. In my judgment the trustees, in deciding how to reduce the surplus, had no duty to be impartial as between members in service and member pensioners. They were entitled to prefer the former. They were entitled to recommend a package which included reductions in the future contributions that the employers would have to pay. There was, in my judgment, no evidence that in their attempt 'to be fair to everyone involved with the funds' they were 'overwhelmed' by any conflicts of interest between members in service and pensioners or between members as a whole and the employers. The Pensions Ombudsman's conclusion is, in my judgment, a consequence of his attempt to put himself in the position of the trustees and himself to decide what was fair. f     e     f

g     He held (para 54) that 'the Trustees breached their duty of impartiality, they did not act in the best interests of all the beneficiaries and they exercised their power for an improper purpose'. As to that, I need not repeat my opinion that references to a duty of impartiality is inapposite where what is in point is a discretionary power to choose between different beneficiaries. It is of course correct that the trustees' decision did not provide any additional benefit for pensioners, but the trustees did not have to do so and their failure to do so is no indication of a breach of trust. And as to improper purpose, the evidence makes clear beyond any argument that the trustees' overriding purpose was to reduce the surplus. In deciding how to do so they took into account the interests and position of the employers. For the reasons I have given there was nothing, in my judgment, improper in that. j     h

Two final points to be borne in mind are, first, that the trustees' decision as to how to reduce the surplus did not involve any immediate payments out. The reduced contributions from the employers and members would reduce the actuarial surplus without any actual funds being paid out. The additional service benefit would in due course involve payments out on the retirement of the

members who qualified for the benefit. But the payments out would not be immediate. The provision of additional benefits to pensioners, on the other hand, by the back-dating of the additional service benefit to, say, 31 March 1992, would not only have led to additional sums being payable by the Employers but would have led also to funds having to be immediately paid out by the trustees. I do not see how the trustees' decision to adopt 1 April 1994 as the qualifying date rather than 31 March 1992 can possibly be criticised.

Second, if the trustees had taken no step to reduce the £29.9m surplus, the result would have been that, pursuant to r 10.1, the employers' contributions would have remained at minimum level until the fund was once more in balance. This benefit to the employers would have resulted from the rules. In the meantime, of course, there would have been adverse tax consequences.

For all these reasons, in my judgment, the Pensions Ombudsman's conclusion that the trustees' decision was taken in breach of trust cannot stand.

### *Conflicts of interest*

The Pensions Ombudsman held that the trustees who were members in service were accountable for any benefit to which they had already or might in the future become entitled under the deed of amendment. The premise for this conclusion was expressed in para 55 of the determination as follows:

'At the date of the decisions complained of, pension scheme trustees were prohibited from allowing any conflict of interest and duty and from receiving or retaining any profit, such as an increase in benefits from their trust ... The application of this prohibition in cases such as the present would not mean that the exercise of the power to increase benefits was void or voidable but merely that the trustees concerned would not themselves become entitled to the increased benefits and would have to account to the trust for any received.'

These propositions make no sense when applied to this pension scheme and the facts of this case and, unless qualified, do not, in my judgment, represent the law.

The pension scheme rules required there to be member trustees who were current employees of an employer participating in the scheme. The trustees as a body, including these member trustees, have a variety of discretionary powers entrusted to them by the rules. The power to fix the level of members' contributions is one such power. The logic of the Pensions Ombudsman's premise would be that if the members' contribution rate were reduced, the member trustees would have to continue paying contributions at the higher rate. Otherwise they would be benefiting from a conflict of interest and duty and would have to account to the trust for the benefit. Another discretionary power is the power to amend the rules. The rules expressly contemplate that an amendment may materially affect 'any benefit ... of ... Members' (see r 205.2), ie may increase, reduce, add to or remove any such benefit. This is a discretion which members' trustees, as part of the body of managing trustees, may from time to time have to exercise. The notion that, when the discretionary power of amendment is exercised so as to increase an existing benefit or add a new benefit, the member trustees must be excluded from benefit is, in my opinion, quite simply ridiculous. The rules could not be taken to have intended so absurd a

a result. So why should equity intervene? Rules of equity were devised in order to produce fair and sensible results.

b There is, indeed, Court of Appeal authority that equity does not intervene in a case such as this. *Sargeant v National Westminster Bank plc* (1990) 61 P & CR 518 was a case in which a testator appointed his three children to be his executors and left his estate to them equally. His estate included three farms which he had let to the three children. They farmed them in partnership. One of them, Charles, died. The other two acquired his share in the partnership and proposed that the farms should be sold subject to the tenancy. The administrator of Charles' estate objected. He contended that the two surviving executors were in a position in which duty and interest conflicted and that they were not entitled to sell the farms so long as their tenancy subsisted. He contended that Charles' estate was c entitled to a one-third share of the vacant possession value of the farms. The Court of Appeal, affirming Hoffmann J, held that the executors were entitled, notwithstanding the conflict between interest and duty, to sell the farms subject to the tenancy.

d Nourse LJ explained why. He pointed out that the executors were both tenants and beneficiaries in the estate and went on (at 523):

e 'It cannot be doubted that the trustees have [since Charles' death] been in a position where their interests as tenants *may* conflict with their duties as trustees to the estate of Charles. But the conclusive objection to the application of the absolute rule on which Mr. Romer relies is that it is not they who have put themselves in that position. They have been put there mainly by the testator's grant of the tenancies and by the provisions of his will and partly by contractual arrangements to which Charles himself was a party and of which his representatives cannot complain.' (Nourse LJ's emphasis.)

f Bingham LJ and Sir George Waller agreed.

g The passage from Nourse LJ's judgment that I have cited is, in my judgment, conclusive of the conflict of interest point in the present case. The member trustees are placed by the rules themselves in the position of conflict between interest and duty to which the Pensions Ombudsman referred. The rules require the body of trustees to include employee members. The rules contemplate that, as trustees, the employee members will from time to time have to exercise discretions in which their duty and interest may conflict. In these circumstances there is, in my judgment, no rule of equity that requires them to account for the benefits that an entirely proper exercise of discretionary powers may produce for them. I would reach the same conclusion as a matter of construction of the rules. h It would have been open to the draftsman of the rules expressly to have provided for member trustees to retain any benefits that exercises of the trustees' discretionary power to fix the level of members' contributions and discretionary power to amend the rules to provide additional benefits for members might produce. In my judgment, a provision to that effect must be implied in order that j the rules should have ordinary business efficacy. A construction that would require members trustees to continue to pay contributions at 6%, the rate having been lowered for all other members, would make no sense. How, for example, would rr 506.4(b) and 602.4(b) be given effect to?

The Pensions Ombudsman's opinion on this conflict of interest point was, I think, based in part of the judgment of Lindsay J in *Re Drexel Burnham Lambert UK*



*Pension Plan* [1995] 1 WLR 32 and the apparently consequential enactment of s 39 of the Pensions Act 1995. a

In the *Drexel* case questions arose as to how a pension fund surplus should be dealt with on the winding up of the pension scheme. The scheme rules provided that the surplus could at the absolute discretion of the trustees be applied to secure further benefits for the members, within certain limits specified in the rules, and that subject thereto the balance of the surplus was to go to the employers. The question arose whether trustees who were themselves beneficiaries could be allowed to benefit from the exercise of the discretionary power. b

Lindsay J commenced the section of his judgment dealing with the point by saying (at 36): c

[The] difficulty is this. All four of the trustees whose proposals are put before me and whose discretion is being exercised are, as I have mentioned, themselves beneficiaries whose benefits under the scheme are thereby augmented. I would expect any intelligent layman interested enough to have read so far to say, "So What?" d

I would have the same expectation. e

After referring to some of the classic cases establishing the rule that a trustee may not put himself in a position in which he has a personal interest conflicting with his duty and to the various exceptions to the rule, including the exception illustrated by *Sargeant v National Westminster Bank plc*, namely that the rule does not apply if 'it was not the persons in the position of conflict who had put themselves in that position' (see at 40–41), Lindsay J approved the scheme being proposed by the trustees and said (at 43): f

'If the "managing" of conflicts is frequently to involve, as it has done here, argument before and a decision of the court, time and money will be spent on legal processes which many would, with some justice, think unnecessary and undesirable ... I commend to [the legislature] consideration of the creation of a clear exception to the so-called "general rule of equity" so that in appropriate cases the administration of pension trusts by trustee-beneficiaries might safely proceed without the expense and delay of proceedings.' g

It should be noted that Lindsay J did not hold that if the trustees had implemented their proposed scheme without first seeking the court's approval, they would have been accountable for any benefits they took. He said (at 42), in terms, that— h

'although evidence on the point is not filed ... the likelihood is that, in the sense of *Sargeant v. National Westminster Bank Plc*. ((1990) 61 P & CR 518), the present trustees are unlikely to have put themselves in the position of conflict in the sense of pushing themselves forward to be trustees but rather were selected as persons able and willing to serve their colleagues in such a way.' j

In my judgment, however, the question whether the case falls within the *Sargeant v National Westminster Bank plc* exception cannot depend on whether the trustees in question have been proactive in seeking appointment or, in the style of the Speaker of the House of Commons, have been dragged protesting into

a office. If the constitution of a pension scheme requires there to be employee member trustees and vests in those trustees, with or without colleagues who are not employees, discretionary powers the proper exercise of which may confer, or augment, pension benefits on employees, the *Sargeant v National Westminster Bank plc* exception, in my judgment, applies. The employee member trustees will not be accountable for those benefits. In the event, Parliament took up the suggestion made by Lindsay J and enacted s 39 of the Pensions Act 1995. Section 39 provides:

c 'No rule of law that a trustee may not exercise the powers vested in him so as to give rise to a conflict between his personal interest and his duties to the beneficiaries shall apply to a trustee of a trust scheme, who is also a member of the scheme, exercising the powers vested in him in any manner, merely because their exercise in that manner benefits, or may benefit, him as a member of the scheme.'

d The Pensions Ombudsman expressed the view that s 39 had confirmed the correctness of the proposition of law he had formulated in the opening sentence of para 55 of the determination (cited above). In my judgment, it did not. Section 39 provided for a general exclusion of the conflict of interests rule from application to employee member trustees of pension schemes. But non sequitur that employee member trustees might not, in particular circumstances, come within one or other of the established exceptions to the rule. In any event, as Viscount Simonds said in *Kirkness (Inspector of Taxes) v John Hudson & Co Ltd* [1955] 2 All ER 345 at 352, [1955] AC 696 at 714: '... the beliefs and assumptions of those who frame Acts of Parliament cannot make the law.'

e In my judgment, the member trustees are not accountable for benefits accruing to them, whether in respect of reduced contributions or the additional service benefit, as a result of their decision taken on 30 April 1993.

f *The steps directed by the Pensions Ombudsman*

A short reference to steps the trustees were directed by the Pensions Ombudsman to take is useful for the purpose of underlining some of the points made earlier in this judgment.

g (1) They were directed to administer the scheme on the basis of the scheme rules prior to the deed of amendment. That direction was, in effect, depriving members who were not parties to the proceedings and were not bound by the determination of proprietary rights to which they were apparently entitled. A court could not properly have given that direction. Nor could the Pensions Ombudsman.

h (2) The trustees were directed 'to seek payment of the full contributions due' in the period between 1 October 1993 and the date of the determination, 4 July 1997. The trustees had, however, no legal power to require members who were not bound by the determination to pay more than the contributions required by the rules as amended or to require employers, also not bound by the determination, to pay more than the amount that had been certified by the actuary under r 10.1.

j (3) The trustees were directed to 'give proper consideration to recommending a set of benefit improvements which is fair as between all the classes of members and their dependants and to enter into negotiations with the Employers ...' The Pensions Ombudsman then gave guidance to the trustees as to how they should

conduct the negotiations (see para 66). The contents of these passages demonstrate clearly what I take to have been the error in the Pensions Ombudsman's approach. He was concerned that the result produced by the trustees' decision should correspond with what he, the Pensions Ombudsman, regarded as fair. But, in a case in which the issue was whether or not the trustees' exercise of a discretionary power was a breach of trust, this approach was, in my judgment, misconceived. The trustees' range of possible decisions covered a very wide spectrum. They were entitled to take into account the position of the employers. They were entitled to confine the additional benefits to members in service. They were entitled to decide not to increase the pensions in payment. The Pensions Ombudsman was no more entitled to sit in judgment on their reasons than the court would have been.

I therefore allow this appeal.

*Appeal allowed.*

Celia Fox Barrister.



## Williams and another v Natural Life Health Foods Ltd and another

HOUSE OF LORDS

LORD GOFF OF CHIEVELEY, LORD STEYN, LORD HOFFMANN, LORD CLYDE AND LORD HUTTON

4 MARCH, 30 APRIL 1998

*Company – Director – Liability – Tort – Tort committed by company – Franchisor company giving negligent advice to franchisees – Franchisees entering into franchise agreement in reliance on advice and subsequently suffering financial loss – Franchisees having no personal dealings with managing director of company – Managing director playing prominent part in production of advice – Company subsequently wound up – Whether managing director personally liable to franchisees on basis that he had assumed personal responsibility for advice.*

In 1987 the plaintiffs approached the defendant company, which had been formed by its managing director, M, the previous year in order to franchise the concept of retail health food shops, with a view to obtaining a franchise for a health food shop in Rugby. They were given a brochure by which the company held itself out as having the necessary expertise to provide reliable advice to franchisees and which made clear that the expertise derived from M's experience in the operation of the original shop in Salisbury. Subsequently, the company sent the plaintiffs detailed financial projections demonstrating the likely future profitability of the shop; and M had played a prominent part in the production of those projections. Encouraged by the brochure and the prospectus, the plaintiffs entered into a franchise agreement with the company, took a lease of the shop and opened for business in October 1987. In the event, the turnover proved substantially less than predicted by the company, and after trading at a loss over the next 18 months, the business ceased trading. The plaintiffs brought an action against the company claiming damages in respect of the financial loss which they suffered as a result of the company's negligent advice and, following the winding up of the company, joined M as a defendant on the basis that he had assumed personal responsibility. The judge held that the company was liable to the plaintiffs for the negligent advice and that M was personally liable on the same basis. The Court of Appeal, by a majority, upheld the judge's conclusion and dismissed M's appeal. M appealed to the House of Lords.

**Held** – A director of a limited company would only be personally liable to plaintiffs for loss which they suffered as a result of negligent advice given to them by the company, if he had assumed personal responsibility for that advice and the plaintiffs had relied on that assumption of responsibility. Whether there had been such an assumption of responsibility was to be determined objectively, so that the primary focus had to be on exchanges (including statements and conduct) between the director and the franchisees. Moreover, the test of reliance was not simply reliance in fact, but whether the plaintiffs could reasonably rely on the assumption of responsibility. In the instant case, there had been no personal dealings between M and the plaintiffs and no exchanges or conduct between them which could have conveyed to the plaintiffs that M was willing to assume

personal liability to them; indeed there was no evidence even that the plaintiffs had believed that M was undertaking personal responsibility to them. It followed that the circumstances were insufficient to make M personally liable to the plaintiffs. Accordingly, the appeal would be allowed (see p 582 *b c e* to p 583 *a*, p 584 *b g* to *j*, p 585 *c* to *e j* and p 586 *a* to *e*, post).

*Henderson v Merrett Syndicates Ltd*, *Hallam-Eames v Merrett Syndicates Ltd*, *Hughes v Merrett Syndicates Ltd*, *Arbuthnott v Feltrim Underwriting Agencies Ltd*, *Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506 applied.

## Notes

For negligent statements, see 33 *Halsbury's Laws* (4th edn reissue) para 614.

For liability of directors for torts committed by the company, see 7(1) *Halsbury's Laws* (4th edn reissue) para 621.

## Cases referred to in opinions

*Edgeworth Construction Ltd v M D Lea & Associates Ltd* [1993] 3 SCR 206, Can SC.  
*Fairline Shipping Corp v Adamson* [1974] 2 All ER 967, [1975] QB 180, [1974] 2 WLR 824.

*Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465, [1963] 3 WLR 101, HL.

*Henderson v Merrett Syndicates Ltd*, *Hallam-Eames v Merrett Syndicates Ltd*, *Hughes v Merrett Syndicates Ltd*, *Arbuthnott v Feltrim Underwriting Agencies Ltd*, *Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506, [1995] 2 AC 145, [1994] 3 WLR 761, HL.

*Ivory (Trevor) Ltd v Anderson* [1992] 2 NZLR 517, NZ CA.

*London Drugs Ltd v Kuehne & Nagel International Ltd* (1992) 97 DLR (4th) 261, Can SC.

*Pioneer Container, The, KH Enterprise (cargo owners) v Pioneer Container (owners)* [1994] 2 All ER 250, [1994] 2 AC 324, [1994] 3 WLR 1, PC.

*Smith v Eric S Bush (a firm)*, *Harris v Wyre Forest DC* [1989] 2 All ER 514, [1990] 1 AC 831, [1989] 2 WLR 790, HL.

*White v Jones* [1995] 1 All ER 691, [1995] 2 AC 207, [1995] 2 WLR 187, HL.

## Appeal

The second defendant, Richard Mistlin, appealed with leave of the Appeal Committee of the House of Lords given on 25 June 1997 from the decision of the Court of Appeal (Hirst, Waite LJ; Sir Patrick Russell dissenting) ([1997] 1 BCLC 131) on 5 December 1996, dismissing his appeal from the decision of Langley J ([1996] 1 BCLC 288) on 1 December 1995 that he pay to the plaintiffs, David Ian Williams and Christine Margaret Reid, damages and interest totalling £149,854.15 in respect of negligent advice given to them by the first defendant, Natural Life Health Foods Ltd, which was dissolved in 1993. The facts are set out in the opinion of Lord Steyn.

Michael Bloch (instructed by Radcliffes Crossman Block, agents for Trethowan Woodford, Andover) for Mr Mistlin.

James Munby QC and Gerard van Tonder (instructed by Kingsford Stacey, agents for Williams & Co, Luton) for the plaintiffs.

Their Lordships took time for consideration.

30 April 1998. The following opinions were delivered.

a

**LORD GOFF OF CHIEVELEY.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Steyn. For the reasons he gives I would allow the appeal, and I would make the order as to costs which he proposes.

b

**LORD STEYN.** My Lords, the principal question on this appeal is whether a director of a franchisor company is personally liable to franchisees for loss which they suffered as a result of negligent advice given to them by the franchisor company. At first instance Langley J ([1996] 1 BCLC 288) answered that question in the affirmative. By a majority, the Court of Appeal ([1997] 1 BCLC 131) upheld

c

this conclusion and dismissed an appeal.

*The franchising transaction*

The underlying dispute arose in the context of a marketing system sometimes described as business format franchising. It involves a contractual licence under which the franchisor permits a franchisee to carry on business under a trade name belonging to the franchisor. The franchisor provides advice and assistance to the franchisee about the manner in which the franchisee does business and exercises some control over it. In return the franchisee pays stipulated fees to the franchisor.

d

In about 1980 Mr Richard Mistlin, the appellant second defendant, started to work in the health food trade. In 1983 he opened a health food shop in Salisbury. In 1986 he formed Natural Life Health Foods Ltd, a company incorporated with limited liability, in order to franchise the concept of retail health food shops under the name 'Natural Life Health Foods'. Mr Mistlin was the managing director and principal shareholder of the company. Mr Mistlin's wife was a nominal shareholder and she was also employed by the company. Mr Ron Padwick and Miss Sara Shepherd were the only other employees of the company. Both had some experience of the franchising business.

e

f

In 1987 Mr David Williams and Mrs Christine Reid, the respondent plaintiffs, approached the new company with a view to obtaining a franchise for a health food shop in Rugby. The plaintiffs asked for a brochure and Mr Padwick gave them one. The brochure described the company's system as 'a proven concept'. The flavour of the brochure is conveyed by the following:

g

'YOUR VERY OWN HEALTH FOOD STORE  
UNDER THE NATURAL LIFE BANNER  
OFFERS YOU  
INDEPENDENCE AND SECURITY  
SUBSTANTIAL INCOME  
FREEDOM TO RUN YOUR OWN BUSINESS  
FULL SUPPORT FROM AN EXPERIENCED COMPANY  
BULK BUYING POWER  
NEW PRODUCT KNOWLEDGE  
ON-GOING TRAINING ...'

h

j

It described the company's team in glowing terms. Dealing with Mr Mistlin the brochure stated:

'In 1983, he opened Salisbury Health Foods, a store that has been a leader in the trade ever since and was awarded "Retailer of the Year" in 1983. It is



still a regular winner of awards and competitions within the industry and is the pilot unit for the NATURAL LIFE franchise network.'

The company sent detailed financial projections to the plaintiffs. The projections demonstrated the likely future profitability of the shop. Mr Mistlin had played a prominent part in the production of the projections. All the material precontractual documents were on the company's notepaper. The plaintiffs dealt with Mr Padwick. They did not know Mr Mistlin and they had no material precontractual dealings with him.

Encouraged by the brochure and the prospectus, the plaintiffs entered into a franchise agreement with the company dated 1 May 1987. The plaintiffs took a lease of the shop premises in Rugby and set up in business there. The shop opened in October 1987. The turnover proved substantially less than predicted by the company. The business traded at a loss over the next 18 months and then ceased trading.

In 1990 the plaintiffs sued the company for damages representing the financial loss which they suffered as a result of the company's negligent advice. The cause of action was based on an assumption of responsibility by the company. In 1992 the company was wound up and in 1993 it was dissolved. In 1992 the plaintiffs joined Mr Mistlin as a defendant. The plaintiffs' action against Mr Mistlin was based on an assumption of personal responsibility. After the dissolution of the company the action proceeded against Mr Mistlin alone.

#### *The judgment of Langley J*

Langley J tried the action over a period of four days in November and December 1995. He held ([1996] 1 BCLC 288) that the company was liable to the plaintiffs for negligent advice. The judge came to this conclusion on the basis of the principle established in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465. Having dealt with other matters, which are not now relevant, the judge (at 296) turned to the question 'whether Mr Mistlin himself is personally liable to the plaintiffs on the same basis ...' In a detailed judgment he concluded that Mr Mistlin was personally liable to the plaintiffs. The recoverable damages were agreed in a sum of the order of £85,000.

#### *The decision of the Court of Appeal*

Mr Mistlin appealed to the Court of Appeal. Only one issue was canvassed in the Court of Appeal, namely whether the judge was entitled to find that Mr Mistlin was personally liable to the plaintiffs on the basis of an assumption of responsibility. A majority (Hirst and Waite LJ) upheld the judge's conclusion and dismissed the appeal (see [1997] 1 BCLC 131). Hirst LJ said (at 152):

'... in order to fix a director with personal liability, it must be shown that he assumed personal responsibility for the negligent misstatement made on behalf of the company. In my judgment, having regard to the importance of the status of limited liability, a company director is only to be held personally liable for the company's negligent misstatements if the plaintiffs can establish some special circumstances setting the case apart from the ordinary; and in the case of a director of a one-man company particular vigilance is needed, lest the protection of incorporation should be virtually nullified. But once such special circumstances are established, the fact of incorporation, even in the case of a one-man company, does not preclude the establishment of personal liability. In each case the decision is one of fact and degree.'

Waite LJ said (at 154):

a '... where representations are made negligently by a company so as to attract tortious liability under the principle of *Hedley Byrne*, the primary liability is that of the corporate representor. In the vast majority of cases it is also the sole liability. The law does, however, recognise a category of case  
b in which a director of the representor will be fixed with personal liability for the negligent misstatement. It is a rare category, and a severely restricted one. If that were not so, representees could set at naught the protection which limited liability is designed to confer on those who incorporate their business activities. The mesh is kept fine by the stringency of the question which the law requires to be asked: do the circumstances, when viewed as a  
c whole, involve an assumption by the director of personal responsibility for the impugned statement?'

Sir Patrick Russell gave a dissenting judgment.

*The theory of the extended Hedley Byrne principle*

d My Lords, a great many precedents were cited at first instance, in the Court of Appeal and in the printed cases lodged for the purpose of the present appeal. It is unnecessary to embark on a general review of the authorities. The sole purpose of the citation of precedent is, or ought to be, the identification of a legal principle or rule which covers, or may arguably cover, the issue in the case to be decided. And that is how I hope to approach the problem under consideration. In this case,  
e the identification of the applicable principles is straightforward. It is clear, and accepted by counsel on both sides, that the governing principles are stated in the leading speech of Lord Goff of Chieveley in *Henderson v Merrett Syndicates Ltd*, *Hallam-Eames v Merrett Syndicates Ltd*, *Hughes v Merrett Syndicates Ltd*, *Arbuthnott v Feltrim Underwriting Agencies Ltd*, *Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER  
f 506, [1995] 2 AC 145. First, in *Henderson's* case it was settled that the assumption of responsibility principle enunciated in the *Hedley Byrne* case is not confined to statements but may apply to any assumption of responsibility for the provision of services. The extended *Hedley Byrne* principle is the rationalisation or technique adopted by English law to provide a remedy for the recovery of damages in respect of economic loss caused by the negligent performance of services.  
g Secondly, it was established that once a case is identified as falling within the extended *Hedley Byrne* principle, there is no need to embark on any further inquiry whether it is 'fair, just and reasonable' to impose liability for economic loss (see [1994] 3 All ER 506 at 521, [1995] 2 AC 145 at 181). Thirdly, and applying *Hedley Byrne*, it was made clear that—

h 'reliance upon [the assumption of responsibility] by the other party will be necessary to establish a cause of action (because otherwise the negligence will have no causative effect) ...' (See [1994] 3 All ER 506 at 520, [1995] 2 AC 145 at 180.)

j Fourthly, it was held that the existence of a contractual duty of care between the parties does not preclude the concurrence of a tort duty in the same respect.

It will be recalled that Waite LJ took the view that in the context of directors of companies the general principle must not 'set at naught' the protection of limited liability. In *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 at 524 Cooke P (now Lord Cooke of Thorndon) expressed a very similar view. It is clear what they meant. What matters is not that the liability of the shareholders of a

company is limited but that a company is a separate entity, distinct from its directors, servants or other agents. The trader who incorporates a company to which he transfers his business creates a legal person on whose behalf he may afterwards act as director. For present purposes, his position is the same as if he had sold his business to another individual and agreed to act on his behalf. Thus the issue in this case is not peculiar to companies. Whether the principal is a company or a natural person, someone acting on his behalf may incur personal liability in tort as well as imposing vicarious or attributed liability upon his principal. But in order to establish personal liability under the principle of *Hedley Byrne*, which requires the existence of a special relationship between plaintiff and tortfeasor, it is not sufficient that there should have been a special relationship with the principal. There must have been an assumption of responsibility such as to create a special relationship with the director or employee himself.

*The practical application of the extended Hedley Byrne principle*

Not surprisingly, opposing counsel approached the application of the principle of assumption of risk from different perspectives. Counsel for the plaintiffs concentrated in his argument on the pivotal role of Mr Mistlin in the affairs of the company. Counsel for Mr Mistlin concentrated on the absence of direct dealings between the plaintiffs and Mr Mistlin. The practical application of the extended *Hedley Byrne* principle was not agreed. Before I turn to the facts of the present case it is therefore necessary to explore this aspect. Two matters require consideration. First, there is the approach to be adopted as to what may in law amount to an assumption of risk. This point was elucidated in *Henderson's case* [1994] 3 All ER 506 at 521, [1995] 2 AC 145 at 181 by Lord Goff of Chieveley. He observed:

‘... especially in a context concerned with a liability which may arise under a contract or in a situation “equivalent to contract”, it must be expected that an objective test will be applied when asking the question whether, in a particular case, responsibility should be held to have been assumed by the defendant to the plaintiff ...’

The touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff. Obviously, the impact of what a defendant says or does must be judged in the light of the relevant contextual scene. Subject to this qualification, the primary focus must be on exchanges (in which term I include statements and conduct) which cross the line between the defendant and the plaintiff. Sometimes such an issue arises in a simple bilateral relationship. In the present case a triangular position is under consideration: the prospective franchisees, the franchisor company, and the director. In such a case where the personal liability of the director is in question, the internal arrangements between a director and his company cannot be the foundation of a director's personal liability in tort. The inquiry must be whether the director, or anybody on his behalf, conveyed directly or indirectly to the prospective franchisees that the director assumed personal responsibility towards the prospective franchisees. An example of such a case being established is *Fairline Shipping Corp v Adamson* [1974] 2 All ER 967, [1975] QB 180. The plaintiffs sued the defendant, a director of a warehousing company, for the negligent storage of perishable goods. The contract was between the plaintiff and the company. But Kerr J (later Kerr LJ) held that the director was personally liable. That conclusion



a was possible because the director wrote to the customer, and rendered an invoice, creating the clear impression that he was personally answerable for the services. If he had chosen to write on company notepaper, and rendered an invoice on behalf of the company, the necessary factual foundation for finding an assumption of risk would have been absent. A case on the other side of the line is *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517. This case concerned negligent advice given by a one-man company to a commercial fruit grower. Despite proper application of the spray it killed the grower's fruit crop. The company was found liable in contract and tort. The question was whether the beneficial owner and director of the company was personally liable. The plaintiff had undoubtedly relied on the expertise of the director in contracting with the company. The New Zealand Court of Appeal unanimously concluded that the defendant was not personally liable. McGechan J, who analysed the evidence in detail, said (at 532) that there was merely 'routine involvement' by a director for and through his company. He said that there 'was no singular feature which would justify belief that Mr Ivory was accepting a personal commitment, as opposed to the known company obligation'. That was the basis of the decision of the Court of Appeal.

d In his 1997 Hamlyn Lecture, Lord Cooke of Thorndon commented that if the plaintiff in *Trevor Ivory Ltd v Anderson* 'had reasonably thought that it was dealing with an individual, the result might have been different': see 'Taking Salomon Further; Turning Points of the Common Law, p 18, n 50. Such a finding would have required evidence of statements or conduct crossing the line which conveyed to the plaintiff that the defendant was assuming personal liability.

e That brings me to reliance by the plaintiff upon the assumption of personal responsibility. If reliance is not proved, it is not established that the assumption of personal responsibility had causative effect. In his Hamlyn Lecture Lord Cooke of Thorndon referred to two judgments of La Forest J in the Canadian Supreme Court on the element of reliance. In *London Drugs Ltd v Kuehne & Nagel International Ltd* (1992) 97 DLR (4th) 261 at 316 La Forest J emphasised in the context of an issue of personal liability of a company's employee the distinction between 'mere reliance in fact and reasonable reliance on the employee's pocket-book' (La Forest J's emphasis). The second case is *Edgeworth Construction Ltd v M D Lea & Associates Ltd* [1993] 3 SCR 206. The plaintiff company had made a successful bid for a road-building contract with a province. The plaintiffs allegedly lost money as a result of errors in the specifications and drawings prepared for the province by an engineering company. The Supreme Court held that the plaintiffs had a prima facie cause of action against the engineering company for negligent misrepresentation. I do not pause to consider that part of the decision. But the Supreme Court unanimously held that by affixing their seals to the drawing the individual engineers did not assume personal responsibility to the plaintiffs. La Forest J said (at 212):

j 'The situation of the individual engineers is quite different. While they may, in one sense, have expected that persons in the position of the appellant would rely on their work, they would expect that the appellant would place reliance on their firm's pocketbook and not theirs for indemnification; see *London Drugs* ((1992) 97 DLR (4th) 261 at 286–287). Looked at the other way, the appellant could not reasonably rely for indemnification on the individual engineers. It would have to show that it was relying on the particular expertise of an individual engineer without regard to the corporate character of the engineering firm. It would seem quite unrealistic, as my colleague

observes, to hold that the mere presence of an individual engineer's seal was sufficient indication of personal reliance (or for that matter voluntary assumption of risk).'

This reasoning is instructive. The test is not simply reliance in fact. The test is whether the plaintiff could *reasonably* rely on an assumption of personal responsibility by the individual who performed the services on behalf of the company. To that extent I regard what La Forest J said in the *Edgeworth* case as consistent with English law.

#### *Academic criticism of the principle of assumption of risk*

Distinguished academic writers have criticised the principle of assumption of responsibility as often resting on a fiction used to justify a conclusion that a duty of care exists: see Barker 'Unreliable assumptions in the modern law of negligence' (1993) 109 LQR 461, Hepple 'The Search for Coherence' (1997) 50 Current Legal Problems 67 at 88 and Cane *Tort Law and Economic Interests* (2nd edn, 1996) pp 177 and 200. For this criticism two cases which were decided on special facts are cited: *Smith v Eric S Bush (a firm)*, *Harris v Wyre Forest DC* [1989] 2 All ER 514, [1990] 1 AC 831 and *White v Jones* [1995] 1 All ER 691, [1995] 2 AC 207. In my view the general criticism is overstated. Coherence must sometimes yield to practical justice. In any event, the restricted conception of contract in English law, resulting from the combined effect of the principles of consideration and privity of contract, was the backcloth against which the *Hedley Byrne* case was decided and the principle developed in *Henderson's* case. In *The Pioneer Container, KH Enterprise (cargo owners) v Pioneer Container (owners)* [1994] 2 All ER 250 at 255–256, [1994] 2 AC 324 at 335 Lord Goff of Chieveley (giving the judgment of the Privy Council in a Hong Kong appeal) said that it was open to question how long the principles of consideration and privity of contract will continue to be maintained. It may become necessary for the House of Lords to re-examine the principles of consideration and privity of contract. But while the present structure of English contract law remains intact the law of tort, as the general law, has to fulfil an essential gap-filling role. In these circumstances there was, and is, no better rationalisation for the relevant head of tort liability than assumption of responsibility. Returning to the particular question before the House it is important to make clear that a director of a contracting company may only be held liable where it is established by evidence that he assumed personal liability and that there was the necessary reliance. There is nothing fictional about this species of liability in tort.

#### *Applying the principle to the facts*

Mr Mistlin owned and controlled the company. The company held itself out as having the expertise to provide reliable advice to franchisees. The brochure made clear that this expertise derived from Mr Mistlin's experience in the operation of the Salisbury shop. In my view these circumstances were insufficient to make Mr Mistlin personally liable to the plaintiffs. Stripped to essentials, the reasons of Langley J, the reasons of the majority in the Court of Appeal and the arguments of counsel for the plaintiffs can be considered under two headings. First, it is said that the terms of the brochure, and in particular its description of the role of Mr Mistlin, are sufficient to amount to an assumption of responsibility by Mr Mistlin. In his dissenting judgment ([1997] 1 BCLC 131 at 156) Sir Patrick Russell rightly pointed out that in a small one-man company 'the

a managing director will almost inevitably be the one possessed of qualities essential to the functioning of the company'. By itself this factor does not convey that the managing director is willing to be personally answerable to the customers of the company. Secondly, great emphasis was placed on the fact that it was made clear to the franchisees that Mr Mistlin's expertise derived from his experience in running the Salisbury shop for his own account. Hirst LJ (at 153) b summarised the point by saying that 'the relevant knowledge and experience was entirely his qua Mr Mistlin, and not his qua director'. The point will simply not bear the weight put on it. Postulate a food expert who over ten years gains experience in advising customers on his own account. Then he incorporates his business as a company and he so advises his customers. Surely, it cannot be right c to say that in the new situation his earlier experience on his own account is indicative of an assumption of personal responsibility towards his customers. In the present case there were no personal dealings between Mr Mistlin and the plaintiffs. There were no exchanges or conduct crossing the line which could have conveyed to the plaintiffs that Mr Mistlin was willing to assume personal responsibility to them. Contrary to the submissions of counsel for the plaintiffs, d I am also satisfied that there was not even evidence that the plaintiffs believed that Mr Mistlin was undertaking personal responsibility to them. Certainly, there was nothing in the circumstances to show that the plaintiffs could reasonably have looked to Mr Mistlin for indemnification of any loss. For these reasons I would reject the principal argument of counsel for the plaintiffs.

e *The joint tortfeasor point*

Counsel for the plaintiffs tried to support the judgment of the Court of Appeal ([1997] 1 BCLC 131) on the alternative ground that Mr Mistlin had played a prominent part in the production of the negligent projections and had directed f that the projections be supplied to the plaintiffs. Accordingly, he submitted, Mr Mistlin was a joint tortfeasor with the company, the latter being liable to the plaintiffs on the extended *Hedley Byrne* principle.

I am satisfied that this case was never pleaded as an independent cause of action. Like Hirst LJ in the Court of Appeal ([1997] 1 BCLC 131) (with whom g Waite LJ agreed), I am satisfied reading Langley J's judgment ([1996] 1 BCLC 288 esp at 303) as a whole that he never intended to find that Mr Mistlin was liable to the plaintiffs as a joint tortfeasor. The possibility of such a cause of action was raised in the Court of Appeal but expressly abandoned. And it was not included h in the agreed statement of facts and issues before the Appellate Committee. In these circumstances the point is not open to the plaintiffs. In any event, the argument is unsustainable. A moment's reflection will show that, if the argument were to be accepted in the present case, it would expose directors, officers and employees of companies carrying on business as providers of services to a plethora of new tort claims. The fallacy in the argument is clear. In the j present case liability of the company is dependent on a special relationship with the plaintiffs giving rise to an assumption of responsibility. Mr Mistlin was a stranger to that particular relationship. He cannot therefore be liable as a joint tortfeasor with the company. If he is to be held liable to the plaintiffs, it could only be on the basis of a special relationship between himself and the plaintiffs. There was none. I would therefore reject this alternative argument.



*Conclusion*

My Lords, I would allow the appeal. The plaintiffs were legally aided at all stages of this litigation. I would therefore order that the costs of Mr Mistlin in the Court of Appeal and in this house be paid out of the Legal Aid Fund in accordance with s 18 of the Legal Aid Act 1988, such order to be suspended for four weeks to allow the Legal Aid Board to object if they wish.

**LORD HOFFMANN.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Steyn. For the reasons he gives I would allow the appeal, and I would make the order as to costs which he proposes.

**LORD CLYDE.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Steyn. For the reasons he gives I would allow the appeal, and I would make the order as to costs which he proposes.

**LORD HUTTON.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Steyn. For the reasons he gives I would allow the appeal, and I would make the order in respect of costs which he proposes.

*Appeal allowed.*

L I Zysman Esq Barrister.

**R v Secretary of State for the Environment,  
ex parte Billson**

QUEEN'S BENCH DIVISION (CROWN OFFICE LIST)

SULLIVAN J

10, 11, 16 FEBRUARY 1998

- Highway – Dedication – Evidence – Definitive map – Public right of way – Landowner executing revocable deed conferring on members of public statutory rights of access for air and exercise to tracks across common land – Existence of deed not publicised – Successor in title erecting barriers obstructing public's use of tracks – Whether deed evidence of landowner's intention not to dedicate land as highway – Whether public using tracks as of right – Whether statutory rights of access including right of access on horseback – Law of Property Act 1925, s 193 – Highways Act 1980, s 31.*
- In 1929 the owners of a common traversed by a number of public footpaths, bridleways and tracks declared, by an expressly revocable deed, that s 193<sup>a</sup> of the Law of Property Act 1925 applied to their land, conferring on members of the public the rights of access to the common for air and exercise. Thereafter, the tracks were used extensively by members of the public, both on foot and on horseback. In 1984 part of the common on which the tracks were located was purchased by F Ltd without knowledge of the 1929 deed. In March 1990 F Ltd put up barriers obstructing the public's use of the tracks, and made a statutory declaration under s 31(6)<sup>b</sup> of the Highways Act 1980 which excluded the tracks from the list of rights of way. F Ltd later revoked the 1929 deed after learning of its existence and, in 1991, transferred the land to a director of the company. The applicant considered that the tracks were deemed to be dedicated as highways, and so were public rights of way, by virtue of s 31(1) of the 1980 Act, since they had been enjoyed by the public as of right without interruption for a full period of 20 years and there was no evidence of a contrary intention on the landowner's part not to dedicate them. He therefore applied to the county council for an order under s 53(2) of the Wildlife and Countryside Act 1981 modifying the definitive map and statement for its area to include eight tracks as bridleways. The modification order was made, but, following a public inquiry into the matter, the inspector appointed by the Secretary of State to decide whether the order should be confirmed refused to do so. The applicant applied for judicial review of the inspector's decision and the issues arose: (i) whether the 1929 deed was 'sufficient' evidence of an intention not to dedicate for the purposes of the proviso in s 31(1) of the 1980 Act; (ii) whether the public belief that their use of the tracks was 'as of right' was sufficient to establish enjoyment as of right for the purposes of dedication under s 31(1) of the 1980 Act; and (iii) whether the rights of access granted to the public by s 193 of the 1925 Act included a right of access on horseback as well as on foot.

**Held** – (1) For the purposes of the proviso in s 31(1) of the 1980 Act, evidence of the landowner's intention had to be overt and contemporaneous, and it would

<sup>a</sup> Section 193, so far as material, is set out at p 591 c to j, post

<sup>b</sup> Section 31, so far as material, is set out at p 590 d to p 591 b, post

not avail the landowner to assert after the event that he had no intention to dedicate. However, he was not required to publicise his intention to users of the way, and whether his acts were overt or not was a question of fact for the inspector. In the instant case, the inspector was entitled to conclude that the formal execution of the 1929 deed and the depositing of it with the appropriate government department, as required by s 193(2) of the 1925 Act, was a sufficiently overt act indicating the landowner's intention not to dedicate. Moreover, the proviso did not require evidence of an intention not to dedicate for the whole of the 20-year period specified in s 31; the words 'during that period' were not to be equated with 'throughout that period' (see p 599 f, p 606 a d g and p 607 b to d, post); *R v Secretary of State for the Environment, ex p Cowell* [1993] JPL 851 considered.

(2) Members of the public claiming the existence of a public right of way had to establish not merely that they believed that their enjoyment of the way was as of right, but also that it was in fact *nec vi, nec clam, nec precario*. In the instant case, the users of the tracks on the common were doing what they were permitted to do under s 193 of the 1925 Act by virtue of the deed and no more: their enjoyment of the tracks was by licence and not as of right, even though they genuinely believed that it was as of right (see p 604 h to p 605 f and p 606 a, post); dicta of Slessor and Scott LJ in *Jones v Bates* [1938] 2 All ER 237 at 241, 245 and dictum of Balcombe LJ in *R v Secretary of State for the Environment, ex p Cowell* [1993] JPL 851 at 858 applied.

(3) For the purposes of s 193(1) of the 1925 Act, rights of access to commons for air and exercise were not confined to access on foot, but extended to access on horseback, since riding would have been a normal way of taking air and exercise in 1925. Moreover, not merely did paras (a) to (d) of s 193(1) not specifically exclude horse-riding, but para (c), which excluded the drawing or driving of, *inter alia*, carriages and carts, would have been otiose if the public were not allowed to bring horses on to commons at all. It followed that the inspector had been right not to confirm the order and the application for judicial review would therefore be dismissed (see p 603 c to g and p 607 e, post); *Mienes v Stone* [1985] Conv 415 considered.

## Notes

For the dedication of public paths and application by individuals for modification of definitive maps, see 21 *Halsbury's Laws* (4th edn reissue) paras 254, 270.

For opposed modification orders, see *ibid* paras 274–276.

For the Law of Property Act 1925, s 193, see 37 *Halsbury's Statutes* (4th edn) 317.

For the Highways Act 1980, s 31, see 20 *Halsbury's Statutes* (4th edn) (1992 reissue) 164.

For the Wildlife and Countryside Act 1981, s 53, see *ibid* 520.

## Cases referred to in judgment

*De la Warr (Earl) v Miles* (1881) 17 Ch D 535, [1881–85] All ER Rep 252, CA.

*Fairey v Southampton CC* [1956] 2 All ER 843, [1956] 2 QB 439, [1956] 3 WLR 354, CA.

*Hue v Whiteley* [1929] 1 Ch 440, [1928] All ER Rep 308.

*Jaques v Secretary of State for the Environment* [1995] JPL 1031.

*Jones v Bates* [1938] 2 All ER 237, CA.

*Mann v Brodie* (1885) 10 App Cas 378, HL.

*Merstham Manor Ltd v Coulsdon and Purley UDC* [1936] 2 All ER 422, [1937] 2 KB 77.



- Mienes v Stone* [1985] Conv 415, DC.
- a *O'Keefe v Secretary of State for the Environment* (1997) Times, 5 August, [1997] CA Transcript 1360, CA; *affg* [1996] JPL 42.
- Poole v Huskinson* (1843) 11 M & W 827, 152 ER 1039.
- R v Secretary of State for the Environment, ex p Blake* [1984] JPL 101.
- R v Secretary of State for the Environment, ex p Cowell* [1993] JPL 851, CA.
- b *Ward v Durham CC* (1994) 70 P & CR 585, CA.

### Cases also cited or referred to in skeleton arguments

- A-G v Antrobus* [1905] 2 Ch 188.
- Ellenborough Park, Re, Re Davies (decd), Powell v Maddison* [1955] 3 All ER 667, [1956] Ch 131.
- c *Jaques v Secretary of State for the Environment* [1995] JPL 1031.
- R v Secretary of State for Wales, ex p Emery* [1997] CA Transcript 1159.

### Application for judicial review

- d Robert Billson applied for judicial review by way of an order of certiorari to quash the decision of the Secretary of State for the Environment given by letter on 16 August 1996, whereby he refused to confirm Surrey County Council Bridleways Nos 587–593 and No 528 (Wotton) Definitive Map Order 1995 in respect of land owned by Adrian E White. The facts are set out in the judgment.
- e *George Laurence QC and Louise Davies* (instructed by *Brooke North & Goodwin, Leeds*) for the applicant.
- John Hobson* (instructed by the *Treasury Solicitor*) for the Secretary of State.
- Christopher Cochrane QC and Richard Rundell* (instructed by *Downs, Dorking*) for Mr White.

f *Cur adv vult*

16 February 1998. The following judgment was delivered.

- SULLIVAN J.** Ranmore Common is a wooded area to the north-west of Dorking. It is traversed by a number of public footpaths and bridleways that are shown on the definitive map and also by Ranmore Common Road. There are also a number of tracks across the common. The tracks connect at various points with defined footpaths and bridleways and with Ranmore Common Road. The tracks have been used extensively by members of the public, both on foot and on horseback.
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- h

In March 1990 the landowner put up barriers obstructing that use. The applicant considered that the tracks were public rights of way and so on 31 January 1993 he asked the county council for an order under s 53(2) of the Wildlife and Countryside Act 1981 modifying the definitive map and statement to include eight tracks as bridleways, one of them being upgraded from a footpath to the definitive map to a bridleway.

j

On 1 December 1993 the county council declined to make the modification order and so the applicant appealed to the Secretary of State under para 4 of Sch 14 to the 1981 Act.

On 13 March 1995 the Secretary of State directed the county council to make a modification order. The county council did so, making the Surrey County

Council Bridleways Nos 587–593 and No 528 (Wotton) Definitive Map Modification Order 1995. a

Making the order is only the first step in what was becoming a lengthy process. The 1981 Act gives an opportunity for objections to be made to a modification order. The landowner, Mr White, objected, and so the Secretary of State held a public inquiry before deciding whether or not to confirm the order. The decision as to whether or not to confirm the order was transferred to the inspector, Mr Mellor LLB, who held an inquiry in May 1996. b

By a letter dated 16 August 1996 the inspector decided not to confirm the order so that the tracks have not been added, or in one case upgraded to the list of bridleways that are shown on the definitive map.

It is a curiosity that whilst a decision to confirm an order may be challenged by way of an application to the High Court under para 12 of Sch 15 of the 1981 Act, no such right is given if, as happened in this case, the Secretary of State declines to confirm an order. Hence the applicant challenges the inspector's decision by way of an application for judicial review, and the matter comes before me nearly eight years after the barriers were first erected. c

Since there was no evidence of any express dedication of the tracks as rights of way, the applicant relied on s 31 of the Highways Act 1980. So far as material that provides: d

'(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. e

(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise. f

(3) Where the owner of the land over which any such way as aforesaid passes—(a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and (b) has maintained the notice after the 1st January 1934, or any later date on which it was erected, the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway ... g

(5) Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as a highway is, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as a highway. h

(6) An owner of land may at any time deposit with the appropriate council—(a) a map of the land on a scale of not less than 6 inches to 1 mile, and (b) a statement indicating what ways (if any) over the land he admits to have been dedicated as highways; and, in any case in which such a deposit has been made, statutory declarations made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time—(i) within six years from the date of the deposit, or (ii) within six years from the date on which any previous declaration was last lodged under j

a this section, to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has been dedicated as a highway since the date of the deposit, or since the date of the lodgment of such previous declarations, as the case may be, are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway.'

b

The other enactment upon which the inspector's decision turned was s 193 of the Law of Property Act 1925, which provides:

c '(1) Members of the public shall, subject as hereinafter provided, have rights of access for air and exercise to any land which is a metropolitan common within the meaning of the Metropolitan Commons Acts, 1866 to 1898, or manorial waste, or a common, which is wholly or partly situated within an area which immediately before 1st April 1974 was a borough or urban district, and to any land which at the commencement of this Act is subject to rights of common and to which this section may from time to time be applied in manner hereinafter provided: Provided that—(a) such rights of access shall be subject to any Act, scheme, or provisional order for the regulation of the land, and to any byelaw, regulation or order made thereunder or under any other statutory authority; and (b) the Minister shall, on the application of any person entitled as lord of the manor or otherwise to the soil of the land, or entitled to any commonable rights affecting the land, impose such limitations on and conditions as to the exercise of the rights of access or as to the extent to the land to be affected as, in the opinion of the Minister, are necessary or desirable for preventing any estate, right or interest of a profitable or beneficial nature in, over, or affecting the land from being injuriously affected, or for protecting any object of historical interest and, where any such limitations of conditions are so imposed, the rights of access shall be subject thereto; and (c) such rights of access shall not include any right to draw or drive upon the land a carriage, cart, caravan, truck, or other vehicle, or to camp or light any fire thereon ...

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g (2) The lord of the manor or other person entitled to the soil of any land subject to rights of common may by deed, revocable or irrevocable, declare that this section shall apply to the land, and upon such deed being deposited with the Minister the land shall, so long as the deed remains operative, be land to which this section applies ...

h (4) Any person who, without lawful authority, draws or drives upon any land to which this section applies any carriage, cart, caravan, truck, or other vehicle, or camps or lights any fire thereon, or who fails to observe any limitation or condition imposed by the Minister under this section in respect of any such land, shall be liable on summary conviction to a fine not exceeding level 1 on the standard scale for each offence ...'

j

Section 193 of the 1925 Act was relevant because the then owners, Cubitt Estates Ltd, had applied s 193 to Ranmore Common by an expressly revocable deed dated 12 December 1929 (the deed). Thereafter, part of the common was conveyed to the National Trust in 1959, which revoked the deed in so far as it affected its land in 1962.



The part of the common on which the disputed tracks are located was purchased by Farmstiles Ltd on 31 October 1984. Farmstiles were not told, and did not know, of the existence of the deed at that time. a

After the barriers had been erected, Mr White, a director of Farmstiles, made a statutory declaration under s 31(6) of the 1980 Act. That declaration acknowledged the existence of certain bridleways and footpaths across the common, but it excluded the disputed tracks from the list of rights of way. b

On 20 June 1990 Farmstiles were told of the existence of the deed by Mole Valley District Council. On learning of its existence, the company revoked the deed on 15 October 1990. On 1 November 1991 the land was transferred to Mr White. c

It is not in dispute that the putting up of the barriers in March 1990 brought the right of the public to use the tracks into question for the purposes of s 31(2) of the 1980 Act, thus the 20-year period in question ran from 1970 to 1990. d

When the county council looked at the matter in 1993 it felt 'that if there were no other considerations, the user evidence would be more than sufficient to substantiate a presumption of dedication under Section 31 of the Highway Act 1980'. e

However, the council considered 'that public rights of way could not have been established under Section 31 of the 1980 Act during the existence of the deed'. They maintained that any user after 1929 was not 'as of right' as the owner had given permission for the public to wander over the common. They also argued that at that time horse-riding was a very common form of exercise for members of the rural population and this supports the contention that riding falls within those rights permitted under the 1925 Act. f

The Secretary of State in 1995 took a different view. He said:

'It is common ground that 1990 is the date when the equestrian use of those paths was challenged by obstructions across them. Therefore, a 20 year period of user has to be established prior to that date. The Secretary of State is satisfied that the evidence of equestrian use on all seven of these routes over the relevant 20 year period would be sufficient to show deemed dedication in the absence of other considerations. Indeed, there seems to be no dispute that many riders have used all the paths in question during this period. The Secretary of State has therefore gone on to consider the effects of the Deed of Dedication of 1929 in relation to the nature of the use and the owners intention to dedicate.'

He then took the view that horse-riding is included within the right to air and exercise. He continued: g

'However, whilst the Secretary of State considers that the Deed of 1929 did grant permission for horse riding on the common, he notes that there is no evidence of any notices or other overt acts by the landowner to indicate that the use was permissive. Indeed, there is no evidence of any indication on the ground that the land was privately owned or of anything that might have led members of the public to believe their use was other than as of right. In these circumstances, the Secretary of State considers that it is reasonable for the public to claim that their use was as of right and he does not consider that the mere existence of the Deed was sufficient to deem the use permissive. Similarly, he does not consider that the Deed represented a clear indication that the owner did not intend to dedicate the way to the public, and there is h

a no evidence of any overt acts by the owner during the relevant period which demonstrate this.'

He therefore allowed the appeal, but that was expressly without prejudice to any decision as to whether or not to confirm the order.

Mr Mellor in his decision letter in 1996 reached the following conclusions:

b '... 21. It has only been possible for me to summarise the contentions of the Applicant and of the Objector as concisely as I have in this letter because  
c virtually all the evidence on the fact and the nature of use of the tracks referred to in the Modification Order has either been conceded or has not been challenged by or on behalf of the Objector. The principal contentious issue is the effect of the Deed of December 1929, applying section 193 of the Law of Property Act 1925 to Ranmore Common, on the acquisition of public rights of way across the Common ... This is clearly a matter of law, and one on which there are differing opinions and few helpful authorities; my own views are set out in the conclusions which follow. 22. Most of the user  
d evidence was given in the form of completed "Public Way Evidence Forms" which are not, of course, capable of challenge by cross-examination, and of the more than 1300 completed, many were by the same people in respect of several tracks. However, I was prepared, as was the Objector, to accept this as a substantial amount of evidence given in good faith by people who had, between the mid-1920's and 1991, used one or more of the tracks referred to in the Modification Order for leisure walking, sometimes with dogs, recreation, exercise, training (running), horse riding, organised rambles, and as routes to visit Ranmore Church. 23. Further, there was no suggestion  
e that people using the tracks did so other than in the belief that they did so "as of right" in the sense of the most respected judicial definitions of that phrase. There was no evidence of notices on the tracks either referring to the Deed of 12 December 1929 or in any other way indicating any conditions subject  
f to which the public might enjoy access; no steps had been taken to publicise the Deed or its effect and few, if any members of the public resorting to the Common are likely to have known of it.'

He listed the ten authorities to which he had been referred, and continued:

g '25. Since the question of user as of right is not contested, and is a matter on which I have indicated my opinion in Paragraph 23 above, I believe I can properly consider the issue of public bridleway rights in 3 parts, i.e. pre-1929, post-1990 and the period between 1929 and 1990.'

h We are not concerned with his consideration of the pre-1929 or the post-1990 periods. He continued:

j 'In my view, the point on which the Ranmore Common Inquiry turns is what I would call the potentially negative effect of section 193. In other words, does the application of that section, whether or not it is known to or appreciated by those who use and enjoy the rights of access which it confers, prevent them acquiring, by uninterrupted and unchallenged usage over a long time, public rights of way? In the case before me, there seems to be no doubt that the existence of the Section 193 Deed was not known to the public; the objector had not published its provisions by notice on the land or elsewhere; until 1990 at least, no signs or barriers had been erected on the common to prohibit or to limit the use of the tracks referred to in the

Modification Order; the Section 193 declaration was not registered either under the Land Registration Act 1925 (transfers of any part of the Common had become compulsorily registrable after 1952), the Commons Registration Act 1965, the Land Charges Act 1972, the Local Land Charges Act 1975—or if it was, this was not disclosed at the Inquiry. The objector accepted that to those members of the public who resorted to Ranmore Common, with or without horses, their use was to them as of right: but the question to be determined is whether the law would recognise that use, conferred by what I have earlier referred to as a revocable statutory licence, in the same terms. 32. This is a matter of some difficulty, and I have arrived at a conclusion only after a great deal of thought. It is true that the law normally requires evidence of there being no intention to dedicate to be open and explicit, by notice on site, by gate, barrier or challenge. However, where procedures are prescribed by statute, there seems to be no greater obligation than to comply with the statutory requirements. For instance, maps deposited and declarations made under Section 31(6) of the Highways Act 1980 require no other publicity to constitute sufficient evidence to negative the intention of the owner to dedicate. Similarly, the only requirement made by statute of publicity for declarations under Section 193(2) of the Law of Property Act 1925 is that they be deposited with the Secretary of State, and it has not been disputed that this was done with the Deed of 12th December 1929 ... It is therefore tenable, on the balance of probability, that the deliberate application of Section 193 of the 1925 Act to Ranmore Common constituted a form of access by agreement that is sufficient to over-ride any claim to establish public rights of way, and, in the absence of authority to the contrary, I am inclined to that view.’

Having dealt with two other matters, his final conclusion was:

‘38. I referred in paragraph 24 of this letter to the case law which I had been asked to consider and which I did indeed examine. Without attempting a detailed summary of the application of each of those cases to the circumstances giving rise to the Modification Order and the evidence presented to the Inquiry, I would venture to state that not all were relevant to my decision, particularly as the question of use “as of right” was not a matter of contention. I believe the factual base of 20 years actual enjoyment without interruption was established for all the routes referred to in the Modification Order, that no issue concerning a right to roam around was raised on the facts of this case, and that though users of the tracks on Ranmore Common believed they were there as of right, the existence of the Section 193 declaration, though unknown to them, affected the nature of their use. Indeed, though it was not argued before me, I would not have been inclined to dismiss the contention that land to which Section 193 applied was of such a character that (while the Section applied) its use could not have given rise to any presumption of dedication, without careful scrutiny.’

He therefore decided not to confirm the order.

Mr Laurence QC, for the applicant, challenges the inspector’s decision on four grounds: firstly, he says, whatever intention might have been evidenced by the deed it could not be ‘sufficient’ evidence of an intention not to dedicate, because to be sufficient for the purposes of s 31(1) the landowner’s intention had to be



a manifested to the public. He relies in particular on the dictum of Denning LJ in *Fairey v Southampton CC* [1956] 2 All ER 843 at 846–847, [1956] 2 QB 439 at 458:

b 'In this connection I would also mention the finding of quarter sessions that, in and from 1931, the landowner, by turning off strangers, showed an intention not to dedicate the path as a highway for the use of members of the public at large. This raises the same point. In my opinion a landowner cannot escape the effect of twenty years' prescription by saying that, locked in his own mind, he had no intention to dedicate; or by telling a stranger to the locality (who had no reason to dispute it) that he had no intention to dedicate. In order for there to be "sufficient evidence that there was no intention" to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large—the public who used the path, in this case the villagers—that he had no intention to dedicate. He must, in LORD BLACKBURN'S words, take steps to disabuse those persons of any belief that there was a public right (see *Mann v. Brodie* ((1885) 10 App Cas 378 at 386)). Such evidence may consist, as in the leading case of *Poole v. Huskinson* ((1843) 11 M & W 827, 152 ER 1039) of notices or a barrier, or the common method of closing the way one day a year. That was not done here; but we must assume that the landowner turned off strangers in so open and notorious a fashion that it was clear to everyone that he was asserting that the public had no right to use it. On this footing there was sufficient evidence to show that there was no intention to dedicate.'

e Although obiter, that dictum has been followed, or a similar approach adopted, in a number of cases. In *R v Secretary of State for the Environment, ex p Blake* [1984] JPL 101 at 102 Walton J said:

f 'Of course, the onus there was on the landowner to establish no intention to dedicate. Quite clearly, it was not sufficient for the landowner merely to come along and beat his breast and say that all was lost, because there was an intention never to dedicate. That intention had to be manifested by sufficient overt or notorious acts.'

g In *R v Secretary of State for the Environment, ex p Cowell* [1993] JPL 851 at 857 Staughton LJ said:

h 'There were dicta, in the case of *Fairey v. Southampton County Council* ([1956] 2 All ER 843, [1956] 2 QB 439), which said that it was not sufficient for the landowner to have an intention not to dedicate *in pectore*. He had to manifest that intention by some overt act. That was not said in the section itself, but it seemed a sensible rule. Subsections (3), (5) and (6) all dealt with acts which were, to a greater or lesser extent, overt; those were the examples of how sufficient intention might be demonstrated. So perhaps it was right to say that evidence of intention had always to be in the form of overt acts.'

j The matter was put slightly differently in *Ward v Durham CC* (1994) 70 P & CR 585 at 590 by Nicholls V-C:

'In the absence of overt acts demonstrating an intention not to dedicate, such as displaying a "no right of way" notice, the court ought to be slow to find that a landowners' unexpressed intention not to dedicate is sufficient evidence for the purposes of section 31.'

Finally, in *O'Keefe v Secretary of State for the Environment* [1996] JPL 42 at 59 Pill J said a propos the proviso to s 31(1):

'On the point of construction, there was of course a danger of putting a gloss on the word "intention" in the statute and normally, when intention was at issue, a witness was permitted to say after the event what his intention at the time had been. In the context of the 1980 Act however, he (Pill J.) respectfully agreed that the intention had to be made manifest by contemporaneous and overt acts. The object of the Act, or one of its objects, was to simplify proof of dedication which was presumed upon proof of user. The statute gave a landowner means of protection against that presumed dedication upon production of sufficient evidence to negative the intention to dedicate during the relevant period of use. Read as a whole, section 31 contemplated overt acts during the relevant period; use, as defined, on the one hand, acts which negative an intention to dedicate on the other. He would in any event have followed the authority referred to. Further, it would be a rare case in which a statement after the 20-year period of what the intention had been during that period could be "sufficient evidence" unless made manifest by acts during the 20-year period. In the circumstances of the case, the sub-Committee and the officers were entitled to take the view they had done. A failure to take into account expressions of intention made only after the event, if a misdirection, was not a material one which should invalidate the order.'

That decision was affirmed by the Court of Appeal on 29 July 1997, but the transcript of the Court of Appeal's decision does not take the matter any further.

Here, says Mr Laurence, the inspector had concluded that no steps were taken to publicise the deed and few if any members of the public resorting to the common were likely to have known of it.

Mr Laurence says that the inspector erred in drawing an analogy with the lack of publicity required for declarations under s 31(6) of the 1980 Act. Parliament chose to enact sub-s (6) as a specific means of satisfying the proviso to s 31(1). The declaration has to particularise the highways that are acknowledged, be deposited with the highway authority and be renewed every six years. It is wholly different from a deed under s 193, which is not concerned with highways at all.

He points out that to be effective under s 31(3) as evidence of a contrary intention the notice must have been erected so as to be visible to persons using the way.

Equally, he says, if other evidence of a contrary intention is to be relied on then that intention must have been capable of being apprehended by the public using the way.

He accepts that there will on his approach be a fine line between acts which are a sufficient manifestation of a contrary intention and acts which are sufficient to bring the right of the public to use the way into question. Once the contrary intention is not merely capable of being apprehended but is actually apprehended by the public they would no longer be using the way believing their use to be of right and/or their right would have been called into question.

Mr Laurence's second point is that the proviso to s 31(1) applies only where the evidence shows that the landowner did not intend to dedicate throughout the whole of the 20-year period. He says that the words 'during that period' refer back to the 'full period of 20 years' and Parliament did not choose to say 'during that period or any part thereof'. He points to the fact that to be effective for the

a purposes of sub-s (3) a notice has to be maintained, and that declarations made under sub-s (6) have to be renewed every 6 years. Here the landowner had no knowledge of the deed between 1984 and 1990. Although the inspector concluded that this did not negate the effect of the deed there was no evidence which showed independently of the deed that the landowner had no intention to dedicate the tracks during that period.

b Thirdly, he says, in any event, the deed is not evidence of an intention on the part of the landowner not to dedicate. Whilst it gave members of the public rights of access to the common for air and exercise on a revocable basis, it said nothing about whether the public could pass and repass along physically defined tracks on the common to get, for example, from one edge of the common to another. Such a use of the tracks to pass and repass going from A to B, rather than  
c simply rambling over the common for air and exercise would be a public use of the tracks 'as of right'.

The inspector had noted that the question of user as of right was not contested. Thus, the inspector was to be read as concluding as a fact that there had been sufficient use of the tracks by the public outside the terms of the permission  
d conferred by s 193 to satisfy the requirements of user in s 31(1).

He submitted it was not open to the respondents to reopen the question of whether user had been as of right. Section 193 enabled landowners to confer a new right on the public, a right of access for air and exercise to common land. It could not have been Parliament's intention that conferring this new right would restrict the public's ability to acquire a right of way by evidence of long user at  
e common law.

I will return to Mr Laurence's submissions on the 'as of right' issue when I have set out the respondent's submissions in respect of that matter.

Mr Laurence's fourth point was that the rights of access granted to members of the public by s 193 do not include a right of access on horseback as well as on  
f foot.

In *Mienes v Stone* [1985] Conv 415 Farquharson and Tudor Price JJ expressed opposing views on this question, both expressions of view being obiter. Mr Laurence invites me to prefer the view of Farquharson J. Had Parliament intended to confer the right on members of the public on horseback it would have said so. Since it did not, the deed is wholly silent as to the dedication of  
g bridleways and so the order should have been confirmed in respect of equestrian rights.

Mr Hobson for the Secretary of State submits that the manner in which the inspector concluded the tracks were used (para 22 of his decision letter) was consistent with the public simply exercising rights of access for air and exercise  
h within s 193(1) of the 1925 Act.

The inspector accepted that the public used the tracks in the belief that they were doing so as of right (para 23). When the inspector said in para 25 that user as of right was not contested he cross-referred back to para 23. Thus, on a proper construction of the decision letter, the inspector was not concluding as a fact that  
j user was as of right, merely that there was undisputed user for the purposes he described and that the public believed that such user was as of right. The inspector went on to consider what was the effect of the deed on that undisputed evidence of user.

Mr Hobson submitted that before one gets to the proviso in s 31(1) one has to consider whether the way has actually been enjoyed by the public as of right for the requisite period. To establish that it was necessary for the public to



demonstrate that they believed they were entitled to use the way as of right, but that belief, although necessary, was not sufficient. It was also necessary to show that the way had actually been enjoyed *nec vi, nec clam, nec precario*. a

None of the cases were concerned with force or secrecy. Dealing with user by permission, in the absence of any evidence from the landowner to the effect that the use had been permissive the public's belief that they were using the way as of right would usually suffice. In those circumstances they were not required to prove a lack of permission. But if the landowner gave evidence that the use was with permission and that evidence was not gainsaid, the use would not be as of right, notwithstanding the belief of the public that it was. b

Mr Cochrane QC for the landowner made similar submissions, and he and Mr Hobson referred to dicta of Hilbery J in *Merstham Manor Ltd v Coulsdon and Purley UDC* [1936] 2 All ER 422. Those dicta were cited by the Court of Appeal in *Jones v Bates* [1938] 2 All ER 237. Slessor LJ said: c

"The expression "as of right" as applied to a public way was considered by TOMLIN, J., in *Hue v. Whiteley* ([1929] 1 Ch 440 at 445, [1928] All ER Rep 308 at 309), where he defines user as of right as meaning that the users were: "believing themselves to be exercising a public right to pass from one highway to another." I think that this is the proper meaning to be attributed to the words in the 1932 Act, and I would further apply to them the language of COTTON, L.J., in *De la Warr (Earl) v. Miles* ((1881) 17 Ch D 535 at 596, [1881–85] All ER Rep 252 at 262), quoted by HILBERY, J., in the *Merstham Manor* case ([1936] 2 All ER 422 at 83): "Acts have been done as of right, that is to say, not secretly, not as acts of violence, not under permission from time to time given by the person on whose soil the acts were done." (See [1938] 2 All ER 237 at 241). d

Scott LJ said ([1938] 2 All ER 237 at 245): e

"There is only one way in which the public can enjoy a footway, and that is by walking over it, and this is the meaning of the short word "user" in all the cases about footpaths. Members of the public enjoy it "as of right," when, as TOMLIN, J., said, in *Hue v. Whiteley* ([1929] 1 Ch 440 at 445, [1928] All ER Rep 308 at 309), they use it: "believing themselves to be exercising a public right to pass from one highway to another." This seems to me the simplest and truest interpretation of the three words "as of right," as applied to public rights of way. It is doubtless correct to say that negatively they import the absence of any of the three characteristics of compulsion, secrecy, or licence—"nec vi, nec clam, nec precario," phraseology borrowed from the law of easements—but the statute does not put on the party asserting the public right the onus of proving those negatives, and I do not think that Parliament borrowed the words "as of right" from the law of easements, as the judge thought. It chose them because all through the decided cases upon public rights of way they had been judicially used, and in the sense stated by TOMLIN, J. Nor do I think that HILBERY, J., in the only reported case upon the 1932 Act, *Merstham Manor, Ltd. v. Coulsdon & Purley Urban District Council* ([1936] 2 All ER 422 at 427, [1937] 2 KB 77 at 82–83), really meant to say anything different from what TOMLIN, J., had said, when he quoted BRETT, L.J., in *De la Warr (Earl) v. Miles* ((1881) 17 Ch D 535 at 591, [1881–85] All ER Rep 252 at 259): "The true interpretation of those words 'as of right' seems to me to be that he has done so upon a claim to do it, as having a right to do f

a it without the lord's permission, and that he has so done it without that permission ..." It is the requisite quality of the act, not merely the act itself, which is here defined ... The essential quality of the acts—that is, as acts done as of right—has from early days in our law been established by showing that the acts were done openly ... I think it right, therefore, to hold that, where the words "as of right" are used in the Rights of Way Act, 1932, in connection with actual enjoyment, they are satisfied if the evidence shows that the actual enjoyment has been open, not by force and not by permission from time to time given."

Finally, in *Ex p Cowell* [1993] JPL 851 at 858, Balcombe LJ had said:

c 'If, therefore, it was established by evidence that the user was permissive, it could not be "as of right", no dedication could be inferred, and in the particular circumstances of this case it was, in his judgment, unnecessary to go on to consider what had been called "the proviso"; those were the words at the end of section 31(1), unless there was sufficient evidence that there was no intention during that period to dedicate it. Of course it was possible that there might be cases where it would be established on the evidence that there had been actual user or enjoyment "as of right" because there was no force, secrecy or permission, but nevertheless it would still be open to a landowner to prove that there was no intention to dedicate.'

In that case both Rose and Staughton LJ had observed that arguments that enjoyment by the public had been as of right and that under the proviso there was no intention to dedicate might well overlap, and the same evidence might well be relevant under both heads.

Turning to the proviso, Mr Hobson says that it was originally inserted in s 1 of the Rights of Way Act 1932 as a benevolent provision for the protection of the landowner. The requirement that there should be 'sufficient evidence' of no intention to dedicate was to prevent the landowner from retrospectively asserting a lack of intention when he had said and done nothing during the 20-year period. There was no requirement that his intention must be made manifest to the public as contended by Mr Laurence. He accepts that it would not be a sufficient intention if the intention remains locked in the landowner's own mind: see Denning LJ in *Fairey v Southampton CC* [1956] 2 All ER 843 at 846, [1956] 2 QB 439 at 458; or if it remains in pectore, see Staughton LJ in *Ex p Cowell* [1993] JPL 851 at 857. But, he says, Denning LJ erred in equating the evidence necessary to satisfy the proviso with the evidence necessary to support the proposition that the right of the public to use the way had been brought into question.

In the case of the latter he accepts that the landowner's challenge must be sufficiently open and notorious to bring it home to the public that their right to use the way is being challenged. The evidence of the landowner's conduct may be sufficient to serve both purposes, to bring the right into question and to show that he had no intention to dedicate, but it need not be. There may be sufficient evidence of lack of intention to dedicate even though the public do not realise that their right has been brought into question, otherwise there would be no scope for the operation of the proviso.

In *Jaques v Secretary of State for the Environment* [1995] JPL 1031 Laws J had discussed the relationship between the first and second parts of s 31(1). He said (at 1037):

‘First, persons asserting a right of way under the subsection had to demonstrate actual enjoyment, as of right and without interruption, for at least 20 years. The expression “as of right” meant that the members of the public using the way had to believe they have the right to do so. This was clear from *Hue v. Whiteley and Cowell*; indeed, it could not be otherwise, since if the expression “as of right” meant that the public had to demonstrate an objective legal right to use the way, the statutory provision would be circular or question-begging. The nature of the user that had to be established was described by the old Latin tag “*nec vi nec clam nec precario*”. It meant that the use had to be open not secret, and in effect unobstructed. Quite plainly, the second part of section 31(1) imported a further requirement. It meant that even if use of the required quality was proved, the status of right of way would not be established if the landowner demonstrated an intention not to dedicate. The logical relationship between the two parts of the subsection entailed that proof of an intention not to dedicate could be constituted by something less than proof of facts which had to have made it clear to the public that they had no right to use the way: otherwise, once the interested public had established their case under the first part of the subsection, there would be no room for the operation of the second part. That was not a very satisfactory state of affairs. It was plain that the landowner had to disprove an intention to dedicate by overt acts directed to the members of the public in question, but equally plain that they need not actually bring home to the public that there was no right to use the way. He could only conclude that any sufficiently overt act or series of acts indicating an intention to keep the way private would be enough for the landowner’s purposes in relation to the second part of the subsection, though they did not in fact bring home to the public his objection to their using his land.’ (Laws J’s emphasis).

Mr Hobson said that the cases cited by Mr Laurence were all examples of the court accepting that the landowner could not simply keep his intention to himself and then retrospectively assert that there had been a lack of intention all along. Thus in *R v Secretary of State for the Environment, ex p Blake* [1984] JPL 101 Walton J said that it was not sufficient for the landowner merely to come along and beat his breast and say that all is lost.

In *Ex p Cowell* Staughton LJ had contrasted overt acts with an intention that was kept to oneself.

In *O’Keefe’s* case Pill J was rejecting as sufficient evidence of no intention to dedicate a statutory declaration which had been made after the way had been brought into question where there had been no overt acts during the relevant period.

In *Ward and Ward v Durham CC* (1994) 70 P & CR 585 Nicholls V-C did not go so far, contenting himself with saying that the court should be slow to find that a landowner’s unexpressed intention not to dedicate was sufficient for the purposes of s 31.

What is sufficient evidence is a question of fact. The execution of the deed and depositing that deed with the relevant government department was a sufficiently overt act for the purposes of the proviso, submits Mr Hobson. He points out that s 31(6) does not require the deposit of the declaration with the local authority to be publicised locally or at all.

So far as Mr Laurence’s second issue is concerned, he says that the deed continued to have effect until it was revoked in 1990 so that the public’s use of the



a common continued to be with permission until then. But, in any event, he says that the words 'evidence that there was no intention during that period to dedicate' in s 31(1) should not be read as though the proviso said 'evidence that there was no intention throughout that period to dedicate'.

b He contrasts the landowner's position with that of the public who have to show that they have enjoyed the right of way, the way as of right and without interruption 'for a full period of 20 years'.

Thus, subject to questions of de minimis, if the evidence shows that, for example because of changes in land ownership, there was no intention to dedicate for some period within the 20 years, the way is not deemed to have been dedicated under s 31(1).

c In this context Mr Cochrane pointed to certain dicta of Walton J in *Ex p Blake*, in which he accepted that for the first three years of the 20-year period in that case a notice sufficient to indicate no intention to dedicate had been in position. Walton J said that that was fatal to the applicant's case that there was a right of way. Walton J's approach had been indorsed in *Ex p Cowell* [1993] JPL 851 at 858 by Balcombe LJ:

d '... Walton J. (rightly in his view, although criticised by Mr. Laurence) held that a notice which was not maintained throughout the whole of the relevant period necessary under section 31(3) could nevertheless be relied on as evidence that during the time that notice was displayed, the way was being used with the permission of the owner, and therefore, during that  
e period at least, there was not user "as of right."

In response to Mr Laurence's third point, Mr Hobson and Mr Cochrane said that by executing the deed under s 193(2) the landowner conferred upon members of the public rights of access to the common for air and exercise. Such rights were enjoyed over many other commons by virtue of s 193(1). The rights  
f extend over the whole of the common, including any tracks across it, thus the public have an express licence to use the tracks for that purpose. That permission serves a dual function, of negating any user as of right, and of satisfying the proviso, particularly since the licence in this case is expressly revocable.

The respondents argue that on the facts found by the inspector that was how the public were using the tracks: for air and exercise. The one possible exception  
g was the use of the tracks as 'routes to the church', but there was no indication in the decision letter of the extent of that use, and here it was being claimed that the tracks were bridleways and there was no evidence of significant numbers of the public riding to church.

Turning to the fourth ground on which Mr Laurence challenged the decision,  
h the respondents contended that the deed did not limit the public's right of access for air and exercise to a right of access on foot. It extended to access on horseback. In 1925 horse-riding was a popular way of taking air and exercise and if Parliament had intended to exclude horse-riders from commons generally it would have said so expressly. If horse-riding caused problems on any particular  
j common the minister could impose limitations and conditions under s 193(1), para (b). This had been done in the case of other commons, see para 28 of the decision letter.

Finally, the respondents pointed to para (c) of s 193(1), which specifically provided that the rights of access should not include a right to draw or drive carriages, carts, etc, upon the land. If the right of access is limited to pedestrians only this provision would have been otiose. In 1925 horses would have been

perhaps the principal means of drawing carriages, carts, and so forth, onto commons. a

In response to the respondent's submissions that the licence conferred upon the public by the deed was sufficient, not merely for the purposes of the proviso to s 31(1), but also for the purpose of defeating any claim that the public's enjoyment of the tracks was "as of right", Mr Laurence argued that it was sufficient to establish that a way was actually enjoyed as of right if the evidence established that the public were using the way believing themselves to be exercising a public right. That is what the inspector had concluded in para 23 of his decision letter. He submitted that the law relating to the public rights of way had diverged from that relating to private rights of way. Whilst in the latter case it was necessary to establish as a fact that the use for the requisite period had been without the landowner's permission and the belief of the user was irrelevant, in the former case the belief of the user that he was exercising a public right was all important, and if that belief was established it did not matter whether there was evidence which showed that the user was in fact with permission. b c

He relied on the dicta of Farwell J in *Jones v Bates* [1938] 2 All ER 237 at 251:

"The expression "as of right," which is to be found in sect. 1 of the Act of 1932, corresponds with the words claiming right in the Prescription Act, 1832, and, in my judgment, bears the same meaning. These words have been explained in several cases, and I understand them to mean that the user must have been by persons who honestly believed that they had a legal right so to do, as distinguished from user by persons who thought they had the express or tacit licence of the owner, or were regardless of the rights of such owner. That being so, the evidence of persons who used the way that they have seen others, unknown to them, using it is some evidence of actual user, but it is not necessarily of great weight, because it is impossible to say whether or not the user of such persons was "as of right." e f

He also referred me to the dicta of Pill J in *O'Keefe's case* [1996] JPL 42 at 52-53:

'He (Pill J.) considered user as of right to mean user which was not only *nec vi*, *nec clam*, *nec precario* but was in the honest belief in a legal right to use. In that context, the legal right believed to exist was the right of members of the public to pass and re-pass on a public highway. There was no further requirement of knowledge of the procedures by which the right had come into existence. If such knowledge were to be required, many users of their town's main street might have difficulty in explaining themselves, the public probably being largely unaware of the concept of dedication. He had used the Latin expression *nec vi*, *nec clam*, *nec precario* not only because it was succinct but also to avoid using, instead of *precario*, one of the several words suggested as alternatives to *precario*: including "licence", "permission", and "tolerance". Force and secrecy were not significant features in the present case. Mr Laurence submitted that use which was tolerated was use *precario*. Toleration should be regarded as tacit permission and had to be distinguished from acquiescence.' g h j

The Court of Appeal ((1997) Times, 5 August, [1997] CA Transcript 1360) dismissed an appeal from that decision. Mummery LJ said:

'The relevant issue was sufficiently considered by reference to whether the public use without interruption for 20 years was in the honest belief in a legal

a right to use it as a public footpath. There was ample material to support the view that the user was peaceable, open, not by permission and as of right.'

Mr Laurence accepts that Mummery LJ's use of the word 'and' was equally consistent with it being necessary to demonstrate both an honest belief in a legal right to use the way and evidence that the user was not in fact by permission.

b He adds that at the inquiry before Mr Mellor, because it was accepted that the user was 'as of right', the applicant did not call the witnesses who would have spoken to their public way evidence forms. I have been provided with a specimen form. It is very detailed and includes, for example, a question: 'For what purpose were you using the way?'

c In the light of those submissions I set out my own conclusions as follows: the first question to be answered is what did the deed permit? Section 193(1) conferred rights of access for air and exercise on the public in respect of very many commons. By sub-s (2) additional commons could be made subject to such rights. In my view Parliament intended in 1925 to confer the broadest possible rights of access for air and exercise to those commons, subject only to the limitations set out in paras (a) to (d) of the proviso to s 193(1).

d The rights of access for air and exercise extend over the whole of the commons in question, including any tracks across them. Walking along such tracks for the purpose of taking air and exercise is permitted by s 193. Indeed, using the tracks across a common will often be the most convenient way of taking air and exercise, particularly in a wooded area such as Ranmore Common.

e Since the dicta in *Mienes v Stone* [1985] Conv 415 are obiter and conflict with each other I am free to conclude that the rights of access for air and exercise conferred by s 193 are not confined to access on foot, but extend to access on horseback. I do so conclude. Riding would have been a normal way of taking air and exercise in 1925. In paras (a) to (d) of the proviso to s 193(1) Parliament set out those limitations which it wished to impose on the rights of access.

f Not merely do paras (a) to (d) not specifically exclude horse-riding, but para (c), which excludes the drawing or driving of carriages, carts, etc, would be otiose (or addressed specifically to motor vehicles) if the public were not allowed to bring horses on to commons at all. In 1925 many, if not most carriages, carts and so forth, would still have been horse drawn.

g If horse-riding caused a problem on any particular common then limitations and conditions could be and have been imposed prohibiting horse-riding under para (b) of the proviso.

The next question is: how were the public actually using Ranmore Common?

h I bear in mind that there was no cross-examination, and that because of the extent of agreement the applicant called only one out of many potential witnesses who were prepared to speak to their public way evidence forms, but the findings of the inspector in para 22 of the decision letter are clear: the public were using the tracks 'for leisure walking, sometimes with dogs, recreation, exercise, training (running), horse-riding, organised rambles and as routes to visit Ranmore Church'. On the face of it, with the sole possible exception of the use of the tracks as routes to visit the church, that is precisely the kind of use of the tracks that falls within s 193(1) and which is therefore permitted by virtue of the deed.

j Turning to the use of the tracks as routes to visit the church, I would accept the proposition that if a track across a common is not used for the purpose of taking air and exercise but is being used by the public for some other purpose: as a route between points A and B, for example, from the village across a common to a



nearby school, church, or railway station, then in principle such usage of the track is capable of establishing a right of way over it under s 31 of the 1980 Act. It may well be difficult to distinguish between user of the track for air and exercise and use for other purposes. For example, the walk across the common to the church may well be the longer way round, but more attractive, and so the public may choose to use it for the dual purpose of enjoying air and exercise on the common and getting to church. But if that distinction can be drawn on the evidence, a right of way over a track may in principle be established even though it runs across a common. But here there is no indication in the decision letter as to how many of the 1300 rights of way forms refer to the use of the tracks as routes to visit the church and no indication as to which of the eight tracks were used for this purpose. We do not know whether the visits were for the purposes of worship or because the church was an attractive place to visit whilst one was taking air and exercise. Moreover, it was being claimed that the tracks were bridleways and there is no suggestion that significant numbers of the public rode to church on horseback. I do not therefore consider that this reference to use as routes to the church takes the use of the tracks across Ranmore Common as described by the inspector outside the ambit of taking 'air and exercise'.

Thirdly, what did the inspector mean when he said in para 25 of his decision letter that the question of 'user as of right' was not contested? In the light of his description in para 22 of how the tracks were actually used I am unable to accept Mr Laurence's submission that the inspector was thereby finding as a fact that the public were using the tracks in ways other than those permitted by the deed.

One has to read the decision letter as a whole and in a commonsense way. Although it was dealing with legal issues it should not be construed as though it was an enactment. The inspector describes the use made of the tracks in para 22 and there is no suggestion elsewhere in the decision letter of any use that falls outside the ambit of taking air and exercise (apart that is from the use of routes to visit the church which I have dealt with above).

In my view, all the inspector was saying in paras 22 to 25 of the decision letter was that it was not contested that: (a) there was a substantial amount of evidence of the public using the tracks in the manner described in para 22 of the decision letter, and (b) they used the tracks in that manner in the belief that they did so 'as of right' (para 23).

The inspector then went on in paras 31 to 33 to determine the question, as he put it, 'whether the law would recognise that use conferred by what I have earlier referred to as a revocable statutory licence in the same terms'.

Fourthly, was the belief of the public that their use of the tracks was 'as of right' sufficient to establish enjoyment as of right for the purposes of dedication under s 31(1) of the 1980 Act?

I do not accept that the law relating to the creation of private and public rights of way has diverged as contended by Mr Laurence.

In both cases it is necessary to establish that the use of the way was in fact enjoyed without force, secrecy or permission.

Whilst the belief of the user may well be irrelevant for the purposes of the acquisition of a private right of way, indeed, he may well be seeking quite deliberately to establish a way across his neighbour's land; in order to establish the existence of a public right of way it is necessary for the public to establish a genuine belief that their enjoyment of the way was 'as of right'.

In practice it will normally be sufficient for those claiming the existence of a public right of way to establish that they enjoyed it for the requisite period in the

a belief that they were doing so as of right. They do not have to prove in every case that they were using the way without permission if that issue is not raised, but if the landowner establishes that their use was in fact with permission, that will defeat the claim that their use was as of right.

I believe that my conclusion accords with the dicta of Slesser and Scott LJ in *Jones v Bates* [1938] 2 All ER 237 at 241 and 245 respectively and with the dicta of Balcombe LJ in *Ex p Cowell* [1993] JPL 851 at 858, to which the respondents have referred.

I consider that Mr Laurence has taken the observations of Farwell J in *Jones v Bates* [1938] 2 All ER 237 at 251 somewhat out of context. A little further on Farwell J added:

c 'Further, it must be remembered that, even if user for more than 20 years, by members of the public who honestly believed that they were entitled to use the way, is established, it is by no means conclusive of the issue whether the alleged right has been proved. That must depend on a variety of matters which must be taken into consideration—for instance, the locality, the nature of the user and its quantity, reputation, the terminus at each end, and other similar matters. All these are questions of fact, as is the ultimate conclusion to be drawn from them—namely, whether or not the public right has been proved.' (See [1938] 2 All ER 237 at 251–252.)

e In *O'Keefe's* case [1996] JPL 42 Pill J was not dealing with an express permission to use the way. It was being argued that toleration should be distinguished from acquiescence. In deciding that use which was tolerated could be 'as of right', Pill J was, in effect, rejecting that claimed distinction.

f It follows that, on the admittedly limited information contained in the decision letter, the users of the tracks on Ranmore Common were doing what they were permitted to do under s 193 by virtue of the deed, and no more. Their enjoyment of the ways was by licence and not as of right, even though they genuinely believed that it was as of right.

g Whilst that conclusion will be disappointing to the applicant and to the many other users of the tracks, I do not consider that it leads to any absurdity or anomaly. Rather the reverse, there are a large number of commons where s 193 applies or has been applied. There must be very many walkers and riders who enjoy using the tracks across them and who do so in the firm belief that their user is as of right. It would be strange if using such tracks for 'leisure walking, recreation, exercise, running or horse-riding', precisely the kind of activities permitted by s 193, should somehow establish rights of way across those commons.

h Therefore, consideration of the proviso does not arise, but as Staughton LJ in *Ex p Cowell* remarked, it may well overlap with the requirement that the user be as of right.

j That need not necessarily be so. Mr Cochrane gave examples of cases where there might be no permission to use the tracks in question but where the owner could nevertheless establish that he had no intention to dedicate. They included the landowner who had a long-term programme of mineral extraction and restoration over a large area. His intention to excavate the tracks in due course might be well established by contemporaneous plans and policy statements, yet he might be content to acquiesce in the public's user of the tracks in the meantime. In such a case there would be no permission to use the tracks, but the

landowner would nevertheless be able to establish that he had no intention to dedicate. a

In the present case, the deed is expressly revocable. It is clear evidence that the landowner intended that the public could be stopped from using the common and from walking and riding along the tracks thereon at any time that he chose.

I would accept Mr Laurence's argument that the deed is silent as to what the landowner's intention might be if the public were to use the tracks across the common not for the purpose of taking air and exercise in accordance with the deed, but for some other purpose, such as travelling along a particular track to a particular destination for the purpose of getting to that destination, but as I have indicated, that question does not arise on the facts of this case as found by the inspector. b

Is the deed 'sufficient evidence' of the landowner's intention, given that it was not publicised or made manifest to the users of the way? c

The authorities cited by Mr Laurence, *Ex p Blake* [1984] JPL 101, *Ex p Cowell* [1993] JPL 851, *Ward's case* (1994) 70 P & CR 585 and *O'Keefe's case* [1996] JPL 42, all of which I have referred to above, do no more, in my view, than establish the proposition that evidence of the landowner's intention must be overt and contemporaneous. Thus, it will not avail the landowner to assert after the event that he had no intention to dedicate, but he is not required to publicise his intention to users of the way. d

The only dicta to the contrary are those of Denning LJ in *Fairey v Southampton CC* [1956] 2 All ER 843, [1956] 2 QB 439. Mr Laurence accepts that they were obiter. e

In so far as they equate the evidence necessary to satisfy the proviso with the evidence necessary to bring home to the public that their right to use the way is being called into question, they go too far, in my view.

Implicit in Mr Laurence's submissions is the existence of a very fine line between acts that are sufficiently 'open and notorious' to be capable of bringing the landowner's intention not to dedicate to the attention of the public, but which are not so open and notorious that they succeed in bringing the user of the way into question. His approach seems to me to leave little if any scope for the operation of the proviso. f

The landowner must not keep his intention locked in his own mind, but whether his acts are fairly described as overt or covert must be a question of fact for the inspector. g

One can imagine far-fetched hypothetical examples: writing a letter to oneself and placing it in one's desk drawer, but the inspector was entitled to conclude in this case that the formal execution of a deed addressed to 'all men' and depositing that deed with the appropriate government department, was a sufficiently overt act. h

I accept that the analogy with s 31(6) is not precise, because Parliament created a specific means of negating intention, and the declaration has to be deposited with a highway authority and renewed every six years, but it is fair to observe that Parliament did not feel that it was necessary to bring the existence of such a declaration to the attention of the public using the way. i

It is true that in order to be effective under s 31(3) the notice has to be visible to persons using the way, but erecting such a notice is merely one way of establishing a contrary intention, and is deemed to be sufficient in the absence of proof of a contrary intention.



a One would expect that the evidential threshold required to bring the landowner within such a deeming provision would be relatively high.

Finally, does it matter that Farmstiles Ltd did not know of the existence of the deed between October 1984 and June 1990? Since the permission conferred by the deed continued regardless of the landowner's state of knowledge it could make no difference as to whether the enjoyment of the public during that period was 'as of right'.

b I do not accept Mr Laurence's submission that for the proviso to operate at all there must be evidence that there was no intention to dedicate for the whole of the 20-year period. Whilst 'that period' is a reference back to the 20-year period, 'during that period' is not to be equated with 'throughout that period'.

c Thus if there is sufficient evidence that for say five or ten years during the 20-year period a landowner who objected to riders or walkers across his land had no intention to dedicate, that would defeat a claim of dedication under s 31(1).

d I consider that such an approach is consistent with that adopted by Balcombe LJ in *Ex p Cowell* in respect of the effect of a s 31(3) notice which is not maintained throughout the whole of the relevant period. It is effective for the period during which it is maintained.

If the evidence shows that there was no intention to dedicate for only a very short period during the 20 years questions of de minimis may well arise. They would have to be resolved on the facts by the inspector hearing the evidence.

I therefore conclude that the inspector was right not to confirm the order and that the applicant's challenge to his decision must fail.

e I would like to express my gratitude to all counsel for the very full and helpful submissions that they have put to me.

*Application dismissed. Leave to appeal granted.*

Lawrence Nesbitt Esq Barrister.

# Don King Productions Inc v Warren and others a

CHANCERY DIVISION

LIGHTMAN J

4-6, 9, 10, 27 MARCH 1998

*Trust and trustee – Creation of trust – Declaration of trust – Chose in action – Boxing promoters entering into partnership agreements relating to promotion and management of boxing – Promoter purporting to assign to partnership benefit and burden of existing promotion and management agreements with boxers – Agreements containing express prohibitions against assignment – Whether ineffective assignment at law capable of being effective in equity as declaration of trust.* b  
c

The plaintiff company was owned by K, the leading boxing promoter in the United States. In 1994 K and the first defendant, W, the leading boxing promoter in the United Kingdom, agreed to extend their business relationship and entered into two successive partnership agreements relating to the promotion and management of boxing in Europe. In the first agreement W purported to assign to the partnership the full benefit and burden of all his existing promotion and management agreements with boxers. In fact, some of the promotion agreements and all the management agreements contained express prohibitions against assignment, and in the second agreement it was provided that the partners should hold all promotion and management agreements relating to the business of the partnership to the benefit of the partnership absolutely. Thereafter, W entered into fresh agreements, including a 'multi-fight agreement' for the broadcasting of certain fights in the United States. A dispute arose between the partners as to W's entitlement to do so, and subsequently the partnership was determined and the plaintiff issued proceedings. The judge made an order for the winding up of the affairs of the partnership with all necessary accounts and inquiries and for the hearing of certain preliminary issues. At the trial of those issues, the question arose, in particular, whether a purported assignment of a contract or the rights arising under a contract which was ineffective at law because the contract involved the rendering of personal services or prohibited their assignment, could be effective in equity as a declaration of trust. d  
e  
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**Held** – In principle, there was no objection to a party to contracts involving skill and confidence or containing non-assignment provisions from becoming a trustee of the benefit of being the contracting party as well as the benefit of the rights conferred. There was no reason why the law should limit the parties' freedom of contract to creating trusts of the fruits of such contracts received by the assignor or to creating an accounting relationship between the parties in respect of the fruits. Accordingly, since it was the intention of the parties that the promotion and management agreements should be held by the partnership or by the partners for the benefit of the partnership absolutely, and those agreements contained no provision prohibiting the partners declaring themselves trustees, those agreements had at all times been held by the partners as trustees for the partnership. It followed that W's entry in the 'multi-fight agreement' in his own name and on his own account was in breach of the duties which he owed to the plaintiff (see p 632 j to p 633 e, p 634 h j, p 635 f g and p 637 b, post); *Re Turcan* (1888) 40 Ch D 5 applied. h  
j

## Notes

- a** For declaration of trust in respect of choses in action, see 6 *Halsbury's Laws* (4th edn reissue) para 27.

## Cases referred to in judgment

- British Waggon Co v Lea & Co* (1880) 5 QBD 149, [1874–80] All ER Rep 1135, DC.
- b** *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229, [1985] AC 191, [1984] 3 WLR 592, HL.
- Brockbank (decd) Re, Ward v Baker* [1948] 1 All ER 287, [1948] Ch 206.
- Carecraft Construction Co Ltd, Re* [1993] 4 All ER 499, [1994] 1 WLR 172.
- Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd* [1993] RPC 493.
- c** *First National Securities Ltd v Hegerty Ltd* [1984] 3 All ER 641, [1985] QB 850, [1984] 3 WLR 769, CA.
- Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, HL.
- Keech v Sandford* (1726) Cas temp King 61, [1558–1774] All ER Rep 230, 25 ER 223, LC.
- d** *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1993] 3 All ER 417, [1994] 1 AC 85, [1993] 3 WLR 408, HL.
- Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* [1926] AC 108, [1925] All ER Rep 87, PC.
- Nokes v Doncaster Amalgamated Collieries Ltd* [1940] 3 All ER 549, [1940] AC 1014, HL.
- e** *Pathirana v Pathirana* [1967] 1 AC 233, [1966] 3 WLR 666, PC.
- Pincott v Moorstons Ltd* [1937] 1 All ER 513, CA.
- Saunders v Vautier* (1841) 4 Beav 115, [1835–42] All ER Rep 58, 49 ER 282.
- Target Holdings Ltd v Redferns (a firm)* [1995] 3 All ER 785, [1996] AC 421, [1995] 3 WLR 352, HL.
- f** *Thompson's trustee in bankruptcy v Heaton* [1974] 1 All ER 1239, [1974] 1 WLR 605.
- Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660, CA.
- Turcan, Re* (1888) 40 Ch D 5, CA.
- Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70, [1932] All ER Rep 527, PC.
- g** *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] 2 All ER 961, [1996] AC 669, [1996] 2 WLR 802, HL.
- Williams v Comr of Inland Revenue* [1965] NZLR 395, NZ CA.

## Cases also cited or referred to in skeleton arguments

- h** *Alghussein Establishment v Eton College* (1988) [1991] 1 All ER 267, [1988] 1 WLR 587, HL.
- Baker (George) (Transport) Ltd v Eynon* [1974] 1 All ER 900, [1974] 1 WLR 462, CA.
- Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1996] 4 All ER 698, [1998] Ch 1, CA.
- Chiltern DC v Keane* [1985] 2 All ER 118, [1985] 1 WLR 619, CA.
- i** *Dean v Dean* [1987] FLR 517, CA.
- Harmsworth v Harmsworth* [1987] 3 All ER 816, [1987] 1 WLR 1676, CA.
- Heatons Transport (St Helens) Ltd v Transport and General Workers Union, Craddock Bros v Transport and General Workers Union, Panalpina Services Ltd v Transport and General Workers Union* [1972] 3 All ER 101, [1973] AC 15, HL.
- Hiscox v Outthwaite (No 1)* [1991] 3 All ER 641, [1992] 1 AC 562, HL.
- Hole v Bradbury* (1879) 12 Ch D 886.



- Ladbroke Group plc v Bristol City Council* [1988] EG 125, CA. a  
*Lewis v Pontypridd, Caerphilly and Newport Rly Co* (1895) 11 TLR 203.  
*McClure v Ripley* (1850) 2 Mac & G 105, 42 ER 105, LC.  
*Messenger v British Broadcasting Co Ltd* [1927] 2 KB 543.  
*Milroy v Lord* (1862) De G F & J 264, [1861–73] All ER Rep 783, 45 ER 1185.  
*Mollwo March & Co v Court of Wards* (1872) LR 4 PC 419.  
*Richco International v Alfred C Toepfer International GmbH (The Bonde)* [1991] 1 b  
 Lloyd's Rep 136.  
*Rother Iron Works Ltd v Canterbury Precision Engineers Ltd* [1973] 1 All ER 394, [1974]  
 QB 1 CA.  
*Russell & Co Ltd v Austin Fryers* (1909) 25 TLR 414.  
*Samuels v Linzi Dresses Ltd* [1980] 1 All ER 803, [1981] QB 115, CA. c  
*Squarey v Harris-Smith* (1981) 42 P & CR 118, CA.  
*Stevens v Benning* (1855) 6 De GM & G 223, 43 ER 1218.  
*Supply of Ready Mixed Concrete, Re (No 2), Director General of Fair Trading v Pioneer*  
*Concrete (UK) Ltd* [1995] 1 All ER 135, [1995] 1 AC 456, HL.  
*Toepfer (Alfred C) v Cremer* [1975] 2 Lloyd's Rep 118, CA.  
*Turner Corp Ltd (in liq), Re* (1995) 17 ACSR 761, Aust Fed Ct. d  
*Warren v Mendi* [1989] 3 All ER 118, [1989] 1 WLR 853, CA.

### Preliminary issues

In November 1997 the plaintiff, Don King Productions Inc issued a writ against the defendants, Frank Warren, Christopher Roberts, Centurion Promotions Ltd, Sports Network (USA) Inc and Time Warner Entertainment Co LP, seeking the winding up of the affairs of the partnership between the parties arising out of successive partnership agreements, following its determination. On 11 December 1997 Lightman J ordered the trial of certain preliminary issues, including issues of construction, and as to the effect of a purported assignment of or agreement to assign a non-assignable chose in action. The facts are set out in the judgment. e f

*Michael Briggs QC, Nicholas le Poidevin and Douglas Close* (instructed by Bird & Bird) for the plaintiff.

*Jonathan Sumption QC, Charles Hollander, Antony Zacaroli and Andrew Thomas* (instructed by Park Nelson) for the first, second third and fourth defendants. g

*Kenneth Maclean* (instructed by Herbert Smith) for the fifth defendant.

*Cur adv vult.*

27 March 1998. The following judgment was delivered. h

### LIGHTMAN J.

#### I. INTRODUCTION

I have before me for trial certain preliminary issues in an action in substance between two boxing promoters but in form between the vehicle company of one of the promoters and the other promoter and his associate and a third party which has become involved in the dispute. The plaintiff, Don King Productions Inc (DKP), is a company owned by Mr Don King, the leading boxing promoter in the USA. The first defendant, Mr Frank Warren, is the leading boxing promoter in this country. The second defendant, Mr Christopher Roberts, is Mr Warren's business associate. The third defendant, Centurion Promotions Ltd, formerly j

a Sports Network Ltd (SNL), until its liquidation was, and the fourth defendant, Sports Network (USA) Inc (SNI), is, a company controlled by Mr Roberts. The fifth defendant, Times Warner Entertainment Co LP (TWE), carries on business in the fields of television and broadcasting. Home Box Office (HBO) is the name of a division of TWE.

b The disputes between the parties arise from the entry by Mr King and Mr Warren into two successive partnership agreements. The difficulties in large part spring from the exceptionally poor drafting of these agreements. The first (on occasion referred to as 'the preliminary agreement') was a partnership agreement dated 16 September 1994 (the first agreement) and made between (1) DKP and (2) Mr Warren and SNL. The second was a partnership agreement dated 25 April 1995 (the second agreement) and made between (1) DKP and (2) the corporate vehicle of Mr Warren and Mr Roberts, Sports Network (Europe) Ltd (SNE). The second agreement superseded the first agreement, but the first agreement has some lasting effect. Issues of construction arise in this action in respect of both agreements.

d It is common ground that not later than March 1996 by act of the parties (but without any formalisation in writing) there was a novation of the second agreement and Mr Warren and Mr Roberts were substituted as parties to that agreement in place of SNE. There was subsequently executed a third agreement (the third agreement), and there is a dispute between the parties as to the extent of a fourth also (the fourth agreement). One or both of these may have modified the rights of the parties under the second agreement, but the questions now before me relate only to the first and second agreements, and all questions relating to the third and fourth agreements are deferred for consideration on a subsequent occasion. The partnership constituted by the second agreement was determined at some (as yet undetermined) date between 27 November and 5 December 1997. The date and method of dissolution are not relevant for present purposes. Issues arise as to the rights of the parties under the second agreement on the dissolution of the partnership.

f DKP issued the writ in this action in early November 1997. On 11 December 1997 I made an order (the order) for the winding up of the affairs of the partnership with all necessary accounts and inquiries and (at the request of the parties) for the hearing of some 16 preliminary issues. The purpose behind the latter direction was to enable the deck to be cleared of a number of questions (essentially of construction of the first and second agreements) so as to enable: (1) the partnership assets to be identified and a regime imposed for the protection of these assets, and no others, pending the completion of the winding up; and (2) the winding up to proceed without delay.

h Before and at the trial it became apparent that not all these questions can satisfactorily be resolved in this way, in particular because of the need which has since become apparent for detailed evidence and substantial cross-examination. It has been agreed that in this judgment I shall not seek to pose and answer the surviving questions as raised in the order, but determine the questions of principle argued before me. In the light of this judgment, it is anticipated that the answers to many (if not all) the questions will be apparent, and that if and so far as further clarification is required, such can be sought hereafter.

j The questions before the court may be categorised as: (1) of construction of the two 'one-off' agreements before the court; and (2) of the issue of law of wide application and importance, namely the effect of a purported assignment of, or

agreement to assign, and of an agreement to hold for the benefit of another, a non-assignable chose in action.

## II. RELEVANT FACTS

### (a) *Background*

The USA is by far the most important country in the world for the sport of professional boxing, and second only to the USA is Britain, which dominates the sport in Europe.

In Europe boxing is regulated by national sporting bodies, which register boxers and license managers, promoters and other participants in boxing matches. The most significant national body for present purposes is the British Boxing Board of Control (BBB of C). The BBB of C (like the equivalent boards of other countries) maintains a register of boxers and grants licences to managers and promoters. It is not in practice possible for a person to operate as a manager or promoter in Britain unless he or his partner has the relevant licence. In view of the fact that Mr Warren has at all times held licences both as a manager and a promoter (and indeed lodged a bond and was accountable to the BBB of C), there is and has been no obstacle to his partnership with DKP promoting in Britain.

Management and promotion are distinct functions in the boxing world, although in Britain (unlike in the USA) the same people commonly perform both. A manager has a management agreement with a boxer managing his career. The duration of the management agreement may be anything up to three years plus 18 months from the date that the boxer has won a championship (see cl 11 and 12 of the BBB of C Approved Boxer/Manager agreement). The contract obliges the manager to arrange and supervise an appropriate programme of suitable boxing and other engagements for the boxer and gives the manager a proportion (normally 25%) of the boxer's earnings (or 'purses'). A promoter promotes a particular event or series of events, paying the costs of the event or events (including the purses). A promoter may enter into a promotional agreement with a boxer conferring on the promoter for consideration (which may take the form of a substantial payment) promotional rights in respect of that boxer. The promotional rights may be to promote events involving that boxer, as do the agreements with Mr Naseem Hamed (the Hamed agreements) to which I will have to refer; but typically they engage the boxer for a given number of fights without specifying the venue or opponent which are decided by the promoter near the time of the fight. Almost all of Mr Warren's promotional contracts are of this kind. They ordinarily contain undertakings by the boxer to fight no other fight during the period of the agreement. It is usual, if the boxer is successful, for the promoter and boxer to enter into further promotional agreements either during the term of the initial agreement or upon its termination. (That process repeatedly occurred in respect of the Hamed agreements). The promoter may exploit these promotional rights by promoting an event or by jointly doing so with a co-promoter or by releasing these rights for a consideration so as to enable another promoter to promote an event in which the boxer takes part. The promoter who promotes an event exploits his promotional rights (and derives his earnings and profits) by entering into 'associated agreements' with third parties, eg for the sale of tickets, broadcasting and merchandising rights. The term 'PM&A agreements' is used to denote in this field of activity and in this judgment such promotion, management and associated agreements.

DKP is the leading promoter of boxing events in the USA. It promotes bouts by boxers of various nationalities, some of whom are European registered. These



a have included at various times Mr Frank Bruno, Mr Nigel Benn, Mr Carl Thompson and Mr Henry Akinwande, the latter of whom Mr King has described as part of his 'core business'. (The contracts with Mr Nigel Benn and Mr Carl Thompson were entered into prior to the date of the first agreement and the contract with Mr Henry Akinwande was entered into prior to the date of the second agreement.) The only promotional contract of DKP with a European registered boxer of which Mr Warren was aware at the time of the first agreement was with Mr Nigel Benn. In addition to promoting the principal boxing events there, DKP has significant interests in US broadcasting and in particular a special relationship with Showtime Television Network and through this relationship the means of obtaining publicity for fights promoted by him. For the purpose of the preliminary issue, it is common ground that DKP does not manage any boxers.

Mr Warren is the most significant manager and promoter in Britain. From about 1985, DKP and Mr Warren co-operated on an ad hoc basis on particular promotions sharing the profits. In 1994 they agreed to extend their business relationship by entering into a partnership whose ambit is in issue, but may broadly be stated as the promotion and management of boxing having some relevant connection with Europe. This took the form of the first agreement, which was later superseded by the second agreement.

(b) *The first agreement*

This agreement was made on 16 September 1994 between DKP and Mr Warren and SNL (referred to therein together as 'the UK Partner'). It provides (so far as material) as follows:

'WHEREAS: The parties have agreed to collaborate together through the medium of a UK partnership for the promotion and/or management of professional boxing in Europe ("the Joint Venture") all upon the terms and conditions hereinafter set out.

NOW IT IS HEREBY AGREED as follows:—

1. *Commencement and Duration*

The Joint Venture shall commence on the date hereof and shall continue thereafter unless and until determined by DKP or the UK Partner upon not less than three months' notice in writing to the other to expire at the earliest on the third anniversary on the date hereof or any subsequent anniversary thereof ("the Term").

2. *Business of Joint Venture*

2.1 The business of the Joint Venture ("the Business") shall be as follows:—2.1.1 to manage on a world-wide basis all European registered boxers in which the UK Partner has an existing interest or in which the Joint Venture has or is able to secure an interest; and 2.1.2 to promote on a world-wide basis all boxing bouts staged in Europe to which DKP, the UK Partner or the Joint Venture has or is able to secure the promotional rights.

2.2 Unless otherwise agreed between DKP and the UK Partner the Joint Venture shall not be engaged or interested in any business other than the Business.

3. *Joint Venture Vehicle*

DKP and the UK Partner shall conduct the business through the medium of a UK partnership ("the Partnership") which shall be structured as follows:—

3.1 *Partnership Interests* DKP shall hold a 50% interest in the Partnership. FW and SNL shall together hold the remaining 50% interest in the Partnership in such proportions (as between themselves) as they shall determine. The joint interests of FW and SNL will be held via a special purpose holding company ("NewCo"). a

3.2 *Partnership Decisions* Decisions of the Partnership shall be taken by mutual agreement between DKP and NewCo (hereinafter together referred to as "the Partners"). The business shall be managed by the Partners in such manner as they shall from time to time agree. No Partner shall have the right to make commitments or otherwise bind the Partnership without the prior consent of the other. b

3.3 *Name* The Partnership shall trade under the name and style "Sports Network". SNL hereby grants to the Partnership for the Term a fully paid up royalty free right and license to use the name "Sports Network" and any of its associated logos or marks for the purposes of the Business. c

3.4 *Boxing Licenses* All and any licenses, permissions or consents ("Licenses") necessary for the conduct of the Business including without limitation Licenses from the British Boxing Board of Control or other European boxing authorities shall be applied for and held by the Partnership. If relevant regulation does not permit the Partnership to hold any such License then and in such event FW shall apply for and hold the same for the benefit of the Partnership absolutely without separate compensation therefor. Any costs incurred in the acquisition or maintenance of such Licenses including without limitation the posting of any bonds shall be borne by the Partnership. d

3.5 *Funding* All funding requirements of the Partnership shall be contributed by the Partners pro rata their respective Partnership interests.

3.6 *Profits and Losses* The Partners shall share profits and losses of the Business in proportion to their respective Partnership interests. All profits of the Partnership shall be promptly distributed to the Partners to the maximum extent permitted by English law. e

#### 4. *Non Compete Covenants*

4.1 Each of FW, SNL and NewCo agree that for the Term they shall not either alone or in concert with others directly or indirectly engage or otherwise be interested in the business of professional boxing in any part of the world other than through the Partnership. f

4.2 DKP agrees that for the Term it shall not either alone or in concert with others directly or indirectly engage or otherwise be interested in the business of professional boxing in Europe other than through the Partnership. g

#### 5. *FW Service Agreement*

The Partnership shall employ FW in the Business and FW agrees to provide his services to the Partnership for the duration of the Term at a salary of £150,000 per annum. The Partnership shall pay Don King £75,000 per annum for his services. h

#### 6. *Partnership Assets*

6.1 FW and SNL as beneficial owners hereby assign to the Partnership with effect from the date hereof the full benefit and burden of all existing promotional and management agreements with boxers together with all and any associated sponsorship, closed circuit, television and radio contracts absolutely. Such contracts shall be assigned to the Partnership free and clear i

a of any and all liens or incumbrances and save as expressly provided herein free of charge and without any recourse whatsoever.

6.2 For the avoidance of doubt the mutual agreement of the Partners shall be required prior to the acquisition from any Partner or third party by the Partnership of any other assets or liabilities whatsoever including without limitation staff or premises.

b 6.3 DKP shall pay to SNL the sum of US\$ for goodwill. The parties will determine the amount and manner of payment within 10 days.

#### 7. *Liquidation of the Partnership*

Upon the expiry of the Term or earlier determination of the Partnership by mutual agreement between the Partners or otherwise through the operation of law the Partners agree as follows:—

c 7.1 After and subject to the discharge in full of all Partnership liabilities all and any of the contracts assigned to the Partnership by FW or SNL pursuant to Clause 6.1 which are still subsisting (excluding for the avoidance of doubt any extensions or renewals thereof) shall be distributed in specie to FW or SNL as appropriate.

d 7.2 Thereafter the remaining assets of the Partnership shall unless otherwise agreed be liquidated and distributed in cash to the Partners pro rata their Partnership interests ...

e 9. The parties understand and agree that DKP has a partnership relationship with Showtime Television Network in the exploitation of U.S. television, radio and pay per view broadcast rights to its Boxing Program. The parties also agree that DKP shall own the U.S. radio, television, pay per view and closed circuit television broadcast rights to Boxing Programs of the J.V. and that the J.V. will negotiate exclusively with DKP for the sale and distribution of the U.S. broadcast rights to its Programs.'

f The drafting of the first agreement is somewhat primitive for a transaction of this size and importance for the parties. The parties to the first agreement intended that the first agreement would be superseded by a further agreement between DKP and a company owned by Mr Warren and SNL. This is reflected in the provision in cl 3.1 for the joint interests of Mr Warren and SNL to be held via a special purpose holding company. This intention was implemented in the second agreement. It is now common ground (although Mr Warren took the contrary position until the hearing commenced) that the provisions of cl 3.1 in no way postponed the creation of a partnership relationship between the parties to the first agreement. The partnership commenced business immediately and was for a minimum term of three years. The existing promotional agreements could all be expected (unless renewed) to expire within that period.

h The first agreement was drafted on the basis that it would and could operate to transfer to the partnership Mr Warren's existing business and place the partnership in the shoes of Mr Warren and enable the partnership without anything more (and in particular without the consent of the other parties to outstanding PM&A agreements entered into by Mr Warren) to take over the existing PM&A agreements. It purported to provide for the assignment to the partnership by Mr Warren and SNL of 'the full benefit and burden of all existing' PM&A agreements. This assignment however could not in law take effect according to its terms for the following reasons: (a) an assignment of the burden was legally impossible (save indirectly by novation); (b) the benefit (at any rate) of the promotion and management agreements was not assignable because they



were contracts based on the personal mutual confidence of the boxer and the promoter and manager. The management agreements involved the right to manage and the promotion agreements involved the right to require the boxer to fight the specified bout or bouts and to sell rights in respect of it; (c) all the management agreements and some of the promotional agreements (including the Hamed agreements) and (it may be) some of the associated agreements contained express prohibitions against assignment. a

An assignment may also have given rise to problems with the BBB of C since Mr Warren alone had licences and there is no evidence that the partnership or DKP could have obtained them. I shall consider later the legal effect of the purported assignment. b

The first agreement does not expressly deal with new PM&A agreements or with renewals or extensions entered into after the commencement of the partnership. It is however clearly implicit that either the partnership should itself enter into such agreements in its own name or the partners individually should enter into these in their own name for the benefit of the partnership. This is necessary to give effect to the intention that the partnership should carry on an ongoing business; the fiduciary obligations of the partners; the prohibition in cl 4.1 on Mr Warren entering into such agreements on his own account; the arrangements in respect of the BBB of C licences in cl 3.4; and the express provision for extensions and renewals held by or belonging to the partnership on dissolution in cl 7.1. Clause 7.1 expressly provided that on dissolution the subsisting assigned PM&A agreements (but not any extensions or renewals) should be distributed in specie to Mr Warren or SNL. It is far from clear whether this distribution was intended to be free of charge or whether some form of valuation and payment or credit in respect of this distribution was intended. It is common ground that this question does not arise in this case and does not require answering. If it did, I would incline to the view that the phrase 'distributed in specie' is apposite to describe the transfer of an asset on account of a partner's capital or profits entitlement on dissolution, and not a 'reverter' or entitlement by way of bounty to the partner who originally transferred that asset to the partnership for value. c  
d  
e  
f

*(c) Meeting of 18 September 1994*

The references to partnership capital in the first agreement are to be found in cl 6.1, which provides for the assignment by Mr Warren to the partnership of the PM&A agreements and in cl 6.3, which provides for DKP to make a contribution to the partnership 'for goodwill', the amount of which should be agreed within ten days. g

At a meeting between Mr King and Mr Warren on 18 September 1994 in the USA held for this purpose, as evidenced by a memorandum of 20 September 1994 (the memorandum), the parties agreed as follows: (1) that in respect of their past collaboration SNL owed DKP \$US525,236.13; (2) that DKP would assign this debt to the partnership as its contribution of \$525,236.13 to the capital; (3) that Mr Warren would contribute a like amount; (4) that the management and promotional agreements which Mr Warren had under the first agreement assigned or agreed to assign to the partnership should be valued at \$US750,000, which should stand as the price payable by the partnership for them. (The figure of \$US750,000 was arrived at by reference to the anticipated profits of 20 programmes for which Mr Warren had made promotional contracts prior to the date of the first agreement); (5) that of this \$US750,000 due from the partnership h  
j

a to Mr Warren, \$US525,236.13 should be treated as satisfying Mr Warren's liability to make his contribution of this amount to the partnership, and the balance of \$US224,763.87 should be left outstanding as a debt due from the partnership to Mr Warren.

(d) *The second agreement*

b The second agreement made on 25 April 1995 between DKP and SNE is a somewhat more sophisticated document than the first agreement, but gives rise to even greater construction difficulties than the first.

The relevant provisions of the second agreement read as follows:

'RECITALS:

c A. Frank Warren ... ("FW") and Sports Network Limited ... ("SNL") are together the legal and beneficial owners of the entire authorised and issued share capital of SNE.

d B. On 16 September 1994, DKP entered into an agreement with FW and SNL under which it was agreed that DKP together with FW and SNL (acting through the medium of SNE) would, with effect from 16 September 1994, form a UK partnership under the name "Sports Network" which would carry on the business of promoting and/or managing professional boxing in Europe.

C. This Agreement sets out the terms which have been agreed between the parties in relation to the Partnership.

e AGREEMENT:

1. *Definitions and Interpretation*

f 1.1 In this Agreement (including the Recitals and the Schedules), unless the context otherwise requires, the following words and expressions shall have the following meanings ... "Capital Contribution" the contributions made from time to time by the Partners in accordance with the provisions of Clauses 10.1 and 10.2; "European Registered Boxer" any boxer who at the date of this Agreement or thereafter is registered with any European boxing authority ... "Licences" all and any licences, permissions or consents necessary for the conduct of the Partnership business including without limitation licences from the British Boxing Board of Control and any other European boxing authority ... "the Partners" DKP and SNE; "the Partnership" the Partnership formed by the Partners under the Preliminary Agreement as varied by this Agreement and as further varied at any time by any supplemental agreement or agreements ... "Preliminary Agreement" the agreement establishing the Partnership dated 16 September 1994 and between DKP, FW and SNL ... "the Term" the period referred to in Clause 2 ...

g 1.3 The headings contained in this Agreement are for the purposes of convenience only and do not form part of and shall not affect the construction of this Agreement or any part of it ...

j 2. *Commencement and Duration*

The Partnership commenced on the date of the Preliminary Agreement and shall continue hereafter unless and until determined in accordance with the provisions of Clause 21.

3. *Business of the Partnership*

3.1 The Partnership business shall be: 3.1.1 to manage on a worldwide basis all European Registered Boxers in which FW, SNL or DKP had an

interest at the date of the Preliminary Agreement or in which either Partner or the Partnership has or is able to secure an interest; 3.1.2 to promote on a worldwide basis all boxing bouts staged in Europe to which either Partner or the Partnership has or is able to secure the promotional rights; and 3.1.3 the performance of all that may relate to or be in furtherance of the foregoing. a

3.2 The Partners agree that where the Partnership or either Partner at any time during the term of the Partnership, holds a promotional contract with a European Registered Boxer all proceeds from exploitation or release of such promotional rights in or outside Europe will be assets of the Partnership. b

#### 4. Name

4.1 The Partnership business shall be carried on under the firm name of "Sports Network". c

4.2 SNL hereby grants to the Partnership a fully paid up royalty free licence to use the name "Sports Network" and the Marks for the Term for the purposes of the Partnership business ...

#### 6. Partnership Property

All assets purchased or acquired by the Partnership shall belong to the Partners in the proportion to their Partnership Interests. d

#### 7. Boxing Licences

7.1 SNE shall procure that FW or SNL (as appropriate) shall apply for and hold all Licences for the benefit of the Partnership absolutely without separate compensation therefore.

7.2 DKP or SNE (as appropriate) shall procure that Don King, FW or SNL (as appropriate) shall hold all promotional and management agreements relating to the business of the Partnership as defined in Clause 3 to the benefit of the Partnership absolutely without separate compensation therefore. e

7.3 Any costs incurred in connection with the acquisition or maintenance of any Licence or any promotional or management agreement, including without any limitation the posting of bonds, shall be borne by the Partnership. f

#### 8. US Broadcast Rights

The Partners hereby agree that DKP shall own exclusively the U.S television, radio, pay per view or closed circuit television broadcast rights to any boxing match or programme promoted by the Partnership. DKP shall negotiate with the Partnership for a rights fee to be paid to the Partnership for such rights. g

#### 9. Service and Consultancy Agreements

As soon as practicable following the execution of this Agreement the Partnership shall enter into: h

9.1 a service agreement with FW for the duration of the Partnership which shall inter alia:—(a) provide for FW to receive a salary of £150,000 per annum; and (b) contain a covenant restricting FW, for the duration of his employment by the Partnership, from undertaking or becoming involved either directly or indirectly with any business which is carried on by the Partnership in accordance with Clause 3 of the Partnership Agreement other than through the Partnership. j

9.2 a consultancy agreement with Don King for the duration of the Partnership which shall inter alia:—(a) provide for Don King to receive a consultancy fee of £75,000 per annum; and (b) contain a covenant restricting Don King, for the duration of his employment by the Partnership, from



a undertaking or becoming involved either directly or indirectly with any business which is carried on by the Partnership in accordance with Clause 3 of the Partnership Agreement other than through the Partnership.

10. *Capital*

10.1 The initial capital of the Partnership shall be the sterling equivalent of US\$1,050,472.26 which shall be contributed by the Partners in equal shares in the manner set out in Schedule 2 ...

b 10.6 Capital Contributions shall only be repaid on the termination of the Partnership.

11. *Profits and Losses*

c 11.1 The Net Profits of the Partnership for each Accounting Period shall be divided between the Partners in proportion to their respective Partnership Interests ...

15.2 SNE shall procure that FW and SNL shall prepare monthly management accounts in respect of the Partnership in a form to be agreed between the Partners which shall be sent forthwith to DKP within 10 days of the end of ...

d 17. *Management and Decisions*

The Business shall be managed by the Partners in such manner as they shall from time to time agree however unless and until the Partners agree otherwise:

e 17.1 all decisions relating to the Partnership including without limitation any decision to change the name or the business of the Partnership or to acquire any assets or liabilities from any Partner or from a third party shall be taken by mutual agreement between the Partners; and

17.2 unless otherwise agreed, no Partner shall have the right to make commitments or otherwise bind the Partnership without the prior consent of the other.

f 18. *Partners' Duties*

18.1 Each Partner shall at all times: 18.1.1 be just and faithful to the other Partner in all matters relating to the Partnership and shall give a true account of the same when reasonably required to do so by the other; and 18.1.2 conduct itself in a proper manner and use its best skills and endeavours to promote the Partnership business for the utmost benefit of the Partnership.

g 18.2 Neither Partner shall and SNE shall procure that neither FW or SNL shall, for the duration of the Partnership, undertake or be involved either directly or indirectly with any business carried on by the Partnership in accordance with Clause 3 other than through the Partnership ...

21. *Determination of the Partnership*

h 21.1 Either Partner may terminate the Partnership by giving the other Partner not less than three months notice in writing to expire at any time after the third anniversary of the Preliminary Agreement.

j 21.2 In addition to the rights conferred by Clause 21.1, either Partner may, by notice in writing to the other Partner, terminate this Agreement forthwith in the event: 21.2.1 that the other Partner is in material breach of its obligations under this Agreement and that breach, of[sic] capable of being remedied, has not been remedied with [sic] ten days of receipt of a notice from the other Partners specifying the breach complained of and requiring remedy; or 21.2.2 that the other Partner enters into liquidation (otherwise than for the purposes of a bona fide reconstruction or amalgamation) or has a petition presented for the making of an administrative order or has a

receiver or administrator appointed over all or a substantial part of its assets or enters into a composition or arrangement with its creditors generally; or 21.2.3 there is a change of control of the other Partner or of any Holding Company of the other Partner.

21.3 The termination of the Partnership (howsoever arising): 21.3.1 shall be without prejudice to the rights of either Partner accrued hereunder at the date of termination or to any claim which either Partner may have for damages or otherwise arising from any antecedent breach of this Agreement by the other Partner; and 21.3.2 shall not operate to affect any of the provisions of this Agreement which are expressed to operate or have effect thereafter.

## 22. *Post-Determination*

22.1 In the event of termination of the Partnership for any reason whatsoever, a full and general account shall be taken of all assets, credits, debts and liabilities of the Partnership and of the transactions and dealings thereof. With all convenient speed sufficient assets and credits shall be sold or otherwise realised to pay and discharge such debts and liabilities and the expenses of the [sic] incidental to the winding up of the Partnership affairs. Subject thereto SNE shall procure that FW shall purchase all the remaining assets of the Partnership at a price to be agreed between DKP and FW or, in the event that no agreement can be reached at a price which an expert appointed by the President for the time being of the Institute of Chartered Accountants in England and Wales shall determine to be the fair market value of such assets.

22.2 The Partners shall respectively execute, do or concur in all necessary or proper instruments, acts, matters and things for effecting or facilitating the sale, realisation and getting in of the Partnership assets and credits and the proper disposal of all articles and things received by the Partnership for the purpose of valuation or otherwise and the due application and division of the proceeds thereof and for their mutual release or indemnity or otherwise.

## 23. *General*

... 23.2 The Partners shall, and shall use their best endeavours to procure that any necessary third party shall, do and execute and perform all such further deeds, documents, assurances, acts and things as either of them may reasonably require by notice in writing to give effect to the terms of this Agreement and the Partnership constituted hereby ...

23.4 This Agreement constitutes the entire agreement between the Partners with respect to the Partnership and supersedes all arrangements or agreements relating to the Partnership previously entered into or made between the parties and all such arrangements or agreements are hereby terminated. This Agreement may only be varied by a written agreement signed on behalf of each Partner ...

## *Schedule 2*

### *Initial Capital*

The initial capital contribution of the Partners shall be deemed to be satisfied by:—(a) the assignment by DKP to the Partnership of the sterling equivalent of the debt of \$525,236.13 due to DKP from SNL; and (b) the assignment by FW to the Partnership of all the contracts referred to in Clause 6 of the Preliminary Agreement.'

a The parties to the second agreement are different to those to the first agreement, with SNE (the joint vehicle of Mr Warren and SNL) replacing Mr Warren and SNL as partners. None the less the second agreement proceeds on the basis that (notwithstanding the absence of Mr Warren and SNL as parties) it can and will supersede and replace the first agreement. Since SNE was the chosen vehicle of Mr Warren and SNL and Mr Warren and Mr Roberts signed the second agreement on behalf of SNE, it is not surprising that no point has been taken that the second agreement was ineffective in achieving what it set out to do.

b Clause 23.4 of the second agreement spells out that the second agreement constitutes the entire agreement between the partners with respect to the partnership and supersedes the first agreement. The effect of this clause (read with the definition of the terms 'Partnership' and 'Term' in cl 1 of the second agreement) is that the terms of the partnership retrospectively as from the date of the first agreement are to be found in the second agreement alone. The first agreement is however relevant in two respects. First it constitutes part of the matrix of facts against which the second agreement is to be construed. Secondly it expressly confirms the capitalisation of the partnership as provided for in the first agreement and at the meeting of 18 September 1994 as set out in the memorandum and the purported assignment by Mr Warren of the PM&A agreements to the partnership. It provides in cl 10.1 and schedule 2 that the initial capital contributions of the partners shall be deemed to be satisfied (in the case of DKP) by the assignment of the debt of \$US525,236.13 due to DKP from SNL and (in the case of Mr Warren) by the assignment of all the PM&A agreements referred to in cl 6 of the first agreement. These capital contributions were the 'seed corn' for the partnership business to be managed and exploited for the benefit of the partnership. Far from there being any indication in the second agreement of any intent that the partnership should be divested of the benefits of these assignments, these assignments are expressly confirmed.

f By the date of the second agreement, the partners appear to have appreciated that the partnership could not take an assignment of the BBB of C licences and that the PM&A agreements could not be assigned to the partnership: instead the second agreement provided (in cl 7.1) that Mr Warren will hold his licences 'for the benefit of the Partnership absolutely'; and (in cl 7.2) that the partners shall procure that Mr King, Mr Warren and SNL 'shall hold all promotional and management agreements relating to the business of the Partnership ... to the benefit of the Partnership absolutely ...' The obligation in cl 7.2 is one the court may presume that the partners have faithfully complied with: certainly there is no reason to believe that this was not the case. The word 'all' in cl 7.2 plainly includes both those existing at the date of the second agreement and those subsequently entered into. There is express provision that the costs of acquisition (in case of the latter promotional and management agreements) and the costs of maintenance in force (in case of the former and the latter promotional and management agreements) will be borne by the partnership (see cl 7.3). The provision in the first agreement to the effect that on dissolution of the partnership the PM&A agreements assigned thereunder and still subsisting shall be distributed in specie to Mr Warren and SNL finds no place in the second agreement. What the second agreement does provide is that SNE shall procure on dissolution of the partnership that all assets of the partnership not sold or otherwise realised to pay debts or liabilities shall be purchased by Mr Warren at a valuation (see cl 22.1). At issue between the parties is whether this clause bites on the PM&A agreements.



It is to be noted that cl 1.3 requires clause headings to be ignored in the exercise of construction of the provisions of the second agreement.

(e) *Further agreements*

On 11 July 1995 the third agreement was entered into between Mr King, Mr Warren and Mr Roberts making certain modifications to the second agreement; and there is a dispute between the parties whether on 10 January 1997 the fourth agreement (which was entered into between Mr King on behalf of DKP, Mr Warren for SNL and by both on behalf of the partnership) provided for an extension of the partnership for another three years. I am not concerned at this stage in these proceedings with either of these agreements or alleged agreements.

(f) *Post second agreement history*

On 13 February 1996 proceedings for the disqualification of Mr Warren from acting as a company director culminated in a hearing before Blackburne J. The *Carecraft* procedure ([1993] 4 All ER 499, [1994] 1 WLR 172) was adopted, involving the admission by Mr Warren of his unfitness to act as a director and the only issue left to the judge being the period of the disqualification which reflected the seriousness of his past misconduct. The learned judge disqualified him for seven years. As a consequence of Mr Warren's disqualification he could no longer act as a director of SNE, and no later than March 1996 by act of parties (without any documentary formalisation) Mr Warren and Mr Roberts by novation replaced SNE as a party to the second agreement. The effect of this novation was that, instead of SNE being under an obligation to procure Mr Warren to assign all promotional and management agreements taken in his name, he became subject to a direct obligation to DKP to do so. The companies of Mr Warren and Mr Roberts, SNL and SNE, had short lives. SNL went into liquidation on 14 November 1996 (prior to the date of the alleged extension by the fourth agreement). SNE was dissolved on 4 June 1997.

After the date of the second agreement the partnership continued its business. Mr Warren continued to hold in his own name the licences from the BBB of C. The existing PM&A agreements in the name of Mr Warren were exploited and fresh agreements were entered into in his name. The most valuable were the later Hamed agreements. On 4 August 1997, there was entered into what is known as the 'multi-fight agreement' made between (1) Mr Warren (2) HBO and (3) SNI. This provided for the broadcasting of Mr Hamed's fights in the USA until the year 2000. The entitlement of Mr Warren to enter into this agreement is a core issue in the disputes between the parties, and its outcome and the rights of HBO thereunder are issues which turn upon the outcome of this trial. DKP also (as set out in part II (a) above) entered into further promotion management agreements with European registered boxers, the entitlement to which likewise turns upon the outcome of this trial.

Disputes subsequently arose between the partners, and these led to the determination of the partnership and the commencement of these proceedings.

(g) *Interlocutory applications*

The issue of the writ in this action was followed by a series of applications by DKP for injunctive relief to preserve what DKP claimed were the partnership assets. The identification of partnership assets was a matter of serious difficulty because Mr Warren and Mr Roberts (and their vehicle company SNE before them) defaulted in their duty under cl 15.2 of the second agreement to maintain

a monthly management accounts. On these applications I had to balance the legitimate interests of both parties pending the final determination of their rights at the trial, and in particular I had to balance the interest of DKP in securing what might prove to be partnership assets against the interest of Mr Warren and Mr Roberts in continuing what they claimed to be their own business without interference and without disclosure of confidential information to DKP (which was now a competitor). Whilst DKP provided a bond to secure its potential liability under the cross-undertakings as to damages which it offered as the price of the grant of injunctive relief, Mr Warren and Mr Roberts hampered the court and their own case by declining either to provide a bond to secure the losses which freedom from an injunction might occasion to DKP or to make any disclosure as to their means and so to enable the court to reach an informed view whether they would be good after judgment for such losses if they lost the action. In consequence, the regime which I was required to impose on Mr Warren and Mr Roberts was severer on them than it might otherwise have been.

### III. THE ISSUES

d The 'bone' over which the parties are fighting, and the entitlement to which I must decide on the preliminary issues before me, is the entitlement to the PM&A agreements entered into prior to the date of the first agreement, those which have been entered into by the partnership or any of the partners during the subsistence of the partnership and which relate to the business of the partnership and those entered into after the determination of the partnership but which may e in equity constitute partnership property. These agreements are of substantial value. In summary DKP says that the business of the partnership was to acquire and exploit such agreements; that the business comprehended the acquisition and exploitation of promotional agreements, conferring the right to promote bouts by European registered boxers outside Europe; that those agreements held or f acquired in the name of a partner are held on trust subject to fiduciary duties for the benefit of the partnership; that they (and later agreements entered into continuing or replacing them) are accordingly partnership assets; and that under cl 22.1 of the second agreement on the dissolution of the partnership Mr Warren became contractually obliged to purchase them for their value as determined by g an expert as there provided.

In summary the defendants' case is: (a) that the partnership agreement between the Warren and King interests was an agreement (i) to share the profits earned during the life of the partnership of the promotional and management activities of DKP and Don King on the one side and Mr Warren on the other, so h far as those activities fell within the definition of partnership business and which the relationship of partners continued; and (ii) to pool their skills and connections with a view to maximising those profits; and (b) that the Warren and King interests were at liberty to carry on the rest of their businesses for their own account. Accordingly on dissolution of the partnership, Mr Warren is entitled to retain for his own benefit free of any charge or any obligation to compensate DKP j all PM&A agreements then in his name.

The essential issues between the parties are accordingly as follows: (1) what interest did the partnership have immediately before its dissolution in the PM&A agreements to which Mr Warren was a party or the fruits of those agreements; (2) to what extent, if at all, did DKP as a partner have a subsisting interest in those contracts or their fruits after dissolution of the partnership; (3) what (if any)

interest did the partnership have in the promotion or proceeds of promotion of bouts fought by European registered boxers outside Europe? a

These issues require the following questions to be answered.

### 1. *PM&A agreements*

(a) Whether the first and second agreements manifest the intention of the parties that: (1) the PM&A agreements held by Mr Warren at the date of the first agreement and those subsequently obtained by him during the period of the partnership should be assigned and belong to the partnership; and (2) promotion agreements in respect of European registered boxers held or acquired by DKP likewise should be assigned and belong to the partnership. b

(b) If such intention is established, whether and if so how in law such intention can be given effect. c

(DKP, which argues that the answer to (a) (1) is in the affirmative, fully accepts that as a corollary the answer to (a) (2) is likewise in the affirmative. Mr Warren does not suggest that the answers to (a) (1) and (2) are or can be different: he argues that the answer to both is in the negative. It is accordingly sensible to concentrate on (a) (1) though the consequences of an affirmative answer on DKP under (a) (2) must be borne in mind.) d

### 2. *Business of the partnership*

What was the business of the partnership, and in particular whether: (a) it included the business of promotion and management or was confined to receiving the profits of the business of promotion and management conducted by Mr Warren and DKP; (b) whether its interest in, or entitlement to the profits, of the PM&A agreements was limited to the duration of the partnership; (c) whether the business or entitlement to profits extended to the promotion of fights of European registered boxers worldwide or was confined to fights within Europe. e

### 3. *Rights on dissolution*

(a) Whether the PM&A agreements constitute assets of the partnership to be realised on the winding up of the partnership or whether they determine or 'revert' to Mr Warren free of charge; and (b) whether Mr Warren is under an obligation to purchase the PM&A agreements (including any promotion agreements entered into by DKP with European registered boxers). f

## IV. APPROACH TO CONSTRUCTION

Both the first and second agreements are, though apparently professionally prepared, amateur productions. By common consent they are badly drafted and replete with obscurities and inconsistencies. It is accordingly essential at the outset to determine what approach is to be adopted to their construction. The answer lies in the speech of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 114–115 where he says: g

'[The modern approach is] to assimilate the way in which such [contractual] documents are interpreted by judges to the common sense principles by which any serious utterances would be interpreted in ordinary life ... The principles may be summarised as follows. (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they h



a were at the time of the contract ... (4) The meaning which a document (or  
any other utterance) would convey to a reasonable man is not the same thing  
as the meaning of its words. The meaning of words is a matter of dictionaries  
and grammars; the meaning of the document is what the parties using those  
b words against the relevant background would reasonably have been  
understood to mean. The background may not merely enable the  
reasonable man to choose between the possible meanings of words which  
are ambiguous but even (as occasionally happens in ordinary life) to  
conclude that the parties must, for whatever reason, have used the wrong  
c words or syntax ... (5) The "rule" that words should be given their "natural  
and ordinary meaning" reflects the commonsense proposition that we do  
not easily accept that people have made linguistic mistakes, particularly in  
formal documents. On the other hand, if one would nevertheless conclude  
from the background that something must have gone wrong with the  
language, the law does not require judges to attribute to the parties an  
intention which they plainly could not have had. Lord Diplock made this  
d point more vigorously when he said in *Antaios Cia Naviera SA v Salen  
Rederierna AB*, *The Antaios* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201:  
"... if detailed semantic and syntactical analysis of words in a commercial  
contract is going to lead to a conclusion that flouts business common sense,  
it must be made to yield to business common sense." If one applies these  
principles, it seems to me that the judge must be right ... The only remark  
e of his which I would respectfully question is when he said that he was "doing  
violence" to the natural meaning of the words. This is an over-energetic way  
to describe the process of interpretation. Many people, including politicians,  
celebrities and Mrs Malaprop, mangle meanings and syntax but nevertheless  
communicate tolerably clearly what they are using the words to mean. If  
f anyone is doing violence to natural meanings, it is they rather than their  
listeners.'

The essential task in construction is to deduce, if this is possible, from the two  
agreements construed as a whole against their commercial background the  
commercial purpose which the businessmen and entities who were parties to  
them must as a matter of business common sense have intended to achieve by  
g entering into them; and if such intent can fairly be deduced and if this is necessary  
to effectuate that intent, the court may have to require what may appear to be  
errors or inadequacies in the choice of language to yield to that intention and be  
understood as saying what (in the light of that purpose) that language must  
reasonably be understood to have been intended to mean.

## h V. BUSINESS OF PARTNERSHIP

### (a) *Business of promotion and management*

#### (1) First agreement

j Under the first agreement, it is quite plain that the parties agreed that their  
partnership should carry on the business of promotion and management of  
professional boxing in Europe. This is (a) stated in the recital; (b) stated expressly  
in cl 2, which specifies the business of the joint venture; (c) the rationale for cl 3.4  
providing for a BBB of C licence being held by or for the benefit of the  
partnership; (d) the object of non-compete covenants in cl 4; and (e) the reason  
for the service contracts provided in cl 5.

## (2) Second agreement

Under the second agreement, it is equally plain that the parties intended that the partnership, constituted under the first agreement for the purpose of carrying on such business, as reconstituted under the second agreement should continue to do so. This is: (a) stated in recitals B and C (in particular when read with the definition of 'Partnership' in cl 1.1 and cl 2); (b) stated expressly in cl 3; (c) implicit in cl 7; (d) implicit in the reference in cl 8 to a 'match or programme promoted by the Partnership'; and (e) the object and reason for the service agreements and non-compete covenants in cll 9 and 18.2.

## VI. THE INTENDED OWNERSHIP OF PM&A AGREEMENTS

There is an issue between the parties whether on the true construction of the first and second agreements the PM&A agreements were intended to be and in fact were assets of the partnership or whether it was only intended that their fruits should be assets of the partnership and whether the fruits alone became such assets.

### 1. First agreement

Clause 2 provides that the business of the joint venture shall be (a) to manage on a worldwide basis all European registered boxers in whom Mr Warren or SNL has an existing interest and in whom the joint venture has or is able to secure an interest; and (b) to promote on a worldwide basis all boxing bouts staged in Europe to which DKP, the UK partner or the joint venture has or is able to secure promotional rights. By cl 6.1 the UK partner assigned the full benefit and burden of all existing promotion and management agreements with boxers together with all associated agreements. By cl 6.3 DKP agreed to pay a sum to be agreed 'for goodwill'. By cl 7, it was provided that on dissolution of the partnership the assigned contracts which were still subsisting (but not any extension or renewal) should be distributed in specie to the UK Partner.

The only clear message from all the provisions of the first agreement is that all PM&A agreements held at the date of the first agreement by Mr Warren should be assigned to the partnership as part of its capital and that DKP should pay a sum of equivalent value into the partnership as its contribution of capital. It seems to me equally clear for the reasons set out in part II (b) above that any new PM&A agreements secured during the life of the partnership, whether by the efforts of Mr Warren or DKP should likewise be vested in and belong to the partnership. The partners, and most particularly Mr Warren, were to use their best efforts to promote the business of the partnership, to secure such agreements, and any such agreements, in whoever's name secured, were to belong to the partnership.

### 2. Second agreement

The second agreement proceeds on the basis that: (1) the partnership business has been in existence continuously since the date of the first agreement; and (2) (as set out in cl 10(1) and schedule 2) Mr Warren has assigned to the partnership (in satisfaction of his obligation to provide by way of capital the sum of \$US525,236.13) all the PM&A agreements referred to in cl 6 of the first agreement. As I have already pointed out in part II (d) above, this state of affairs is confirmed and reinforced by cl 7(2). This provision is apt to bite both on agreements which should in the past have been, but for any reason have not been, assigned, and on agreements arising in the future.

- a The intention that all PM&A agreements obtained in the future by the partnership, the partners or Mr Warren shall likewise be assigned to or at least belong to the partnership is further manifested in other clauses of the second agreement. This is the rationale for cl 7.3 (providing for the partnership to pay the cost of the acquisition or maintenance of any promotional or management agreement); and it is the plainly intended as well as the legally inevitable consequence of the fiduciary duties of the partners and the non-compete covenant of the partners and to be procured from Mr Warren.
- b

#### VII. DURATION OF PARTNERSHIP INTEREST IN PM&A AGREEMENTS

- c It is plain that both under the first and second agreements the partnerships thereby constituted were intended to be absolute owners of the PM&A agreements. The purchase of the PM&A agreements from Mr Warren was 'out and out' for \$US525,236.13. The obligation under cl 7.2 is that the PM&A agreements shall be held to the benefit of the partnership 'absolutely'. Under ordinary partnership principles, a partnership acquires an absolute interest in assets purchased or acquired or held by a partner or other fiduciary for its benefit.
- d There is no hint, still less any clear manifestation of intention, in the second agreement that the interest of the partnership is determinable, or that there is any right of reverter in favour of Mr Warren, on dissolution.

#### VIII. GEOGRAPHICAL LIMITATION ON PARTNERSHIP BUSINESS

- e The one area of real difficulty in the construction of the second agreement relates to the meaning and effect of cl 3.2. The issue between the parties is whether the business of the partnership was intended to extend to the exploitation of the promotional and management agreements held by the partnership or a partner in respect of a European registered boxer by a promotion staged outside Europe. The importance of the answer to this question lies in its relevance to the entitlement of the parties to this right of exploitation and the promotion agreements which give rise to them. DKP contends that on the true construction of the ineptly drafted second agreement the business of the partnership does extend this far and that the entire promotion rights to European registered boxers under promotion agreements to which the partnership or a partner is entitled belong to the partnership. Mr Warren and Mr Roberts
- g however contend that the business of the partnership does not extend so far and that in effect a severance must be made between the promotion rights in fact exploited within Europe (the proceeds of which belong to the partnership) and the promotion rights in fact exploited outside Europe (to which the partnership has no claim).
- h Clause 3.1 states that the partnership business shall be: (1) to manage on a world-wide basis all European registered boxers in whom Mr Warren, SNL or DKP had an interest at the date of the first agreement or in whom either partner or the partnership has or is able to secure an interest (see cl 3.1.1). This element of the business is confined to the management of specific identifiable boxers; (2)
- j to promote on a worldwide basis all bouts staged in Europe to which either partner or the partnership has or is able to secure promotional rights. This element of the business is confined to promoting (in the sense of staging) specific bouts staged in Europe where the right has been secured to promote that bout. The boxers may be from anywhere in the world. There need not be any promotional contract with the boxers beyond that which may be implicit in the agreement of the boxers to participate in the specific bout.



Neither (1) nor (2) above is directed at exploiting rights under promotional contracts with European registered boxers held by the partnership or a partner. Such agreements are often, if not generally, unspecific as to the country in which the bout is to take place and not limited to Europe. Yet both the first and second agreements provided for the assignment to the partnership of all such agreements held at the date of the first agreement by Mr Warren (implicitly) for their fullest exploitation by the partnership.

The critical question is whether upon its true construction cl 3.2 includes as part of the business of the partnership the exploitation of such contracts. The defendants argue that the answer is in the negative because: (i) the language and layout of cl 3 is inept for this purpose. It specifies as the business of the partnership the management of European registered boxers and the promotion of boxing bouts in Europe: cl 3.2 merely states that the proceeds of exploitation or release of promotional rights held by the partnership or a partner with a European registered boxer will be assets of the partnership; (ii) if the parties had intended the business so to extend, the obvious way of doing so would have been to insert in cl 3.1.2, after the words 'staged in Europe', the words 'or, in the case of European registered boxers, staged anywhere in the world'; (iii) the words 'proceeds from exploitation or release of such promotional rights' in the context mean, not proceeds from exploitation by promoting bouts, but only proceeds from the release of rights or something of a similar character such as the transfer of those rights (with the boxer's consent) to another promoter; (iv) if cl 3.2 does extend to exploitation of promotion rights by promoting bouts, so far as the bouts are held in Europe, there will be an overlap with cl 3.1.2; and so far as the bouts are held outside Europe this will 'conflict' with cl 3.1.2; (v) if cl 3.2 is read as extending to staging bouts between two boxers and only one is European registered, it will be difficult to regard the proceeds of associated contracts as resulting from the exploitation of the promotional contract with the one who is European registered. But no difficulty can arise if it is read as dealing only with the benefits obtained by releasing or transferring the promotional rights in respect of a European registered boxer; (vi) if DKP's construction is correct, the result is that under the second agreement the partnership agreement extended to every bout promoted by DKP in the USA for the past three years in which at least one of the contestants was European registered and it is inconceivable that DKP should have agreed to such a large incursion in his own business in his home market.

There is some real force in the first of these contentions and some also in the second, but I do not find the others impressive. As regards the third, I can see no justification for the artificially narrow construction of the word 'exploit'. As regards the fourth, it is to be noted that there is no reason why the ambits of cll 3.1.1, 3.1.2 and 3.2 should not overlap: indeed necessarily they may do so. The target of cl 3.1.2 is bouts, whoever the participants, staged in Europe. The target of cl 3.2 (on the construction adopted by DKP) is promotional agreements in respect of European registered boxers held by the partnership or a partner. There is no reason why they should not be separately particularised. As regards the fifth argument, there is no reason to believe that this difficulty should have been considered a real obstacle. As regards the sixth, I do not see any compelling reason why the parties cannot have agreed this. I might mention that DKP accepts that this was what it agreed in relation to any European registered boxer with whom DKP has a promotional agreement. DKP contend that an amendment was made to this provision in the third agreement.

a But whatever the weight to be attached to these contentions, I am satisfied that the intention of the parties, apparent from the second agreement as a whole is that the worldwide exploitation or release of rights under such promotional agreements with European registered boxers was to be part of the partnership business and that so far as the language in cl 3 is inept to express this intention, none the less it can and should be read in such a way as effectuates this intention.

b My reasons are as follows. (1) The first and second agreements specifically provided that all such promotional agreements as were vested in Mr Warren (inferentially) for exploitation by the partnership at the date of the first agreement and all acquired later up to the date of the second agreement should be assigned to or belong to the partnership. It is inconceivable that the parties intended that the fullest rights of exploitation so conferred should be cut back by the second

c agreement and rights so divested should be vested in Mr Warren for his own benefit. (2) The partnership was to pay the costs of obtaining and maintaining any agreement subsequently acquired (see cl 7.3). There is no limitation to agreements if and so far as they are subsequently exploited in any particular way, and such a limitation would be unworkable. Yet it is inconceivable that the

d parties intended that the partnership should pay the full costs of obtaining and maintaining agreements which may be exploited in whole or in part, not for the partnership, but for one partner alone for his exclusive benefit. (3) Clause 3.2 itself assumes that the partnership or a partner may hold such promotional agreements and that the partnership or a partner on behalf of the partnership is free to 'exploit' such agreements for the partnership's benefit. The term 'exploit' in that context means 'exploit in any way possible' and is not cut down by the

e addition of a provision making clear that there is intended to be conferred (if not included by the word 'exploit') the power to grant a release for valuable consideration. (4) It is absurd to imagine that the parties intended that the partnership should include the exploitation of such promotional agreements so

f long as the bout took place in Europe (and accordingly fell within cl 3.1.2) but should have no rights if the bout took place elsewhere. The choice of location in such a case would pose the most acute conflict of interest for Mr Warren both as regards the partnership and as regards the boxer, at any rate if he was managed by Mr Warren. (5) The construction I prefer accords with the language of cl 7.2, which refers to agreements relating to the business of the partnership 'as defined

g in Clause 3', and not 'as defined in Clause 3.1' and is entirely consistent with the language of other clauses which contain references to the business of the partnership.

#### IX. ASSIGNMENT

##### h A. Introduction

j I accordingly conclude that: (1) the intentions of the parties to the first and second agreements were that all the PM&A agreements relating to European registered boxers held at any time during the subsistence of the partnership by the partnership or either partner (and accordingly held by Mr Warren) should be assigned to or be held for the benefit of the partnership absolutely; and (2) that the business of the partnership included the exploitation of the rights under such agreements.

The question now arises whether and how far the first of those intentions can in law or equity have effect in case of PM&A agreements which involve the rendering of personal services or include express provisions prohibiting any assignment of such contracts. The defendants concede that a purported

assignment of a personal contract and of the benefit of non-assignable rights, though ineffective at law, can have some effect in equity as between assignor and assignee; but contend that this effect does not extend to creating a trust of the contract or of the rights under the contract, but is limited to creating a trust of the receipts in the hands of the 'assignor' or requiring the assignor to account for them to the assignee. In contrast DKP contends that a trust of the contract and of the rights under the contract can be and in this case was created.

The resolution of this dispute requires consideration of the relevant principles governing the declaration of trusts of contracts and the rights arising thereunder and the assignment of such rights.

### 1. Declaration of trust

The defendants sought to discourage me from finding the existence of any trust in this case, and they invoked for this purpose the long established principle restated in *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] 2 All ER 961 at 988–989, [1996] AC 669 at 704–705 that the wholesale importation into commercial law of equitable principles would be inconsistent with the certainty and speed which are the essential requirements for the orderly conduct of business affairs. There can however be no sustainable objection on these grounds to recognition of a trust if the parties have manifested their intention to create it, a fortiori when this is necessary to achieve justice between the parties. Justice does so require its recognition when the 'trustee' has already received (as SNE, Mr Warren and Mr Roberts received in this case) the full agreed consideration for the beneficial interest in the subject matter of the trust. For this purpose it makes no difference that the subject matter is a chose in action. 'The scope of the trusts recognized in equity is unlimited. There can be a trust of a chattel or of a chose in action, or of a right or obligation under an ordinary legal contract, just as much as a trust of land': see *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* [1926] AC 108 at 124, [1925] All ER Rep 87 at 95 per Lord Shaw.

The *Westdeutsche* case is also authority for the proposition (contrary to previous thinking), that the fact that the legal ownership is vested in one person and the beneficial ownership is vested in another does not necessarily involve the relationship of trustee and beneficiary. This proposition (counsel has suggested), supports a possible view that the contractual rights may be vested in Mr Warren and the beneficial ownership of those rights may be vested in the partners without the creation of any trust or trust relationship. I do not however think that this is a possibility in this case. The reasoning of the House of Lords was that the existence of an obligation binding the conscience of the person vested with the legal ownership is the hallmark of a trust. Only if and so long as the exceptional circumstances exist where separation of the legal and equitable ownership does not give rise to or co-exist with such an obligation, will a trust relationship not come into being. If and so long as legal ownership of the PM&A agreements remained in one or other partner and the beneficial ownership was in the partnership, the necessary fiduciary obligation co-existed and so did a trust.

As a matter of general principle it is, I think, quite clear that a trust may exist of a contract, and this may extend, not merely to the benefit of the rights conferred, but also the benefit of being a contracting party. This will occur when eg a trustee or partner enters into a contract as such or a trustee or partner or other fiduciary becomes a constructive trustee of the contract. It is important to recognise that a trust of the benefit of the contract (and in particular of the benefit of being a contracting party), may be more beneficial to the beneficiaries than the



a mere assignment to them of the benefit of the covenants contained in it. For according to established principles the trustee will hold any benefit arising from his trusteeship (and in particular his being a contracting party), such as renewals of the contract, on trust for the beneficiaries whether or not the renewal would have been granted to anyone other than the trustee or was assignable: see e.g. *Pathirana v Pathirana* [1967] 1 AC 233 and *Thompson's trustee in bankruptcy v Heaton* [1974] 1 All ER 1239, [1974] 1 WLR 605.

b There can be no doubt that the partnership in this case could have validly entered into management and promotion contracts with boxers: the partners in such a case would hold the contract as a partnership asset. The issue raised is whether one of the partners who has entered into such an agreement in his own name alone can subsequently hold such a contract as a partnership asset. The c defendants contend that this is not possible without the consent of the other parties to the management and promotion contracts (ie the boxers) because the contracts involve the rendering of personal services and by their terms are not assignable.

## d 2. Assignment of rights

It is clear that a purported assignment of a contract or the rights arising under a contract may be ineffective as such because the contract involves the rendering of personal services or prohibits their assignment. The question arises whether a purported assignment for valuable consideration, ineffective as an assignment for the above reasons, may be effective as a declaration of trust or as imposing e fiduciary duties on the assignor. The defendants contend that it cannot be so effective.

### B. General principles

#### 1. The principles

f The applicable principles emerging from the authorities in a field still undeveloped are as follows:

(1) It is not possible (save pursuant to statutory authority) without a novation to transfer the burden of a contract to a third party.

g (2) In the case of contractual obligation where the obligation is such that the identity of the person who performs it is a matter of indifference to the contracting party for whose benefit the obligation is imposed (the obligee) (e.g. the payment of a sum of money or the delivery of a fungible), the other contracting party (the obligor) may delegate to a third party the performance of the obligation: see *British Waggon Co v Lea & Co* (1880) 5 QBD 149, [1874–80] All ER Rep 135. But otherwise no such delegation is possible. Thus in the absence of a contractual provision to the contrary, in the case of a publishing contract, the author cannot delegate to someone the performance of the duty of writing the book and the publisher cannot delegate to someone else the performance of the duty of publishing it.

h (3) The only assignment in respect of a contract which is legally possible is an assignment of the benefit of the contract (ie the rights thereby created) or some benefit (e.g. the profits) derived by the assignor from the contract. The distinction is between the assignment of rights under the contract and of what is referred to as 'the fruits'. A provision for the assignment of a contract is to be construed as the assignment of the benefit of the contract: see *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1993] 3 All ER 417 at 427, [1994] 1 AC 85 at 103. The assignment may expressly or by implication require the assignor to perform

outstanding obligations on his part under the agreement so as to enable the assignee to obtain the full benefit intended (subject if necessary to the assignee indemnifying the assignor against the cost); and to hold the benefit of being the contracting party (and accordingly eg the opportunity to obtain a renewal) as trustee for the assignee.

(4) Whether or not the benefit can be assigned depends primarily upon the terms of the contract and secondarily upon the character of the obligations. The benefit of some obligations of a party under one contract may be assignable whilst at the same time others under the same contract may not: assignability is not a matter of all obligations arising under a contract or none at all.

(5) The contract may expressly or impliedly permit assignment of rights not otherwise so assignable: see *Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd* [1993] RPC 493 at 503. The contract may likewise prohibit assignment of rights otherwise prima facie assignable. Such contractual provisions are legally effective. The purpose of the non-assignment clause is the genuine commercial interest of a party of ensuring that contractual relations are only with the person he has selected as the other party to the contract and no one else. This is particularly important in areas such as building contracts which are 'pregnant with disputes': see *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1993] 3 All ER 417 at 431–432, [1994] 1 AC 85 at 107–108. Such a clause avoids the possibility of a third party being enabled to raise issues of set-off not available to the other contracting party. Unless specially drafted to draw such a distinction, the prohibition attaches equally to the assignment of the right to future performance of the contract and the right to receive benefits accrued under the contract (*ibid*). The clause also preserves the parties' rights of set-off against each other and saves them having any concern whether there has or has not been, or preserving any record of, any assignment of the benefit of the contract by the other party.

(6) Unless the contract expressly or impliedly otherwise provides, the character of an obligation precludes assignment of the benefit of the obligation if the identity of the obligee is material to the obligor: see *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 at 668 per Collins MR. For the effect of such an assignment can alter the substance of the obligation. For this reason an employer cannot assign the benefit of an obligation of the employee to serve him, for the choice of employer is material to the employee: and the employer cannot without his consent transform a contract to serve him into a contract to serve anyone else. Accordingly any purported assignment or contract to assign will have no effect at law or in equity: see per Lord Atkin in *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] 3 All ER 549 at 561, [1940] AC 1014 at 1033. Again for the same reason neither an author nor his publisher may assign the right to performance of the other's obligations under a publishing agreement: see the case of *Devefi*. But the benefit of any obligation of the employer to pay his salary, or of a publisher to pay royalties to an author, is (in default of a term of the contract to the contrary) assignable, since the identity of the recipient is a matter of indifference to the employer or publisher: consider *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1993] 3 All ER 417 at 428, [1994] 1 AC 85 at 105 and *Devefi Pty Ltd v Mateffy Pearl Nagy Pty* [1993] RPC 493 at 505.

(7) A declaration of trust in favour of a third party of the benefit of obligations or the profits obtained from a contract is different in character from an assignment of the benefit of the contract to that third party: see *Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd* [1993] RPC 493 at 505. Whether the contract contains

- a a provision prohibiting such a declaration of trust must be determined as a matter of construction of the contract. Such a limitation upon the freedom of the party is not lightly to be inferred and a clause prohibiting assignments is prima facie restricted to assignments of the benefit of the obligation and does not extend to declarations of trust of the benefit: consider *Pincott v Moorstons Ltd* [1937] 1 All ER 513 at 516. In the words of Lord Browne-Wilkinson in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1993] 3 All ER 417 at 431, [1994] 1 AC 85 at 108):
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‘... a prohibition on assignment normally only invalidates the assignment as against the other party to the contract so as to prevent the transfer of the chose in action: in the absence of the clearest words it cannot operate to invalidate the contract as between the assignor and assignee and even then it may be ineffective on the grounds of public policy.’

### C. Application of principles

- The application of these principles to this case produces the situation that neither the first nor the second agreement could effectively vest the PM&A agreements in, or assign the benefit of them to, the partnership, but none of the PM&A agreements (so far as I have been able to ascertain) contained any provision purporting to prohibit or having the effect of prohibiting the partners declaring themselves trustees of the PM&A agreements entered into in their own names for the partnership. It is necessary however to turn to the question raised by the defendants whether the nature of the PM&A agreements was none the less such as to preclude such a declaration of trust.
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Mr Sumption has submitted that a party cannot without the consent of the other parties to the contract make himself or become a trustee in respect of a contract which involves personal skill and confidence and which prohibits assignments.

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#### 1. Personal skill and confidence

- Mr Sumption submits that the assumption of trusteeship by a party to such a contract would involve him in creating a conflict between the duties owed to the other party to the contract and those duties owed to the beneficiaries under the trust. He drew the distinction between the case where the other parties to the contract deliberately contract with trustees as such (eg as partners in a partnership) and accordingly consent to such a conflict, and the case where by a subsequent declaration of trust by the other party to the contract, such a conflict is foisted on them without their consent. This contention fails for (amongst others) the following reasons: (a) there is in neither of these situations any objectionable conflict of duty. It is a matter of every day experience that the same persons owe fiduciary duties to one set of people (eg one partner to the other partners in a solicitors' firm or a director to the company that employs him) and at the same time fiduciary duties to another (eg to the solicitors' or company's clients). The reason that there is no problem of conflict is that one set of these duties (namely the duties assumed to the client) is paramount. The fiduciary owes to the client in the performance of the duties owed to the client a duty of undivided loyalty; and (b) a party to a contract involving fiduciary duties who declares himself a trustee of the contract has the paramount duty to perform his obligations under the contract and to fulfil his duty of undivided loyalty to the other contracting party. Indeed this accords with the recognition by equity that
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the first duty of a trustee is to preserve the trust property (in this case the contract itself). a

## 2. Non-assignable contracts

Mr Sumption further submitted that, where a contract contains a provision prohibiting assignment, a party cannot by a declaration of trust or otherwise make himself the trustee of the benefit of that contract because this would defeat the whole purpose of the non-assignment obligation which is to ensure that the other contracting party alone, and no one else, can enforce the obligations contained in the contract against him; and that if a trust is created and if the trustee refuses to enforce an obligation, the beneficiary may sue for enforcement, joining the trustee as a defendant: see *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70 at 79, [1932] All ER Rep 527 at 532. b  
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This contention likewise fails for (amongst others) the following reasons: (a) if one party wishes to protect himself against the other party declaring himself a trustee, and not merely against an assignment, he should expressly so provide. That has not been done in this case; (b) the applicable principles of trust law in this situation are the basic principles and those (and only those) whose rationale have application in this commercial context (see *Target Holdings Ltd v Redfern (a firm)* [1995] 3 All ER 785 at 795–796, [1996] AC 421 at 436). The courts will accordingly be astute to disallow use of the procedural shortcut sanctioned in *Vandepitte's* case in a commercial context where it has no proper place. A beneficiary cannot be allowed to abrogate the fullest protection that the parties to the contract have secured for themselves under the terms of the contract from intrusion into their contractual relations by third parties; (c) a declaration of trust cannot prejudice the rights of the obligor. If the contract requires any judgment to be exercised whether by the obligor or the obligee, an assignment cannot alter who is to exercise it or how that judgment is to be exercised or vest the right to make that judgment in the court; (d) the rule in *Saunders v Vautier* (1841) 4 Beav 115, [1835–42] All ER Rep 58 (which enables the sole beneficiary or beneficiaries to give directions to the trustee) only applies if the beneficiary is entitled to wind up the trust and require the trustee to assign to him the subject matter of the trust. If the trust cannot be determined because the trustee has under the contract held as a trust asset outstanding obligations and has no power to transfer the trust asset to the beneficiary or his order, the rule does not apply: see *Re Brockbank (decd)*, *Ward v Baker* [1948] 1 All ER 287, [1948] Ch 206. Accordingly in a case where the subject matter of the trust is a non-assignable contract and there are outstanding obligations to be performed by the trustee, the beneficiary under the trust cannot interfere. d  
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Accordingly in principle I can see no objection to a party to contracts involving skill and confidence or containing non-assignment provisions from becoming trustee of the benefit of being the contracting party as well as the benefit of the rights conferred. I can see no reason why the law should limit the parties' freedom of contract to creating trusts of the fruits of such contracts received by the assignor or to creating an accounting relationship between the parties in respect of the fruits. The broader approach which I favour appears to be in accord with the authorities, so far as they go. The leading authority is *Re Turcan* (1888) 40 Ch D 5. The Vice-Chancellor of the County Palatine of Lancaster (Bristowe V-C) in that case held that an agreement to assign a non-assignable policy constituted the assignor a trustee of the policy for the assignee. The Court of Appeal dismissed the appeal. At the date of the hearing of the appeal the proceeds h  
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a of the policy were represented by certain assets and the Court of Appeal upheld the validity of the trusteeship of these assets, and Lord Browne-Wilkinson in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1993] 3 All ER 417 at 428, [1994] 1 AC 85 at 104 referred to *Re Turcan* as authority for the proposition that a party to a contract may agree with a third party to account for him for the fruits he receives from the other contracting party. No doubt was cast by the Court of Appeal in *Re Turcan* or by the House of Lords in the *Linden Gardens* case on the decision of Bristowe V-C. As Lord Browne-Wilkinson said in the *Linden Gardens* case [1993] 3 All ER 417 at 430–431, [1994] 1 AC 85 at 107) the House of Lords only had to consider the validity of the restriction of an assignment which would have the effect of bringing the assignee into direct contractual relations with the other party to the contract. The view of Bristowe V-C finds some support in *Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd* [1993] RPC 493 at 55–56 and *Williams v Comr of Inland Revenue* [1965] NZLR 395 at 401. (See also *First National Securities Ltd v Hegerty* [1984] 3 All ER 641, [1985] QB 850 at 854.) But most importantly this view accords with common sense and justice and achieves the commercial objective of the parties.

d X. ALTERNATIVE ROUTE

I should add that, even if for some technical reason there could not be created in this case a trust relationship in respect of the PM&A agreements, I would reach the same practical result by another means. For it seems to me that, if parties agree to enter into a partnership and bring about the vesting of the benefits of certain agreements in a partnership, (public policy considerations apart) they will be constrained by the terms of that contract to bring about the same substantive consequence if it lies within their powers to do so, even if the anticipated means of doing so is blocked. No public policy considerations preclude the adoption of this course in this case.

f XI. RESULT

I accordingly hold that the clear intent of the parties manifested in the first and second agreements was that the PM&A agreements should be held by the partnership or by the partners for the benefit of the partnership absolutely, and that this intent should be given fullest possible effect. The agreements have accordingly at all times been held by the partners as trustees for the partnership. Accordingly the ordinary equitable principles apply (including the rule in *Keech v Sandford*) and the partnership assets include all renewal and replacement agreements obtained by any partner during the partnership and over the period between dissolution and the completion of winding up.

h XII. DISSOLUTION

There was at one time some considerable debate between the parties as to the rights arising on dissolution in respect of the PM&A agreements, but in view of my finding that the PM&A agreements held by the partnership or any partner constitute partnership assets, most of these difficulties disappear.

j It is common ground that, howsoever the partnership was determined, cl 22.1 of the second agreement applies. This clause supplements the regime imposed by cl 21.3, which preserves existing rights and provisions expressed to be operative during winding up. These provisions do not exclude, but rather embrace, the provisions made by ss 38 and 42 of the Partnership Act 1890. Section 38 provides for the completion of outstanding transactions unfinished at the date of dissolution. This must include completion of the outstanding PM&A

agreements if it is in the interests of the partnership to complete them and if the partnership has the means to do so. Such completion obviously requires the co-operation of the partners in whose names these agreements were taken during the twilight period until winding up is completed or the purchase by Mr Warren pursuant to cl 22.1 is completed, whichever is the shorter. (The period until completion of the purchase but for the present disputes should have been relatively short). There is involved no particular problem or difficulty. If the partner in whose name a PM&A agreement is held completes the agreement or exploits any of the rights thereunder without the consent of his partner for his own benefit, he is acting in breach of duty, and his partner will be entitled to appropriate relief. It is no answer that the completion or exploitation required the partner to take a substantial financial risk or provide substantial funds or security, though these considerations may be taken into account when the accounts are taken between the partners. Subject to the fulfilment of these obligations, cl 9.1 and 18.2 contemplate that the partners will be free on dissolution to compete.

Clause 22.1 provides that on the winding up of the partnership sufficient assets and credits (which could theoretically include the benefit of the PM&A agreements) will be realised to pay and discharge, debts, liabilities and the expenses of winding up; and that subject thereto:—

‘SNE shall procure that [Mr Warren] shall purchase all the remaining assets of the Partnership at a price to be agreed between DKP and [Mr Warren] or, in the event that no agreement can be reached at a price which an expert appointed by the President for the time being of the Institute of Chartered Accountants in England and Wales shall determine to be the fair market value of such assets.’

With the novation effecting the substitution of Mr Warren and Mr Roberts for SNE, this obligation to purchase became the personal obligation of Mr Warren, and it must be clear that the obligation extends to purchasing the partnership's interest in the PM&A agreements. As a matter of construction this extends equally to the PM&A agreements entered into by Mr Warren and those entered into by DKP with European registered boxers irrespective of any assignment covenant contained in them. Contrary to contentions of Mr Sumption, I can see nothing unworkable in including such equitable interests as assets of the partnership to be dealt with in the winding up. The required valuation exercise may be difficult, but that would be a good reason for providing (as the second agreement does provide) for its determination by an expert in default of agreement. No doubt if Mr Warren completes his purchase and this includes (as provided) the promotion contracts entered into by DKP with the European registered boxers, DKP will be obliged to fulfil the obligations he has assumed under those agreements (subject to provision of an indemnity by Mr Warren) so as to enable Mr Warren to obtain the benefit of what he has bought. No doubt if Mr Warren fails to complete, the available market for the benefit of the agreements could be very restricted and indeed could be limited to the parties and the boxers and others who might wish to purchase a release of the existing rights under them. But the obligation imposed by cl 22.1 is clear and enforceable and extends to the benefit of those agreements. I do not accept the defendants' submission that the clause is or is intended to be limited in effect and operation to office equipment, any securities held and the like. Pending completion of this purchase, the trusteeship of the contracts held by Mr Warren has continued for



a the benefit of the partnership, and the trusteeship has extended to replacements and renewal agreements and the proceeds of exploitation.

XIII. CONCLUSION

b I accordingly determine the questions raised on the trial in favour of the contentions made by DKP. One consequence which I should spell out is that since the date of the first agreement the successive Hamed agreements have been  
c held by Mr Warren as trustee for the partnership and his entry in the multi-fight agreement in his own name and on his own account was in breach of the duties which he owed to DKP. The detailed working out of the consequences of this judgment can be left to the parties to agree so far as they can and incorporate in a minute of order; and so far as any questions cannot be resolved in this way they may be referred back to me for decision.

*Order accordingly.*

Celia Fox Barrister.

## Phonographic Performance Ltd v Maitra and others (Performing Right Society Ltd intervening)

COURT OF APPEAL, CIVIL DIVISION

LORD WOOLF MR, ALDOUS AND MUMMERY LJ

13, 14 JANUARY, 3 FEBRUARY 1998

*Judgment – Default of defence – Duty of court – Court to give such judgment as plaintiff entitled to – Statement of claim alleging infringement of copyright and seeking injunctive relief – Whether court retaining any discretion – Whether court entitled to set time limit to injunction – Whether court entitled to attach conditions to injunction – RSC Ord 19, r 7(1).*

PPL, a corporate agency established by the record industry, administered, as assignees, the performance, broadcasting and cable programme rights in sound recordings owned by the majority of record companies. They operated a number of standard tariffs for an annual licence which entitled a licensee to use of all the recordings in the repertoire of PPL's member companies. If it came to PPL's notice that unlicensed use of recordings was being made, they instituted proceedings for infringement of copyright. On a number of occasions PPL obtained final judgment in default against defendants who had used the repertoire without a licence and the orders made included an injunction to restrain further infringement with immediate effect and without an express limit of time. However, in actions in 1996 and 1997 where PPL made a number of applications for judgment in default under RSC Ord 19, r 7 seeking, inter alia, injunctions restraining the particular defendants from infringing copyright without the licence of PPL, the judge considered that PPL's practice of using an injunction of unlimited duration as a lever to extract payment of past fees was an abuse of process and concluded that final injunctions without time limit were not appropriate. He therefore granted injunctions to take effect 28 days after the date of the order, and to continue until seven months from the date of the order or until the defendant obtained a licence, whichever was the earlier. PPL appealed against the orders made in the 1997 actions on the grounds that, in restricting the terms of the injunctions, the judge had improperly exercised his discretion.

**Held** – Although Ord 19, r 7 did not deprive the court of the discretion given by s 37 of the Supreme Court Act 1981 to refuse to grant an injunction or to grant it on such terms and conditions as were just, that discretion had to be exercised judicially, the judge having to decide in each case whether, on the facts, an injunction was appropriate and if so its form. Even though the court would normally grant an injunction without restriction where copyright infringement and threat to continue infringement had been established, especially where the defendant took no part in the proceedings, there could be circumstances where restriction or refusal of that relief would be warranted. However, unless there were special circumstances, a person who exploited his property right by licensing was entitled to prevent another from using that right without his

- a* licence and to refuse to grant a licence save on his terms and conditions. In the instant cases, the defendants did not contest the allegation in PPL's statement of claim, they were well aware of PPL's rights and that they were infringing and they had shown an intention to continue to infringe, and, as such, there was no reason why the use of an injunction in the normal form to prevent further infringement should be an abuse. There were accordingly no grounds for suspending the injunctions for 28 days, nor for limiting their duration to six months. The appeals would therefore be allowed (see p 644 *d e*, p 646 *c d f* to *j* and p 648 *c*, post).

*Young v Thomas* [1892] 2 Ch 134 considered.

Decision of Chadwick J [1997] 3 All ER 673 reversed.

### *c* Notes

For judgments in default of defence, see 37 *Halsbury's Laws* (4th edn) para 406.

For the Supreme Court Act 1981, s 37, see 11 *Halsbury's Statutes* (4th edn) (1991 reissue) 1001.

### *d* Cases referred to in judgment

*Colgate Palmolive Ltd v Markwell Finance Ltd* [1990] RPC 197.

*Gramophone Co Ltd v Cawardine & Co* [1934] 1 Ch 450.

*Jones v Harris* (1887) 55 LT 884.

*Performing Right Society Ltd v Berman* [1975] FSR 400, Rhodesia HC.

*Performing Right Society Ltd v Caryl Theatrical Syndicate Ltd* [1923] 2 KB 146.

### *e* *Performing Right Society Ltd v Mitchell* [1924] 1 KB 762.

*Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] 1 All ER 179, [1953] Ch 149, [1953] 2 WLR 58, CA.

*Redland Bricks Ltd v Morris* [1969] 2 All ER 576, [1970] AC 652, [1969] 2 WLR 1437, HL.

### *f* *Samuelson v Producers' Distributing Co Ltd* [1932] 1 Ch 201, [1931] All ER Rep 74, CA.

*Smith v Buchan* (1888) 58 LT 710.

*Weatherby & Sons v International Horse Agency and Exchange Ltd* [1910] 2 Ch 297.

*Webster v Vincent* (1898) 77 LT 167.

*Young v Thomas* [1892] 2 Ch 134, CA.

### *g*

#### Cases also cited or referred to in skeleton arguments

*A-G v Times Newspapers Ltd* [1973] 3 All ER 54, [1974] AC 273, HL.

*Aspden v Seddon* (1875) LR 10 Ch App 394.

*Banier v News Group Newspapers Ltd* [1997] FSR 812.

### *h* *Blue Town Investments Ltd v Higgs & Hill plc* [1990] 2 All ER 897, [1990] 1 WLR 696.

*Chanel Ltd v GM Cosmetics* [1981] FSR 471.

*Charles v Shepherd* [1892] 2 QB 622, CA.

*Charrington v Simons & Co Ltd* [1971] 2 All ER 588, [1971] 1 WLR 598, CA.

*Clarke v Chadburn* [1985] 1 All ER 211, [1985] 1 WLR 78.

*Cristel v Cristel* [1951] 2 All ER 574, [1951] 2 KB 725, CA.

### *i* *Doherty v Allman* (1878) 3 App Cas 709, HL.

*Eagil Trust Co Ltd v Piggott-Brown* [1985] 3 All ER 119, CA.

*Exxon Corp v Exxon Insurance Consultants International Ltd* [1981] 2 All ER 495, [1982] Ch 119.

*Fritz v Hobson* (1880) 14 Ch D 542, [1874-80] All ER Rep 75.

*Gibbings v Strong* (1884) 26 Ch D 66, CA.



*Heatons Transport (St Helens) Ltd v Transport and General Workers' Union* [1972] 2 All ER 101, [1973] AC 15, HL. a

*Jaggard v Sawyer* [1995] 2 All ER 189, [1995] 1 WLR 269, CA.

*Kennaway v Thompson* [1980] 3 All ER 329, [1981] QB 88, CA.

*Oxy-Electric Ltd v Zainuddin* [1990] 2 All ER 902, [1991] 1 WLR 115.

*Patel v W H Smith (Eziot) Ltd* [1987] 2 All ER 569, [1987] 1 WLR 853, CA. b

*Pawley v Pawley* [1905] 1 Ch 593.

*Penrice v Williams* (1883) 23 Ch D 353.

*Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287.

*Wallersteiner v Moir* [1974] 3 All ER 217, [1974] 1 WLR 991, CA.

*Wood v Sutcliffe* (1851) 2 Sim NS 163, 61 ER 303.

*Woollerton & Wilson Ltd v Richard Costain Ltd* [1970] 1 All ER 483, [1970] 1 WLR 411. c

## Appeal

The plaintiff, Phonographic Performance Ltd (PPL), appealed from the decision of Chadwick J ([1997] 3 All ER 673) on 19 June 1997 whereby he imposed conditions on injunctions he granted restraining the defendants, Simon Andrew, Nick Rose and The Underworld (Bradford) Ltd, from infringing PPL's copyright. The facts are set out in the judgment of the court. d

*Peter Goldsmith QC, Jonathan Rayner James QC and Amanda Michaels* (instructed by *Green Sheikh & Co* and *Hamlin Slowe*) for PPL. e

*Mary Vitoria QC* (instructed by *Nick Kounoupias*) for the Performing Right Society as intervener.

*Michael Silverleaf QC* (instructed by the *Treasury Solicitor*) as *amicus curiae*.

*Cur adv vult*

3 February 1998. The following judgment of the court was delivered. f

**LORD WOOLF MR.** Following the decision in *Gramophone Co Ltd v Cawardine & Co* [1934] 1 Ch 450, which established for the first time that under s 1 of the Copyright Act 1911 a performing right subsisted in a record, Phonographic Performance Ltd (PPL) were incorporated to exercise and enforce performing rights assigned by gramophone companies to PPL. That right was preserved in the Copyright Act 1956 (s 12(5)(b)), pursuant to the recommendation of the Gregory Committee, and is now enshrined in the Copyright, Designs and Patents Act 1988 (ss 16(1)(c) and 19). g

This appeal raises the question of what is the appropriate order to be made when final judgment for infringement of copyright is given in favour of PPL in default of defence. h

## *The factual background*

PPL, as assignees, now administer on behalf of the vast majority of record companies, the performing, broadcasting and cable programme rights in their sound recordings. Like other collecting societies, PPL operate a number of standard tariffs for annual licences applicable to different classes of users which are either negotiated with music user organisations or have been decided after a reference to the Performing Right Tribunal, now the Copyright Tribunal. A j

a person who takes a licence is entitled to use all of the recordings in the repertoire of PPL's member companies.

PPL, unlike the Performing Right Society (the PRS) which performs a similar function on behalf of composers, authors and publishers, do not have inspectors who visit premises to ascertain whether copyright works in their repertoire are being used without a licence. They monitor the press and conduct surveys of particular businesses. If it comes to their notice that unlicensed use may be made, PPL write to the person concerned drawing his attention to the need for him to obtain a licence. If he fails to apply for a licence, further letters are written to persuade him to take a licence before solicitors are instructed. The solicitors, when instructed, write at least one letter before action and, if no satisfactory reply is received, engage inquiry agents to ascertain whether there is infringement and if so to obtain evidence upon which an action for infringement could be based. It is only then that proceedings for infringement of copyright are started.

The proceedings are normally commenced by a writ indorsed with a statement of claim. Annexed to the statement of claim is a schedule of the current repertoire of PPL. The copyright in the recordings referred to in the schedule will expire on different dates. Concern has been expressed that if the court grants injunctive relief in relation to the recordings forming the repertoire at any particular time this will result in the defendant being restrained in relation to a recording after its copyright has expired. We recognise that in theory this must be a possibility. However we do not consider that in practice this requires any change to the way the proceedings are now usually conducted.

Inevitably any proposed defendant will be playing a variety of recordings. In view of the dominant position of PPL it is inconceivable that recordings in which PPL holds the copyright will not have been played and continue to be played, if not restrained, by a proposed defendant. If such a defendant is licensed he is licensed for all the recordings in the repertoire. If he is not licensed and is providing music for the public he will inevitably infringe PPL's copyright and which particular recording's copyright is infringed will be a matter of no concern to the proposed defendant.

A person who applies for a licence before starting to use the repertoire pays at the standard tariff rate. To encourage that to happen juke-box licensees who do not apply in advance are normally required to pay a slightly higher royalty rate for the first year and to pay that rate from the first day of use. That has been accepted by the Copyright Tribunal to be reasonable in principle.

The way that the question for decision arose is fully set out in the judgment in the Chancery Division of Chadwick J ([1997] 3 All ER 673). PPL have for many years sought and obtained from the judges of the Chancery Division final judgment in default against persons using the repertoire who have failed to take a licence. The orders made included an injunction to restrain further infringement in the normal form, ie with immediate effect and without an express limit of time.

This appeal arises out of applications by PPL in 1996 for judgments in default of defence against a number of defendants. Notices of motion for judgment in default were served seeking injunctions restraining the particular defendants from infringing copyright without the licence of PPL, an inquiry as to damages and costs. Chadwick J concluded that final injunctions without limit of time were not appropriate and therefore limited the injunctions to a period of six

months. He ordered inquiries as to damages and costs and that there should be 'liberty to apply'. He contemplated that the liberty to apply would enable PPL to come back to the court to extend the term of the injunctions, if that proved necessary. a

In a number of cases PPL considered it was necessary and, believing that the 'liberty to apply' enabled them to do so, they came back to the court to have the time limit removed. At an early stage of the hearing it became clear that PPL's submissions challenged the judge's decision to refuse to grant injunctions without a time limit. The judge concluded that it was not appropriate for him to entertain such submissions on those applications because, if he had been wrong to make the order which he did, it was for the Court of Appeal to reverse his decision. PPL indicated that they wished the matter to be considered by the Court of Appeal. To enable that to be done PPL brought before the judge, in proceedings started in 1997, two further notices of motion for judgment in default of defence. Thus, if he came to the same conclusion as he had done in the 1996 actions, the matter could be reviewed by the Court of Appeal. b

This appeal is from the order made by Chadwick J (1996 P 3979) in which Mr S Maitra was the defendant and against the orders made in the 1997 actions. As the issues of importance to PPL arise for decision in the 1997 actions, PPL, rightly in our view, are content not to pursue the appeal in the Maitra action. c

The first action (1997 P 2238) was started by writ dated 22 April 1997. It is indorsed with a statement of claim. It alleges that the plaintiffs were the owners of the copyright in the repertoire; that the defendant was the proprietor or occupier of 'The Underworld Nightclub', which had record playing equipment for public performance; that the defendant had infringed the plaintiff's copyright on a specified date by playing a number of named records in the repertoire; that because of letters sent prior to that date the defendant is and was at all material times well aware of the nature and extent of the plaintiff's repertoire and that playing it in public constituted an infringement of the plaintiff's rights. It is also pleaded: d

'Despite requests the defendant has failed to obtain a licence and has continued to infringe the plaintiff's rights as aforesaid and it is to be inferred that it will continue to do so unless restrained by an Order of this Honourable Court.' e

The statement of claim concludes with a claim for an injunction in these terms: f

'An injunction to restrain the defendant from doing ... the following acts or any of them that is to say infringing the plaintiff's copyright by playing in public sound recordings issued under any of the names or marks specified in Schedule A annexed hereto or by authorising any of the acts aforesaid without the plaintiff's licence but as to each such sound recording only during the respective periods during which the exclusive right to play the same in public is vested in the plaintiff or from infringing the plaintiff's copyright in any other way.' g

The writ was served by post pursuant to RSC Ord 10, r 1(2)(a). The defendant did not acknowledge service, but, as required by Ord 13, r 6(1), PPL proceeded as if notice to defend had been given. In June 1997 PPL applied by notice of motion for judgment in default as claimed in the statement of claim. There is no dispute that the appropriate procedure was adopted. h



a The judge ordered the inquiry as to damages sought and costs, but limited the injunction by inserting this proviso:

‘But PROVIDED that (i) the said injunction shall take effect from the day 28 days after the date of this Order or from such later day as the parties (in writing signed by them or by solicitors on their behalf) may have agreed; and (ii) the injunction shall continue until whichever shall first occur of (i) b the day seven months after the date of this Order or (ii) the day on which the defendant shall first obtain a licence to play in public the sound recordings then comprised in the plaintiff’s repertoire.’

c He also ordered that ‘the parties are to be at liberty to apply’. The issue of principle raised in this appeal is whether the judge was right to refuse to grant an injunction without the two limbs of the proviso.

The factual background, pleadings and order made in the other 1997 action, the subject of this appeal, are for all relevant purposes the same and therefore need not be considered separately.

d *The procedural issue*

PPL’s applications for judgment were made under Ord 19, r 7(1). It provides:

‘Where the plaintiff makes against a defendant or defendants a claim of a description not mentioned in rules 2 to 5, then, if the defendant or all the defendants (where there is more than one) fails or failed to serve a defence e on the plaintiff, the plaintiff may, after expiration of the period fixed by or under these rules for service of the defence, apply to the court for judgment, and on the hearing of the application the court shall give such judgment as the plaintiff appears entitled to on his statement of claim.’

f That rule is permissive. It follows that a plaintiff need not move for judgment in default of defence and can proceed to trial in the normal way or seek summary judgment under Ord 14. The advantage of doing so is that a judgment so obtained cannot be set aside under Ord 19, r 9, but to do so can increase the costs which may not be recoverable. Paragraph 19/7/10 states:

g ‘Proof of plaintiff’s case—At a meeting of the Judges, a majority decided that the Court cannot receive any evidence in cases hereunder, but must give judgment according to the pleadings alone (*Smith v. Buchan* ((1888) 58 LT 710)); *Young v. Thomas* ([1892] 2 Ch 135, CA)). It is therefore not necessary on the hearing of the summons or motion for judgment to prove the case by evidence (*Webster v. Vincent* ((1898) 77 LT 167)). The costs of any h affidavits in support of the case will be disallowed (*Jones v. Harris* ((1887) 55 LT 884)).’

The reason for it not being necessary to prove the case by evidence was explained by Bowen LJ in these terms (*Young v Thomas* [1892] 2 Ch 134 at 137):

j ‘There is no doubt that, in determining the rights of the parties in the action, the statement of claim alone is to be looked to, and the reason of this rule is obvious, namely, that the facts stated therein are taken to be admitted by the defendant; and as has been decided by [Mr] Justice Kay in *Smith v. Buchan* ((1888) 58 LT 710), no evidence can be admitted as to those facts.’

The judge reminded himself of that statement by Bowen LJ and drew attention to the conclusion reached in that case that the court had, when considering costs, a discretion given by the rules which enabled the court to look at facts outside the statement of claim just as it did in other cases. The judge went on:

‘Equally, as it seems to me, there is nothing in Ord 19, r 7(1) which has the effect of depriving the court of the power to decide, in the exercise of a judicial discretion, not only whether an injunction should be granted, but also what the terms of that injunction should be. I reject any suggestion that the function of the judge in these cases is confined to checking that there is an affidavit of due service and that the time periods prescribed by the rules have elapsed; and that, subject to those checks he is required to act as a judicial rubber stamp in granting the injunction in the terms sought. For these reasons it appears to me that it is appropriate—indeed, it is necessary in the proper exercise of the judge’s discretion—to consider whether the injunction to be granted should be of unlimited duration or for some lesser period.’ (See [1997] 3 All ER 673 at 680.)

We indorse the judge’s view that Ord 19, r 7 does not deprive the court of the discretion given by s 37 of the Supreme Court Act 1981 to refuse to grant an injunction or to grant it on such terms and conditions as are just. However, that discretion has to be exercised judicially and we can see no reason for applying any different principle when the discretion is being exercised under Ord 19, r 7 than under Ord 14 or after a trial. In each case the judgment is final in the sense that it concludes the litigation, subject to appeal when made under Ord 14 or after trial, and the power to set aside when made under Ord 19, r 9. Upon the facts as proved, admitted or deemed to be admitted, the judge must decide whether an injunction is appropriate and if so its form.

It is clear from the terms of Ord 19, r 7 and para 19/7/10 that judgment in default is given upon the facts pleaded in the statement of claim and that affidavit evidence to supplement or support those facts is not appropriate as the pleaded facts are deemed to be admitted. However, that cannot be rigidly applied where the judge has to exercise a discretion whether to grant the relief sought. Where an injunction is sought facts relevant to the grant of that injunction, which are not deemed to be admitted, should be brought to the attention of the judge by way of affidavit or otherwise. Further, if the judge is aware of matters relevant to the exercise of his discretion, he can seek an appropriate explanation before coming to any decision. The appropriate costs of such an exercise would, if reasonably incurred, be accepted as allowable. Paragraph 19/7/10 is not applicable to this situation.

#### *The appropriate order*

The judge was aware of the practice of PPL from earlier contempt proceedings which had come before him. PPL require a person who applies for a licence to take the licence from the first day that the person used the repertoire. Thus a person who infringes will only be granted a licence when he has regularised his position. Similarly a person who has been enjoined will not be granted a licence if he does not pay the appropriate licence fee in respect of the time when he has infringed. The attitude of PPL is ‘pay or stop’—those who do not pay should not be in a better position to those who do.

a The judge was concerned at the practice of PPL using an injunction of unlimited duration as a lever to extract payment of past fees, a practice he regarded as an abuse of process. He therefore restricted the injunction by the proviso set out above. That, PPL submitted, was a wrong exercise of discretion.

b As neither of the defendants appeared, this court thought it right that it should have the assistance of an amicus curiae and we are grateful for the submissions of Mr Silverleaf QC who was appointed, and for the submissions of Miss Vitoria QC, who appeared for the PRS as intervener.

c Mr Goldsmith QC, who appeared for PPL, submitted that where, as in this case, a plaintiff establishes that his copyright has been infringed and there is a threat of further infringement, he is entitled as a matter of course to an injunction to prevent the defendant from carrying out further infringements (see *Weatherby & Sons v International Horse Agency and Exchange Ltd* [1910] 2 Ch 297, *Performing Right Society Ltd v Caryl Theatrical Syndicate Ltd* [1923] 2 KB 146, *Samuelson v Producers' Distributing Co Ltd* [1932] 1 Ch 201 at 210, [1931] All ER Rep 74 at 82, *Performing Right Society Ltd v Mitchell* [1924] 1 KB 762 at 774, *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] 1 All ER d 179 at 197 and 205, [1953] Ch 149 at 181 and 194, *Redland Bricks Ltd v Morris* [1969] 2 All ER 576 at 578 and 579, [1970] AC 652 at 664 and 665, *Colgate Palmolive Ltd v Markwell Finance Ltd* [1990] RPC 197 at 200 and *Performing Right Society Ltd v Berman* [1975] FSR 400 at 403). That, he submitted, was the intention of Parliament as can be seen from the Copyright, Designs and Patents Act 1988. e Further, PPL were in no different position in this respect from other copyright owners. There was nothing in the attitude or practice of PPL which required the court to deviate from the normal practice of restraining by final injunction in the normal form infringement of copyright when there is a threat to continue.

f Section 1(1) of the 1988 Act states in terms that copyright is a property right. It entitles the owner to the exclusive right to do the acts restricted by copyright (see s 2) which, in this case, is public performance of a record (see ss 16 and 19). The exclusive right has a duration fixed by statute (the 50-year period now specified in s 13A in the case of sound recordings). In an infringement action the copyright owner has available all relief, including injunctive relief, as is available in respect of any other property right (see s 96). Although the Act in other parts g provides for licences as of right to be granted, there is nothing requiring an owner of copyright of the type being considered in this case to grant a licence, save where the Monopolies and Mergers Commission has become involved (see ss 98 and 144). An owner may exercise and exploit his proprietary right by licensing some and not others. He may charge whatever he wishes.

h Collecting societies, such as PPL and PRS, have been recognised to be in the public interest. They provide a practical way for copyright owners to obtain recompense for use of their work and for the public to obtain a licence to use the complete repertoire of works. However, by reason of their control of all the works of record companies and of composers, they have quasi-monopoly positions and have considerably more power when exercising their copyright j than an individual owner. That was recognised by Parliament both in the 1956 and 1988 Acts. Chapter VIII of the 1988 Act set up the Copyright Tribunal, which has jurisdiction to hear and determine disputes relating to licensing schemes of Collecting Societies. For example, a person claiming that he requires a licence may refer a scheme to the Copyright Tribunal and the tribunal can upon such a reference confirm or vary the scheme (see s 119). A person may also



apply to the tribunal, if he has been refused a licence or he believes that the terms offered are unreasonable and the tribunal may make an order declaring that he is entitled to a licence on such terms as the tribunal considers reasonable (see s 121). Mr Goldsmith properly concedes that it would be perfectly proper for a judge to stay an action on appropriate terms if a defendant wishes to refer a relevant issue to the tribunal. a

Although the terms upon which PPL licence their copyright are subject to the control of the Copyright Tribunal, Parliament did not see fit to restrict the way that they enforced their copyright against infringers. Parliament provided them with the same rights as ordinary copyright owners and *prima facie* they should be granted the same relief. b

We accept that when a person establishes infringement of copyright and a threat to continue infringement, an injunction will in the ordinary case be granted without restriction. This is especially true when the defendant takes no part in the proceedings. But the court, when granting an injunction, is still required to exercise a discretion and in so doing there could be circumstances where restriction or refusal of an injunction would be warranted. We do not believe that such circumstances arise in this case or would normally do so in similar cases. c  
d

At the heart of the judge's decision to limit the injunction in time was his view that the injunctions obtained by PPL were used as a lever to extract licence fees—a practice that he regarded as an abuse. Although PPL have, since the judge first expressed his views, modified the letters they write, it remains their objective to make sure that all users of their rights pay the appropriate licence fee or stop infringing. The purpose of the injunction is to prevent unlicensed use. Inevitably it is an incentive to the enjoined person to obtain a licence or, when threatened with committal, to pay the fee which he should have paid or stop. e  
f

We do not take the same view as the judge. A person who exploits his property right by licensing is entitled, unless there are special circumstances, to prevent another from using that property right without his licence and to refuse to grant a licence save on his terms and conditions as to payment and use. In a case, such as the present, where the defendant did not contest the allegation in PPL's statement of claim, was well aware of PPL's rights and that he was infringing and shows an intention to continue to infringe, we can see no reason why the use of an injunction in the normal form to prevent further infringement could be an abuse. No doubt the consequence is that a defendant is forced to pay if he wishes to use the repertoire, but PPL are entitled to use the rights assigned to them for the purpose of requiring payment of fees in return for a licence to do what would, in the absence of a licence, be an infringement of the rights. On the admitted facts of the 1997 cases, there were no grounds for suspending the injunction for 28 days which the judge said was 'intended to provide time for negotiation'. The admitted facts were that the defendant was a person who had, with full knowledge of the position, disregarded the proprietary rights of PPL. Whether or not the defendant would be in a position to pay any damages or costs was not known. To allow him a further 28 days of infringement (which is also a criminal offence under s 107(3)(b) of the 1988 Act, if the offender knew or had reason to believe that copyright would be infringed) was, in our view, wrong. g  
h  
i

a The second limb of the proviso to the injunction was intended to ensure that the injunction did not continue for a period longer than was necessary to protect PPL's rights. That was considered to be, at most, seven months. The purpose of such a limitation in time was to prevent PPL using the threat of committal to make the defendant pay further licence fees.

b Use of an injunction by PPL to obtain money to which they are not entitled would be an abuse, but there is no evidence that that ever occurs. Where unauthorised use of PPL's copyright is taking place, we do not believe it is an abuse to refuse to licence that copyright without an appropriate payment for past use and an agreement for future use. Nor do we consider it an abuse for PPL to require compliance with an injunction either by the person refraining from using the repertoire or by paying for such use that has taken place and will take place.

c A man who is aware of PPL's rights and that he has infringed them and has shown an intention to continue to do so should not be surprised to be told that, if he continues to do so in the future, he risks committal to prison: nor should he be surprised that, when a breach of the injunction has occurred, it is pointed out  
d that committal proceedings will follow unless the infringer regularises his position. We can see no reason why a court should modify the normal form of injunction for the benefit of a person in the position of the defendants in the 1997 actions. In fact, we can see every reason to grant the normal form of injunction to PPL to prevent the defendants infringing copyright, which is not only an infringement of PPL's rights but can also be a criminal offence. If a defendant  
e has no intention of infringing, then he should apply to have the order set aside in so far as it grants an injunction against him. If there were to be any abuse of the grant of the injunction then again the defendant could apply for the discharge of the injunction. In any event, the court would take into account abuse by refusing any relief on any contempt application. In the ordinary case,  
f however, the course taken by the judge might lead unnecessarily to further litigation and to substantial additional costs, which might well be irrecoverable by PPL from the defaulting defendant.

g It was suggested by Mr Silverleaf that it might be appropriate in the circumstances of the cases before us, where licences were available, to refuse to grant an injunction at all as damages would be an adequate remedy and, if necessary, to award damages in lieu of an injunction under s 50 of the Supreme Court Act 1981. That, it was said, would reflect the position and provide appropriate relief as PPL's desire was to maximise their return and not to refuse licences.

h Such a course would not be sufficient to safeguard what are the admitted rights of PPL for four reasons. First, upon the admitted facts the defendants have an intention to continue to infringe PPL's rights. In those circumstances an injunction is the appropriate remedy to prevent that intention being carried out. Second, calculation of the damages for future infringements of copyright in lieu of the injunction would not be practical, as it would not be possible to  
j estimate the length of time the infringement would continue. Damages for infringement of copyright are awarded as compensation for loss caused by past infringements, but they are rarely an appropriate remedy for unlicensed future use of copyright. Third, PPL are the owners of a statutory property right which they are seeking to enforce in the same way as they have done for many years. When Parliament enacted the 1988 Act it did not give these defendants

permission to perform sound recordings in public without the need for the copyright owner's licence or, apart from the right to apply to the Copyright Tribunal, a right to compel the copyright owner to grant a licence to do the restricted act (and without payment). It would therefore be surprising, absent special circumstances, if the court framed an injunction in terms which would licence a defendant's activities when Parliament did not consider it was right to do so. Fourth, we can see no reason why a court should have any sympathy with a defendant who, as in this case, is aware of PPL's rights and that he is infringing them and then shows an intention to continue to do so.

It follows that we would allow the appeals in the 1997 actions with the result that the injunctions will be in the normal form sought by PPL.

*Appeals allowed.*

Kate O'Hanlon Barrister.



## *a* Johnson and another v Davies and another

COURT OF APPEAL, CIVIL DIVISION

KENNEDY, WARD AND CHADWICK LJ

15, 16 JANUARY, 18 MARCH 1998

*b* Insolvency – Voluntary arrangement – Solvent co-debtors – Effect of arrangement on solvent co-debtors – Plaintiff shareholders sureties under lease taken by company – Plaintiffs selling shares and purchasers agreeing to indemnify them against claims under lease – Plaintiffs meeting claims under lease and seeking indemnity from purchasers – Individual purchaser entering into voluntary arrangement with creditors  
*c* – Plaintiffs given notice of creditors' meeting – Whether arrangement extinguishing liability of solvent co-debtors to plaintiffs – Whether arrangement releasing co-debtors from debt by operation of law.

*d* In 1989 the plaintiffs, who were sureties under a lease taken by a company in which they owned practically all of the shares, sold their shares in the company to the two defendants and a third person, H. By cl 3 of the sale agreement the defendants and H covenanted to keep the plaintiffs indemnified against all claims arising under the lease. The company subsequently went into receivership and a claim was made against the plaintiffs under the lease, which they met. Thereafter H entered into an individual voluntary arrangement with his creditors under  
*e* Pt VIII of the Insolvency Act 1986, under which he was to pay to the supervisor 75% of his net income for a period of five years, and to transfer all 'windfall' assets accruing to him during that period. Paragraphs 4 and 19 of the arrangement provided that when all moneys to be made available had been realised and distributed to creditors, H would be released from any further liability to them.  
*f* The plaintiffs were given notice of the creditors' meeting and were deemed to be parties to the arrangement and bound by it pursuant to s 260(2)<sup>a</sup> of the 1986 Act. The plaintiffs brought proceedings against the defendants to recover the sum they had had to pay under the lease, and applied for summary judgment under RSC Ord 14. The deputy district judge dismissed the plaintiffs' application, holding that the voluntary arrangement had the effect of releasing the defendants  
*g* from their joint liability under cl 3 of the share sale agreement, but the judge allowed the plaintiffs' appeal. The defendants appealed.

*h* **Held** – Having regard to the provisions of s 260(2) of the 1986 Act, a term in a voluntary arrangement under Pt VIII of the Act releasing a debtor could, as a matter of principle, have the effect of releasing a jointly liable co-debtor; whether it did so depended on whether, as a matter of construction, having regard to the surrounding circumstances and taking into account also any terms which could properly be implied, it constituted an absolute release in relation to all the joint debtors or a release with a reservation. In the instant case, the words of paras 4 and 19 of the voluntary arrangement, construed in the light of the proposals as a whole, were inconsistent with any intention to effect an immediate or absolute  
*j* release of the debts owed to the creditors. Moreover, although it was necessary in order to give efficacy to the arrangement to imply a term that the creditors would take no steps to enforce their debts against the debtor while he was

*a* Section 260(2) is set out at p 658 *a*, post

complying or had complied with his obligations, no such term was necessary in the case of co-debtors. It followed that the terms of the arrangement did not have the effect of releasing the defendants from their liability as co-debtors and so were not such as to preclude the plaintiffs from enforcing their claims against the defendants. The appeal would therefore be dismissed (see p 655 a, p 656 a to e, p 657 a to d and p 664 j to p 666 d, post).

*Watts v Aldington, Tolstoy v Aldington* (1993) Times, 16 December applied.

Decision of Jacob J [1997] 1 All ER 921 affirmed.

## Notes

For the effect and implementation of individual voluntary arrangements, see 3(2) *Halsbury's Law* (4th edn reissue) paras 100-109, and for a case on the subject see 4(1) *Digest* (2nd reissue) 174, 1514.

For the Insolvency Act 1986, s 260, see 4 *Halsbury's Statutes* (4th edn) (1987 reissue) 904.

## Cases referred to in judgments

*Bateson v Gosling* (1871) LR 7 CP 9.

*Commercial Banking Co of Sydney Ltd v Gaty* [1978] 2 NSWLR 271, NSW SC.

*Dane v Marine Insurance Corp Ltd* [1894] 1 QB 54, CA.

*Deanplan Ltd v Mahmoud* [1992] 3 All ER 945, [1993] Ch 151, [1992] 3 WLR 467.

*Ellis v Wilmot* (1874) LR 10 Exch 10.

*EWA (a debtor), Re* [1901] KB 642, CA.

*Garner's Motors Ltd, Re* [1937] 1 All ER 671, [1937] Ch 594.

*Hill v Anderson Meat Industries Ltd* [1972] 2 NSWLR 704, NSW SC.

*Jacobs, Ex p, re Jacobs* (1875) LR 10 Ch App 211.

*London Chartered Bank of Australia, Re* [1893] 3 Ch 540.

*March Estates plc v Gunmark Ltd* [1997] 2 EGLR 38.

*Megrath v Gray, Gray v Megrath* (1874) LR 9 CP 216.

*Nicholson v Revill* (1836) 4 Ad & El 675, [1835-42] All ER Rep 148, 111 ER 941.

*North v Wakefield* (1849) 13 QB 536, 116 ER 1368.

*Oriental Commercial Bank, Re* (1871) LR 7 Ch App 99.

*RA Securities Ltd v Mercantile Credit Co Ltd* [1995] 3 All ER 581.

*Richard Adler (t/a Argo Rederei) v Soutos (Hellas) Maritime Corp, The Argo Hellas* [1984] 1 Lloyd's Rep 296.

*Rumboll, Ex p, re Taylor and Rumboll* (1871) LR 6 Ch App 842.

*Solly v Forbes* (1820) 2 Brod & Bing 38, [1814-23] All ER Rep 437, 129 ER 871.

*Watters v Smith* (1831) 2 B & Ad 889, 109 ER 1373.

*Watts v Aldington, Tolstoy v Aldington* (1993) Times, 16 December, [1993] CA Transcript 1578, CA.

*Webb v Hewitt* (1857) 3 K & J 438, 69 ER 1181.

*White v Tyndall* (1888) 13 App Cas 263, HL.

## Cases also cited or referred to in skeleton arguments

*Burford Midland Properties Ltd v Marley* [1995] 1 BCLC 102.

*Close v Close* (1853) 4 De GM & G 176, 43 ER 474.

*Cole v Lynn* [1941] 3 All ER 502, [1942] 1 KB 142, CA.

*Cutler v McPhail* [1962] 2 All ER 474, [1962] 2 QB 292.

*Duck v Mayeu* [1892] 2 QB 511, [1891-4] All ER Rep 510, CA.

*Finch v Jukes* [1877] WN 211.

*Gardiner v Moore* [1966] 1 All ER 365, [1969] 1 QB 55.

*Hill v East and West India Dock Co* (1884) 9 App Cas 448, HL.  
*Mytre Investments Ltd v Reynolds* [1995] 3 All ER 588.  
*Naeem (a bankrupt), Re* (No 18 of 1988) [1990] 1 WLR 48.  
*Perry v National Provincial Bank of England* [1910] 1 Ch 464, CA.  
*Pybus v Gibb* (1856) 6 E & B 902, 119 ER 1100.

**b Appeal**

By notice dated 2 January 1997 the defendants, Suzanne Davies and Nicholas Cole appealed with leave from the decision of Jacob J ([1997] 1 All ER 921, [1997] 1 WLR 1511) on 5 December 1996 allowing the appeal of the plaintiffs, Robert Arthur Johnson and Anne Johnson, from the decision of Deputy District Judge Radcliffe on 14 May 1996 in the Brighton District Registry refusing their application for summary judgment under RSC Ord 14 in respect of their claim against the defendants for moneys due under an indemnity agreement made between the parties. The facts are set out in the judgment of Chadwick LJ.

*Clifford Darton* (instructed by *Judge Sykes Frixou*) for the first defendant and  
(instructed by *Edward Harte & Co*, Brighton) for the second defendant.  
*Christopher Wilson* (instructed by *Aldrich Crowther & Wood*, Brighton) for the plaintiffs.

*Cur adv vult*

18 March 1998. The following judgments were delivered.

**CHADWICK LJ** (giving the first judgment at the invitation of Kennedy LJ). These two appeals, from the order of Jacob J made on 5 December 1996, raise the same question: whether or not the appellants were released from their obligation under a covenant to indemnify the respondents against claims arising under a lease by reason of the terms of an individual voluntary arrangement made under Pt VIII of the Insolvency Act 1986 by a co-obligee who was liable, jointly with the appellants, under the same covenant.

The facts may be stated shortly. (1) At all material times until July 1989 or thereabouts Robert Arthur Johnson and his wife, Anne Johnson, (the plaintiffs in this action and the respondents to these appeals), were the owners of 98 out of the 100 issued shares of £1 each in PPM Plastics and Photographs Ltd (the company). The company was lessee of premises known as Cambridge Works, Cambridge Grove, Hove. Those premises were held under a lease dated 4 January 1984 for a term of 12 years from 29 September 1982. Mr and Mrs Johnson had joined in that lease as sureties for the obligations of the tenant. (2) By an agreement dated 19 June 1989 Mr and Mrs Johnson agreed to sell their shares in the company to Nicholas Cole (the second defendant), his former wife Susan Cole (now Susan Davies, the first defendant) and Christopher Hopkins. Mr Cole, Mrs Davies and Mr Hopkins are, together, described in the agreement as 'the purchasers'. Clause 3(d)(ii) of the agreement contains a covenant by the purchasers to keep Mr and Mrs Johnson indemnified against all claims, liabilities and costs arising under the lease of 4 January 1984. (3) At or about the end of 1992 the company was placed in receivership. Mr and Mrs Johnson were called on to pay, and did pay, (i) the quarterly instalments of rent due under the lease in respect of the remaining 21 months of the term, (ii) the cost of insuring the demised premises (payable as additional rent under the terms of the lease) and (iii)



a  
a sum in respect of dilapidations payable upon termination of the lease in September 1994. (4) On 8 February 1994 an interim order under s 252 of the Insolvency Act 1986 was made in the Brighton County Court on the application of Mr Hopkins. The nominee's report on the debtor's proposals was submitted to the court, pursuant to s 256 of the Act, on 18 March 1994. A meeting of creditors was summoned for 12 April 1994. The decision of that meeting, approving the proposals, was reported to the court pursuant to s 259 of the Act b  
on 21 April 1994. Mr and Mrs Johnson were given notice of the creditors' meeting. They were entitled to vote at that meeting; and they exercised that right by voting in favour of the voluntary arrangement. (5) Under the voluntary arrangement approved on 12 April 1994 Mr Hopkins was to pay to the supervisor 75% of his net income (in excess of reasonable living expenses but subject to a minimum monthly payment of £300) for a period of five years from the date of approval; and to transfer all 'windfall' assets accruing to him during that period. c  
Paragraph 4 of the voluntary arrangement was in these terms:

'When all monies to be made available under these proposals have been realised and distributed to creditors in accordance with the terms herein, I d  
will be released from any further liability to them relating to claims in respect of which they were entitled to participate in this Voluntary Arrangement.'

Paragraph 19 was in terms identical to para 4. Paragraph 24 contained the usual provision for the issue of a certificate of default in respect of the matters referred to in s 276 (1) of the Insolvency Act 1986; and required the supervisor, following e  
the issue of a default certificate, to consult creditors as to the presentation of a bankruptcy petition.

The claim in this action is for repayment of the sums paid by Mr and Mrs Johnson under the covenant for indemnity, after giving credit for the net income received by them from a subletting or licence of the demised premises during part f  
of the remainder of the leasehold term. The action was commenced by writ issued in the Queen's Bench Division, Brighton District Registry on 6 September 1994. In or about September 1995 the plaintiffs applied for the summary determination of two points of law, pursuant to RSC Ord 14A, and for summary judgment in respect of the whole of their claim. Those applications were heard by Deputy District Judge Radcliffe. In the course of a long and careful reserved g  
judgment delivered on 14 May 1996 he held (inter alia) that the defendants had been released from liability under their covenant for indemnity. The plaintiffs appealed from that decision. The appeal was heard by Jacob J, sitting in the Chancery Division, on 29 November 1996. Jacob J set aside the order of 14 May 1996 made in the Brighton District Registry and ordered that the defendants pay h  
to the plaintiffs the sum of £19,663.90 (together with interest) on terms that the plaintiffs should give credit for all sums received by them under the terms of Mr Hopkins' voluntary arrangement. The defendants appeal to this court with the leave of the judge.

The judge, following an earlier decision of his own in *RA Securities Ltd v j  
Mercantile Credit Co Ltd* [1995] 3 All ER 581, took the view that the effect of an individual voluntary arrangement—or, at the least, the effect of this individual voluntary arrangement—was not such as to release solvent co-debtors under the rule of law that the release of one of two or more joint debtors has the effect of releasing the other or others. The short question on this appeal is whether the judge was correct in that view.

a An authoritative statement of the general rule of law as to the release of co-debtors—as it was understood before the recent decision of this court in *Watts v Aldington*, *Tolstoy v Aldington* (1993) Times, 16 December, [1993] CA Transcript 1578—is found in the judgment of Judge Paul Baker QC, sitting as a judge of the High Court, in *Deanplan Ltd v Mahmoud* [1992] 3 All ER 945, [1993] Ch 151. After a review of the nineteenth century authorities from *Watters v Smith* (1831) 2 B & Ad 889, 109 ER 1373 and *Nicholson v Revill* (1836) 4 Ad & El 675, [1835–42] All ER Rep 148 to *Re EWA (a debtor)* [1901] KB 642 Judge Baker expressed his conclusions in the following terms ([1992] 3 All ER 945 at 959–960, [1993] Ch 151 at 170):

c ‘First, a release of one joint contractor releases the others. There is only one obligation. A release may be under seal or by accord and satisfaction. A covenant not to sue is not a release. It is merely a contract between the creditor and the joint debtor which does not affect the liabilities of the other joint contractors or their rights of contribution and indemnity against their co-contractor. It is a question of the construction of the contract between the creditor and joint debtor in the light of the surrounding circumstances whether the contract amounts to a release or merely a contract not to sue.’

Judge Baker went on to consider whether the same principles applied to a contract between the creditor and one of joint and several debtors. Different considerations arise in such a case because the existence of several indebtedness negates a conclusion based on the premise that there is only one obligation. Nevertheless, for the reasons which he explained, Judge Baker reached the conclusion that if one joint and several covenantor is released by accord and satisfaction, all are released. He said ([1992] 3 All ER 945 at 960, [1993] Ch 151 at 170):

f ‘Some have seen this as illogical, and so it would be if the only reason for the rule that the release one of joint contractor releases the other is that there is only one obligation. Professor Glanville Williams sees the reason for the extended rule to have been an early uncertainty as to the nature of a joint and several obligation (see *Joint Obligations* p 135). Two other reasons can be adduced. First, where the obligations are non-cumulative, ie the obligation of each is to perform in so far as it has not been performed by the other party, the acceptance of some other performance in lieu of the promised performance relieves the others. The covenantee cannot have both the promised performance and some other performance which he agrees to accept. Secondly, unless the co-covenantors were released following an accord and satisfaction, they could claim a right of contribution or indemnity. Thus, by suing the co-contractor, the creditor commits a breach of the contract with the released covenantor, for such an action will inevitably lead to the very claim from which the release has been purchased by accord and satisfaction.’

j The second of the two additional reasons identified in that passage has particular force in a case, such as the present, where the release (if any) is part of an arrangement between the debtor and a number of his creditors. In such a case the effect of allowing one creditor to sue the debtor’s co-covenantor (who will not usually be party to that arrangement) is that enforcement by the co-covenantor against the debtor of the co-covenantor’s right of contribution or indemnity (which will not itself be subject to the arrangement) may prejudice the

other creditors who have entered into the arrangement on the basis that that debt will stand in the same position as the debts which are owed to them. a

The extent to which the statement of the general rule in *Deanplan Ltd v Mahmoud* [1992] 3 All ER 945, [1993] Ch 151 continues to represent the law, at least in this court, was considered by the Court of Appeal in *Watts v Aldington, Tolstoy v Aldington* (1993) Times, 16 December, [1993] CA Transcript 1578. The question in that appeal arose out of terms of settlement following proceedings for libel brought by Lord Aldington against Mr Nigel Watts and Count Nikolai Tolstoy. Lord Aldington had obtained judgment for substantial damages against both defendants following a trial. Bankruptcy orders were made against both Mr Watts and Count Tolstoy. By early 1991 Lord Aldington was faced with appeals or applications to appeal in four sets of proceedings as described by Neill LJ. There were negotiations for settlement between Mr Watts and Lord Aldington which led to a letter agreement dated 20 March 1991. It was a term of that letter that third parties should pay £10,000 to Lord Aldington on behalf of Mr Watts. Paragraph 6 of the letter was in these terms: b

‘That Lord Aldington undertakes to accept the said sum in full and final settlement of the judgment and orders referred to above and any liability howsoever arising before today’s date which could involve any payment by you directly or indirectly to Lord Aldington.’ c

Following that settlement a consent order was made annulling the bankruptcy order which had been made against Mr Watts. d

Lord Aldington had sought to prove in the bankruptcy of Count Tolstoy. The trustee in that bankruptcy claimed contribution against Mr Watts under s 1 of the Civil Liability (Contribution) Act 1978. Mr Watts sought a declaration against Lord Aldington that the settlement of 20 March 1991 constituted a release of all rights which Lord Aldington had against himself and Count Tolstoy; and Count Tolstoy sought an order directing his trustee in bankruptcy to reject Lord Aldington’s proof in respect of the original judgment debt. e

Those applications came before Morritt J. The issue, so far as material, was whether para 6 of the settlement letter of 20 March 1991 constituted a release of the judgment debt so relieving Count Tolstoy, as well as Mr Watts, from any further liability to pay that debt and so extinguishing the right of contribution which Count Tolstoy, through his trustee in bankruptcy, would otherwise have had against Mr Watts; or whether the settlement should be construed merely as an agreement by Lord Aldington not to sue Mr Watts. The judge held that the agreement of 20 March 1991 was an agreement not to sue on or enforce the original judgment debt, not an agreement for the discharge of the liability under it. f

The Court of Appeal found difficulty in adopting the judge’s view that, as a matter of construction, the letter of 20 March 1991 evidenced an agreement not to sue rather than a release. Two members of the court (Steyn and Simon Brown LJ) held that para 6 of that letter did contain a release of Lord Aldington’s claim against Mr Watts. Neill LJ did not find it necessary to decide that point. But the view that the agreement contained a release of Lord Aldington’s claim against Mr Watts did not lead to the conclusion that there was a release of Lord Aldington’s claim against Count Tolstoy. On the contrary, each member of the court held that the appeal should be dismissed. Neill LJ rejected the traditional dichotomy between release and agreement not to sue. He said: g



a 'I have come to the conclusion, however, that in trying to fit the agreement into a particular category one may lose sight of the true inquiry: what is the meaning and effect of the agreement having regard to the surrounding circumstances and taking into account not only the express words used in the document but also any terms which can properly be implied.'

b He was satisfied that, on the facts in that case—

'the agreement of 20 March 1991 was plainly subject to an implied term that Lord Aldington's rights against Count Tolstoy would be reserved. I consider that any other result would offend common sense.'

c Steyn LJ, who had expressed the view that although the rule that the release of one of two joint and several tortfeasors releases the other or others was absurd and required re-examination nevertheless the court was bound to follow it, approached the matter in the same way. He said:

d 'In my judgment the right question is the following: is Lord Aldington reserving the right under his agreement [with Mr Watts] to sue Count Tolstoy? In my judgment the objective setting of the contract convincingly shows that the answer of both parties to that question would have been "Yes, of course".'

e Simon Brown LJ also rejected what he described as the 'technicality and intrinsic artificiality' of the conventional approach to the rule as to the release of co-debtors—a rule which he described as a 'juridical relic'. He defined the central question before the court as being 'whether it is proper here to imply a reservation by Lord Aldington of his rights against Count Tolstoy'. That question admitted of only one answer: 'On the facts known to both parties it was perfectly obvious that Lord Aldington was not prepared to abandon his judgment against Count Tolstoy.'

f In *Watts v Aldington*, *Tolstoy v Aldington* the liability of Mr Watts and Count Tolstoy as judgment debtors was, plainly, several as well as joint. In such a case, for the reasons explained in the judgments in this court, the relevant question is not whether the agreement between the creditor, A, and one of the co-debtors, B, releases the debt which B owes to A. Even if it did, that would, in logic, have no effect on the several debt owed to A by the other co-debtor, C. The relevant question is whether the agreement between A and B precludes A from enforcing the debt owed by C. It is in B's interest that the agreement should have that effect—because, if it does not, C will be in a position (if he pays the debt which he owes to A) to seek contribution from B. It is in A's interest that the agreement should not have that effect—because, *prima facie*, A will wish to recover from C the balance of the indebtedness. Given the opposing interests of A and B, the question is what have they agreed. As Neill LJ pointed out, that has to be determined 'having regard to the surrounding circumstances and taking into account not only the express words used in the document but also any terms which can properly be implied' (my emphasis).

j The liability of the purchasers, in the present case, under the covenant in cl 3(d)(ii) of the share sale agreement of 19 June 1989, is a joint liability. There are no words of severance sufficient to create several as well as joint liability: see *White v Tyndall* (1888) 13 App Cas 263 and *Richard Adler (t/a Argo Rederei) v Soutos (Hellas) Maritime Corp*, *The Argo Hellas* [1984] 1 Lloyd's Reports 296 at 330. I am not persuaded that s 81 of the Law of Property Act 1925—to which we were

referred by counsel for the respondents—has the effect of imposing a joint and several liability on the covenantors. That section enables one of joint covenantees to enforce the benefit of the covenant; but it does not otherwise affect the obligation of the covenantors. It is necessary, therefore, to consider whether, and to what extent, the approach of this court in *Watts v Aldington*, *Tolstoy v Aldington* is applicable in a case where the only liability is joint—that is to say, in a case where the rule is firmly based on the unity of the cause of action. The answer is, I think, to be found in the judgment of Neill LJ, where, after referring to *Solly v Forbes* (1820) 2 Brod & Bing 38, [1814–23] All ER Rep 437, *Watters v Smith* (1831) 2 B & Ad 889, 109 ER 1373 and *North v Wakefield* (1849) 13 QB 536, 116 ER 1368, which are all cases of joint, but not joint and several, liability, he said:

‘Accordingly, though the result may be the same, in my opinion it will often be more satisfactory to consider whether the relevant document is an absolute release or a release with a reservation rather than to consider whether the document can be fitted into the straight jacket of a covenant or agreement not to sue.’

Approaching the matter on this basis, it seems to me plain that the words used in paras 4 and 19 of the voluntary arrangement, construed in the light of the proposals as a whole, are inconsistent with any intention to effect an immediate or absolute release of the debts owed to creditors. The proposals are for the debtor to make income payments—and to transfer windfall assets—to the supervisor over a period of five years. The words in paras 4 and 19: ‘*When all monies to be made available under these proposals have been realised and distributed to creditors*’ (my emphasis) have to be read in that context. Failure by the debtor to make the income payments or to transfer windfall assets (if any) during the five year term would give rise to the issue of a certificate of default, under para 23, and, potentially, to an order for bankruptcy—see para 24 of the proposals and s 276 of the Insolvency Act 1986. In those circumstances it seems to me obvious that the creditors would wish to prove in the bankruptcy for the full amount of their debts; they would be appalled to find that those debts had been released and replaced by rights under the failed arrangement. It is for this reason, as it seems to me, that the further words in paras 4 and 19—‘*I will be released from any further liability to them relating to the claims in respect of which they were entitled to participate in the Voluntary Arrangement*’—look to the future. When all moneys ‘*to be made available ... have been distributed ... I will be released*’ (my emphasis) means just that. The release is not to take effect (if at all) until the debtor’s obligations under the proposals have been fulfilled.

I am satisfied, therefore, that this is not a case in which the bargain evidenced by the voluntary arrangement between Mr Hopkins and his creditors has led to a release by accord and satisfaction of the joint debt owed by Mr Hopkins and the appellants to the respondents; such that that debt can no longer be enforced against the appellants. But I do not think that that, necessarily, provides a complete answer to the issue raised on this appeal. It is plain that some term has to be implied into the arrangement if it is to work. This is because the arrangement does not, in terms, preclude any creditor from taking steps, outside the arrangement, to enforce his claim. Nor is there anything in Pt VIII of the Insolvency Act 1986 which has that effect, other than the terms of the arrangement to which creditors are bound. Any interim order made under s 252 of the Act ceases to have effect once the approval of the creditors to the

a arrangement has been notified to the court—see s 260(4). But, plainly, the arrangement will not work as intended if creditors are under no restriction in relation to the enforcement of their claims. At the least, a term which must be implied in order to give efficacy to the arrangement is that creditors bound by the proposals will take no steps to enforce their debts *against the debtor* while the debtor is complying, or has complied, with his obligations thereunder. It is plain  
b that the arrangement would work better, in the interests of the debtor and of creditors who have no claim against a co-debtor, if all creditors were bound to take no steps to enforce their debts not only against the debtor but also *against any co-debtors*. But, although that might be a convenient and tidy result, it does not seem to me it is *necessary* that that result should be achieved in order to give efficacy to the arrangement. And if it is not *necessary* the term should not be  
c implied. It is, I think, pertinent, to keep in mind that compositions or arrangements between a debtor and his creditors which do not have the effect of releasing co-debtors have long been thought sufficiently beneficial to justify the imposition of their terms on dissenting creditors by order of the court—see, for example, s 16(20) of the Bankruptcy Act 1914.

d For these reasons I am satisfied that the terms of the arrangement in the present case are not such as to preclude the respondents from enforcing their claims against the appellants, as co-debtors of Mr Hopkins.

The conclusion just expressed is sufficient to dispose of the present appeal. Nevertheless, it would not be satisfactory to leave the matter there. Jacob J held,  
e in *RA Securities Ltd v Mercantile Credit Co Ltd* [1995] 3 All ER 581 at 586–587, that a term which, if contained in a consensual document, would have the effect of discharging a surety as a matter of law, will not have that effect if contained in a voluntary arrangement (whether individual or corporate) made under the provisions of the Insolvency Act 1986; at least where the creditor has not, in fact, consented to the arrangement. He distinguished actual consent from what he  
f described as ‘a statutory binding’. He followed that decision in the present case (see [1997] 1 All ER 921 at 924–928). His general approach to the problem was indorsed by Lightman J in *March Estates plc v Gunmark Ltd* [1997] 1 EGLR 38 at 39, although that judge accepted that a voluntary arrangement might expressly or by necessary implication regulate the rights of a creditor of the company and of third  
g parties liable for the same debt. Lightman J (at 39) expressed the view that, for such to be the case, the intention to regulate such rights must be made plain on the face of the proposal: ‘*The voluntary arrangement may statutorily absolve the company from liability without absolving or releasing from liability any other party and will ordinarily be construed as reserving all rights of creditors against other parties.*’ (My emphasis.) Jacob J’s view that proposals for compromise between a debtor and  
h his creditors which are imposed by a ‘statutory binding’ under the Insolvency Act 1986 have an effect on third party obligations which is in some way different from the effect which proposals in precisely the same terms would have if contained in a consensual document differs from the view expressed in *Chitty on Contracts* (27th edn, 1997) para 42-047; and is criticised by the authors of Andrews and  
j Millett *The Law of Guarantees* (2nd edn, 1995) para 9-14). The point is of some general importance. It was argued strenuously before us on behalf of the respondents and it seems to me appropriate that we should consider it.

The effect of an individual voluntary arrangement which has been approved by creditors at a meeting summoned under s 257 of the Insolvency Act 1986 is prescribed by s 260(2) of that Act:



'The approved arrangement—(a) takes effect as if made by the debtor at the meeting, and (b) binds every person who in accordance with the rules had notice of, and was entitled to vote at, the meeting (whether or not he was present or represented at it) as if he were a party to the arrangement.'

There is nothing in that subsection, or elsewhere, which saves a party who is bound '*as if he were a party to the arrangement*' from the consequences which would follow as a matter of law if he were indeed a party to the arrangement. The statutory hypothesis is that the person who has notice of and was entitled to vote at the meeting is party to an arrangement to which he has given his consent. It is important to keep in mind that, where B and C are co-debtors of A, the reason why C is released as a result of an arrangement or bargain between A and B is that the effect of that bargain is to extinguish the debt; alternatively, that the effect of that bargain is that A has agreed with B that A will not sue C on a debt which, if paid by C, will give C rights of contribution against B and so negate the release from any further liability in respect of that debt which is the basis of B's arrangement with A. C is not released by reason of any arrangement or bargain between A and C *inter se*; and it is no answer to point out, as is the case, that there is nothing in s 260(2) of the Act which purports to affect the rights of A and C *inter se*.

The need to save a creditor who is bound by a release under a composition or arrangement imposed upon him by statute from the consequences which would follow in relation to co-debtors or sureties in respect of the same debt had been recognised for more than one hundred years before the enactment of the Insolvency Act 1986. I have already referred to s 16(20) of the Bankruptcy Act 1914. Section 16 of the 1914 Act was a re-enactment of s 18 of the Bankruptcy Act 1883. Section 18(1) provided that creditors might, at a meeting after the making of a receiving order, resolve to entertain a proposal for a composition or a scheme of arrangement in relation to the debtor. If accepted by three fourths in value of the creditors at a subsequent meeting called for that purpose, and approved by the court, the composition or arrangement was binding on all creditors in respect of debts due to them from the debtor and provable in bankruptcy (s 18(8) of the 1883 Act). Section 18(15) provided that the acceptance by a creditor of a composition or arrangement should not release any person who under the 1883 Act would not be released by an order of discharge if the debtor had been adjudged bankrupt. The effect of an order of discharge is set out in s 30 of the 1883 Act. Section 30(2) provided that an order of discharge should release the bankrupt from all debts provable in bankruptcy, other than those specified in sub-s (1)—which are not material in this context. But s 30(4) was in these terms:

'An order of discharge shall not release any person who at the date of the receiving order was a partner or co-trustee with the bankrupt or was jointly bound or had made any joint contract with him or any person who was a surety or in the nature of a surety for him.'

So the position under the 1883 Act was that a creditor bound by a composition or arrangement in lieu of bankruptcy, which had been imposed on him by a majority and approved by the court under the statutory arrangements, was in the same position in relation to sureties and co-debtors of the debtor as he would have been if the bankruptcy proceedings had taken their course. His rights against sureties and co-debtors of the debtor, which under the general law would or might have been extinguished by any release of the debtor contained in the

a composition or arrangement, were expressly preserved. That continued to be the position under the Bankruptcy Act 1914. The comparable provisions in that Act are s 16(13) and (20) and s 28(2) and (4).

b Consensual deeds of arrangement between a debtor and his creditors took effect under the general law; subject to the provisions of the Deeds of Arrangement Acts 1887 and 1914. There is nothing in those Acts which preserves the rights of creditors against co-debtors of, or sureties for, the debtor with whom a consensual deed of arrangement has been made. The question whether or not co-debtors or sureties are released depends on the terms of the deed.

c Under the bankruptcy code in force from 1883 and until the reforms enacted by the Insolvency Act 1985—and subsequently upon consolidation in the 1986 Act—the imposition of a composition or arrangement by resolution of the majority of creditors and the approval of the court followed the making of a receiving order. That, itself, followed (and required) an act of bankruptcy on the part of the debtor. The need for an act of bankruptcy, and the intermediate stage of a receiving order, ceased to be part of the bankruptcy code after the 1986 Act took effect. Accordingly there are no provisions in the 1986 Act directly comparable with those in s 18 of the 1883 Act and s 16 of the 1914 Act. But the provisions as to discharge and release following bankruptcy, formerly in s 30 of the 1883 Act and s 28 of the 1914 Act, have been re-enacted. They are now found in s 281 of the 1986 Act. In particular, s 281(7) of that Act preserves the creditor's rights against co-debtors and sureties from the effect of the statutory release in terms which are virtually identical to those in the earlier legislation:

e 'Discharge does not release any person other than the bankrupt from any liability (whether as partner or co-trustee of the bankrupt or otherwise) from which the bankrupt is released by the discharge, or from any liability as surety for the bankrupt or as a person in the nature of such a surety.'

f It seems clear, therefore, that when the 1986 Act was enacted the legislature was well aware of the problem: that is to say, that one consequence of releasing the debtor from debts owed to his creditors was that, under the general law, that release would or might have the effect of releasing co-debtors and sureties in respect of the same debts. In the context of a statutory release following bankruptcy that problem was dealt with in the same way as it had been in legislation for the past one hundred years. In the context of a release contained in a voluntary arrangement, which could be imposed on a dissenting creditor under Pt VIII of the 1986 Act, the legislature did not adopt—or, at the least, did not adopt in express terms—the precedent which was offered by earlier legislation in relation to compositions or arrangements in bankruptcy proceedings. There is, to my mind, a strong inference that that was the result of a deliberate decision that, in this respect, voluntary arrangements should be treated as—and have the same consequences as—consensual deeds of arrangement; and not be regarded as a substitute for compositions or arrangements in bankruptcy proceedings. It is, perhaps, significant, in this context, that the recommendations of the Cork Committee on *Insolvency Law and Practice* (Cmnd 8558) which led to the introduction of individual voluntary arrangements were based on the need to provide an alternative to bankruptcy proceedings; a need not then met in practice by consensual deeds of arrangement—see, in particular (para 359) '*a satisfactory form of proceedings for dealing with the insolvent debtor otherwise than directly through the machinery of the Bankruptcy Court ... would fill an important social need.*'

In support of the proposition that, notwithstanding the provision in s 260(2) of the Insolvency Act 1986 that those creditors who had notice of and were entitled to vote at the statutory meeting are bound by the arrangement as if they were parties and the absence of any express words which would preserve the rights of those creditors against co-debtors and sureties (if those rights would otherwise be affected under the general law by a consensual arrangement in the same terms), it would be contrary to authority to hold that the rights of creditors against co-debtors could be affected by anything in proposals for a voluntary arrangement which only took effect by reason of what Jacob J had described as a 'statutory binding' we were referred to decisions on s 125 (liquidations by arrangement) and s 126 (composition with creditors) of the Bankruptcy Act 1869. Those decisions illustrate that the question whether a statutory release was to have the effect of releasing co-debtors was occupying the courts before the enactment of the Bankruptcy Act 1883. Indeed, it might be said that that question was laid to rest by the 1883 Act; and has only now revived, one hundred years later, with the repeal of the code enacted by that Act.

Section 125 of the 1869 Act provided that a meeting of creditors, summoned for that purpose, might by special resolution declare that the affairs of a debtor be liquidated by arrangement and not in bankruptcy and might appoint a trustee. The trustee had all the powers of a trustee in bankruptcy. On completion of the liquidation it was provided, by s 125(10), that:

'The trustee shall report to the registrar the discharge of the debtor, and a certificate of such discharge given by the registrar shall have the same effect as an order of discharge given to a bankrupt under this Act.'

An order of discharge given to a bankrupt did not have the effect of releasing any person 'who, at the date of the order of adjudication [in bankruptcy], was a partner with the bankrupt, or was jointly bound or had made a joint contract with him' (see s 50 of the 1869 Act). Section 126 provided for creditors, by extraordinary resolution, to resolve that a composition be accepted in satisfaction of the debts due to them from the debtor; and for a composition accepted by an extraordinary resolution to be binding on all creditors to whom proper notice of the meeting had been given; but it contained no provision comparable to that in s 125(10) of the Act. It did, however, provide for rules of court to be made in relation to proceedings on the occasion of the acceptance of a composition—'in the same manner and to the same extent and of the same authority as in respect of proceedings in bankruptcy'.

In *Megrath v Gray*, *Gray v Megrath* (1874) LR 9 CP 216 it was held by the Court of Common Pleas (Lord Coleridge CJ, Keating, Brett and Denman JJ) that the provisions of s 50 of the 1869 Act applied both to a liquidation by arrangement under s 125 and to a composition with creditors under s 126. The basis on which the court reached that conclusion appears from the following passages in the judgment (at 227–231):

'Now, that statute [the Bankruptcy Act 1869] is "An Act to consolidate and amend the law relating to bankruptcy;" that is to say, that, where it does not amend, it assumes only to consolidate the existing law. It, by new enactment, or repetition, gives power and sanction to three kinds of settlement between a debtor unable to pay his debts in full and his creditors,—first, by an adjudication of bankruptcy, ending in a division of assets,—secondly, by a liquidation by arrangement, ending also in a division



a of assets, but without the form of an adjudication of bankruptcy,—and  
b and thirdly, in a liquidation by arrangement, ending in an acceptance by the  
creditors of a composition in lieu of a division of assets, leaving the debtor in  
possession of his trade and goods or assets ...

The first kind of settlement ends in a discharge of the debtor by order of  
discharge given according to s. 48. And so likewise do the other kinds of  
settlement end in an order of discharge: they do so by and according to the  
rules 302 and 303, and in the forms 123 and 124. And the first question for  
decision seems to be, whether the enactments in ss. 49 and 50 apply only to  
a discharge given in a pure bankruptcy, or to all the discharges given under  
and by virtue of and according to the statute and rules ...

c Now, it has always been a cardinal point of bankruptcy law that a discharge  
under it of an insolvent debtor unable to pay his debts in full does not release  
his solvent co-debtor. This has been so ever since the declaratory Act, 10  
Anne, c. 15. Each successive Bankruptcy Act has been in great measure a  
consolidation Act, and has incorporated this principle. It is a strong  
argument in favor of the defendant's contention in this case that such a  
cardinal principle would hardly be cut away from any discharge of any  
insolvent debtor, without express terms. It is also a strong argument that a  
consolidation statute should be construed rather so as to maintain than to  
alter the existing law ... In *Ex parte Rumboll* ((1871) LR 6 Ch App 842), the  
contention was that s. 72 in the Act of 1869 did not apply to disputes arising  
in proceedings under a deed of composition entered into in 1868, because, it  
was said, s. 72 is confined to "proceedings in bankruptcy:" but it was held  
that it was applicable. "The Act of 1869," says Lord Justice James, "gives to  
the Court of Bankruptcy jurisdiction to determine all questions for the  
distribution of assets in bankruptcy, and extends to anything that might be fairly  
called a case in bankruptcy." "I am of opinion," he says, "that the Chief Judge  
was right in holding that he had jurisdiction in this case, as he would have in  
any ordinary case in bankruptcy." That case seems to be an authority for  
holding that the earlier sections in the statute are not confined to cases of  
pure bankruptcy, and that the words "proceedings in bankruptcy" are not  
necessarily confined to proceedings in pure bankruptcy. The minds of the  
Lord Justices, who are peculiarly the interpreters of bankruptcy law, seem to  
be, as disclosed in that case, impressed with the view that all the three  
proceedings, though different in form, are proceedings in bankruptcy,  
subject to the control of the Bankruptcy Court, subject to the laws of  
bankruptcy, and intended for the relief of insolvent debtors, and that the  
more general enactments in the earlier sections are applicable to the  
proceedings under ss. 125 and 126 ...

h In the result, therefore ... we hold that all three forms of proceeding in the  
case of an insolvent debtor contained in the Bankruptcy Act, 1869, are  
proceedings in bankruptcy, though different in form; that the general  
enactments in ss. 49 and 50 apply to the discharges under ss. 125 and 126 and  
the rules and forms relative to them; that the word "bankrupt" in ss. 49 and  
50 is to be read as applicable to any debtor obtaining an order of discharge  
under the statute; and consequently that an order of discharge in all three  
cases releases only the debtor in whose favor it is given, and leaves his  
solvent co-debtor liable to be sued separately by a joint creditor who has  
been a party to the release of the insolvent debtor.' (Lord Coleridge CJ's  
emphasis.)

Later in the same year, in *Ellis v Wilmot* (1874) LR 10 Exch 10, the Court of Exchequer (Kelly CB, Cleasby and Amphlett BB) considered whether a surety was discharged following a liquidation by arrangement under s 125 of the 1869 Act. The question was stated by Cleasby B (at 16–17):

‘The general question is as to the effect of liquidation on the position of the surety of the person liquidating, and we have to consider whether a discharge under a liquidation is to be regarded as a voluntary act of the parties. We are not dealing with a composition or with a deed of arrangement under the previous bankruptcy law. The effect of a deed of arrangement has been much considered in the case of *Bateson v. Gosling* (1871) LR 7 CP 9. In that case the debtor had made over the whole of his property to the trustee, but the deed of arrangement contained a clause of release reserving expressly the rights against the sureties; and the effect of the decision is, that if the deed of arrangement had resulted in an absolute discharge of the principal debtor, then, following the judgment of Vice-Chancellor Wood in *Webb v. Hewitt* ((1857) 3 K & J 438, 69 ER 1181), it would have operated so as to discharge the surety altogether; but that, where the deed contains a clause reserving all the rights of the surety, it has not that operation. However, we are not now dealing with the effect of a deed of arrangement, but with the question, whether a resolution in liquidation can be considered a voluntary act of the creditors as regards the principal debtor. We have to consider whether they can be regarded in the present case as having by their voluntary act altered the position of the surety or discharged the principal debtor.’

Each member of the court reached the conclusion that discharge under s 125 of the 1869 Act was not the result of a voluntary act on the part of his creditors; rather it was the result of the bankruptcy proceedings initiated by the debtor having summoned his creditors to a meeting in proceedings which were under the control of the court of bankruptcy. That form of bankruptcy proceeding having been initiated, the bankrupt was entitled to have his discharge if he complied with his obligations under the arrangement; the creditors were morally bound to release him. Kelly CB and Amphlett B placed reliance on the express provisions of s 125(10) and noted the distinction between that section and s 126 of the Act.

The question arose again in *Ex p Jacobs, re Jacobs* (1875) LR 10 Ch App 211. The headnote sets out the conclusion:

‘Where the acceptor of a bill of exchange presents a petition for liquidation or composition under the *Bankruptcy Act*, 1869, and the creditors pass a resolution for liquidation or composition, the acceptor must be considered as discharged by operation of law, and the drawer is not thereby discharged from his liability. In such a case it makes no difference whether the bill-holder is present at the meeting or not, or whether he votes in favour of the resolution or against it.’

Again, it is of importance to see how the question was put in the judgment of the court (Mellish and James LJ) (at 213):

‘The question to be determined is, whether *Martin*, by voting in favour of accepting a composition from *Phillips*, the acceptor, had discharged *Jacobs*, the drawer, and can no longer maintain an action against him on the bill.

a There can be no doubt that, if the holder of a bill, by becoming party to a deed or arrangement, independently of any bankruptcy Act, agrees to accept a composition from the acceptor, he thereby discharges the drawer; but, on the other hand, it is equally clear that if the acceptor is discharged from his liability by operation of law by becoming a bankrupt, the liability of the drawer to the holder is not thereby affected. We have now to consider whether the discharge of the acceptor under the 125th and 126th sections of the *Bankruptcy Act*, 1869, when the holder of the bill votes in favour of the liquidation or composition, is to be considered as a discharge by the voluntary act of the holder, or a discharge by operation of law.'

The court answered that question by following *Megrath v Gray*, *Gray v Megrath* (1874) LR 9 CP 216. James LJ said (at 214):

d 'We entirely agree in the decision of the Court of Common Pleas, and in the reasons they have given for it. We think that a discharge of a debtor under a liquidation or composition is really a discharge in bankruptcy by operation of law. Where a creditor voluntarily agrees to a composition by deed or arrangement with the acceptor, it is by his act alone that the acceptor is discharged and the position of the drawer altered. When, however, a debtor summons his creditors under the 125th and 126th sections of the *Bankruptcy Act*, 1869, the proper majority of the creditors have power to assent to the terms by which the debtor is to be discharged, whether the creditor who is the holder of the bill chooses to attend or not or chooses to vote or not. The consequence of holding that the holder of a bill could not vote at a meeting of the acceptor's creditors without discharging the drawer would be that in many cases a great number, and in some cases the majority, of the creditors could not vote at the meeting. On the other hand, if resolutions for liquidation by arrangement or for composition were to contain a reserve of remedies by the creditors against any other person than the debtor, the consequence would be that the debtor would not, either by arrangement or by composition, be completely discharged from any of his debts in respect of which the creditor had a remedy against any other person, which we think would be contrary to the intention of the Act.'

g It is of interest to note that the 'complete discharge' of the debtor, as envisaged by the court in the last sentence of that passage, requires that he is discharged not only from the debt which he owed to the creditor, but also from the rights of contribution exercisable by a co-debtor who is subsequently required to pay the creditor. The court seems to be suggesting that the 1869 Act had that effect. But it is difficult to see how that could be so. Section 49 of the 1869 Act provided for the release of the bankrupt from '*debts provable under the bankruptcy*'. The contingent right of a co-debtor to contribution when he, himself, has paid the debt was not a debt provable under the bankruptcy, because to allow such a claim to proof would contravene the rule against double proof: see *Re Oriental Commercial Bank* (1871) LR 7 Ch App 99 at 103.

j For the reasons which I have already explained the problem identified in those three authorities under the Bankruptcy Act 1869 was laid to rest, in relation to individual insolvencies, by the introduction of the code enacted by the Bankruptcy Act 1883. But the decision in *Ex p Jacobs, re Jacobs* (1875) LR 10 Ch App 211 was considered and applied in relation to corporate schemes of arrangement. In *Re London Chartered Bank of Australia* [1893] 3 Ch 540 the court



was asked to sanction a scheme under s 2 of the Joint Stock Companies Arrangement Act 1870, following a winding-up order. The question arose whether the scheme should contain an express reservation of rights against sureties. Vaughan Williams J thought such a reservation unnecessary. He pointed out (at 546) that the discharge of the company (the debtor) was effected by operation of law under s 87 of the Companies Act 1862; and went on (at 547):

‘It seems to me, then, that, the discharge being clearly by operation of law consequent upon pending statutory liquidation, the principles laid down by Lord Justice Mellish in *In re Jacobs* ((1875) LR 10 Ch App 211) apply, and that, therefore, there is no need, and it would not be right, to introduce a reservation of rights against sureties into the scheme of arrangement.’

The Court of Appeal reached a similar conclusion in *Dane v Marine Insurance Corp Ltd* [1894] 1 QB 54, where the compromise had been sanctioned by the Supreme Court of Victoria under the comparable legislation in the State of Victoria. Kay LJ said (at 63):

‘It was decided in *Ex parte Jacobs* that a resolution for liquidation or composition, though binding on all the creditors, is a discharge of the debtor by operation of law, and does not discharge the surety.’

In *Re Garner’s Motors Ltd* [1937] 1 All ER 671, [1937] Ch 594 Crossman J applied the same principle to a scheme sanctioned under s 153 of the Companies Act 1929. He said ([1937] 1 All ER 671 at 675, [1937] Ch 594 at 599):

‘The scheme when sanctioned by the court becomes something quite different from a mere agreement signed by the parties. It becomes a statutory scheme.’

We were referred, also, to two decisions in the Supreme Court of New South Wales, *Hill v Anderson Meat Industries Ltd* [1972] 2 NSWLR 704 and *Commercial Banking Co of Sydney Ltd v Gaty* [1978] 2 NSWLR 271, in which the principle was applied to arrangements under the Companies Act 1961 in the Australian legislation. In the former case Hope JA explained ([1972] 2 NSWLR 704 at 708–709):

‘The provisions of Pt. VIII of the *Companies Act* 1961, and in particular the provisions of s. 181, seem to me to be consistent with a policy, as was stated by James L.J. in *Ex parte Jacobs* ((1875) LR 10 Ch App 211), of enabling creditors to vote in a way which they think best for all the creditors of the company, and for the company, without standing to lose the benefit of a guarantee or other analogous remedy.’

Hutley AJA agreed with the need to adapt new institutions (treating s 181 as such) to the existing doctrines of the law by analogy; but he pointed out (at 709):

‘This in my opinion is an example of a discharge by operation of law, and the rules in regard to accessory obligations, which have been laid down in relation to bankruptcy and where there has been a scheme in the course of winding up, have to be extended to a scheme adopted under s. 181 of the *Companies Act*, 1961. It is that section which gives the scheme its operative effect and not the agreement of the parties.’

I have set out these authorities at some length in order to do justice to the powerful arguments advanced before us in support of the proposition that,

a notwithstanding any express term in an arrangement which would or might otherwise have the effect of discharging co-debtors and sureties (if any) of the debtor from further liability, that will not be the effect if the arrangement is made under the provisions in Pt VIII of the Insolvency Act 1986. At the end of the day, however, it is essential to keep in mind that it is those provisions which have to be applied. The Insolvency Act 1985—subsequently consolidated in the 1986 Act—was not, itself, a consolidating Act. There is no presumption that the provisions now in Pt VIII of the 1986 Act were not intended to alter the existing law; or to depart from the position established by the authorities on different provisions in the 1869 Act.

c There is an important—and, to my mind, crucial—distinction between the provisions in Pt VIII of the 1986 Act and those in ss 125 and 126 of the 1869 Act. Under the 1869 Act the discharge of the debtor took effect by virtue of the statute and the rules made under it: see *Megrath v Gray*, *Gray v Megrath* (1874) LR 9 CP 216 at 231 and *Ex p Jacobs, re Jacobs* (1875) LR 10 Ch App 211 at 213. Under the various Companies Acts, considered in the authorities cited, the discharge takes place by virtue of a scheme which becomes operative when it is approved by the court. Under Pt VIII of the 1986 Act, the discharge of the debtor depends entirely on the terms of the arrangement. One must look at the arrangement, and nothing else, in order to find the terms (if any) under which the debtor is discharged. This is emphasised by the words in s 260(2) of the 1986 Act: ‘*The approved arrangement ... (b) binds every person ... as if he were a party to the arrangement.*’ Unlike the earlier legislation, s 260(2) of the 1986 Act does not purport, directly, to impose the arrangement on a dissenting creditor whether or not he has agreed to its terms; rather, he is bound by the arrangement as the result of a statutory hypothesis. The statutory hypothesis requires him to be treated as if he had consented to the arrangement. The consequence, as it seems to me, is that the legislature must be taken to have intended that both the question whether the debtor is discharged by the arrangement and the question whether co-debtors and sureties are discharged by the arrangement were to be answered by treating the arrangement as consensual; that is to say, by construing its terms as if they were the terms of a consensual agreement between the debtor and all those creditors who, under the statutory hypothesis, must be treated as being consenting parties.

g Whether or not to exclude co-debtors and sureties from the operation, under the general law, of the terms of a composition or arrangement between a debtor and his creditors is a matter of policy. There are, plainly, arguments of policy which point towards exclusion; in particular, that it is in the interest of the debtor and his other creditors that a creditor should not be dissuaded from voting in favour of a voluntary arrangement out of concern that he will lose his rights against co-debtors and sureties. But, equally, there are arguments which point towards allowing the general law to have effect; in particular, that it is in the interests of the debtor that he should be able to propose a scheme under which he will obtain a complete release from his liabilities, including the rights of contribution of co-debtors. It is also in the interests of other creditors, bound by the scheme, that it should not be frustrated by action by a co-debtor (not so bound) in enforcing rights of contribution. These arguments had been identified in the cases over the past one hundred years or more before the enactment of the Insolvency Act 1985 and its successor, the 1986 Act. In my view, by choosing to enact Pt VIII—and, in particular, s 260(2)—of that Act in the form that it did, the legislature must be taken to have preferred the latter approach. The general law

is to have effect. It is up to the debtor to propose, and for the creditors to accept or reject, proposals which either do or do not have the effect of releasing co-debtors or sureties. A creditor who is prejudiced by the decision of the majority to approve proposals which have the effect of releasing a co-debtor against whom he would otherwise have recourse can apply to the court, under s 262 of the 1986 Act, for the approval of the meeting to be revoked.

It follows that I would reject the submission that, as a matter of principle, no term in a voluntary arrangement can have the effect of releasing a co-debtor or surety. In my view the effect of a voluntary arrangement has to be determined by construing its terms. In the present case, the terms of Mr Hopkins' voluntary arrangement did not have the effect of releasing or discharging the appellants from their liability as co-debtors. I would dismiss these appeals.

**WARD LJ.** I agree.

**KENNEDY LJ.** I also agree.

*Appeals dismissed.*

Dilys Tausz Barrister.



## Practice Statement

### SUPREME COURT

*Practice – Judgments – Handed down judgments – Availability – Judgments in advance of hearing – Approved versions – Uncorrected copies – Approved judgments – Restrictions on disclosure or reporting – Approved versions of ex tempore judgments – Citation of authorities.*

#### 1. Introduction

I am making this statement with the agreement of the Master of the Rolls, the Vice-Chancellor and the President of the Family Division. It applies to judgments delivered in all divisions of the High Court and the Court of Appeal.

In recent years a practice has developed for the written judgment of the court to be handed down without, as in the past, being read aloud. In this way much time is saved for the court, for practitioners and for litigants. The development of this practice, coupled with the increasing use of information technology, has, however, also led to the development of problems which have hindered the efficient administration of justice.

One of these problems is associated with the delays that have often been experienced before the approved judgment of the court can be made available from an official source. A second problem has arisen as a direct consequence of the first: because of these delays, there has been widespread dissemination of many unapproved judgments of the court, which often omit significant last minute changes to the text, sometimes without any clear warning about their unapproved status. A third problem has been that the judgments delivered in courts not staffed by official shorthand writers have lacked a common format, and inconsistent practices have developed in the way they are distributed. There is also a contemporary need for the courts to facilitate the speedy publication of their approved judgments by electronic means, including the Internet's Worldwide Web.

Sir Richard Scott V-C and Brooke LJ were invited to study these problems last autumn and to make recommendations as to how they might be resolved. Although they consulted quite widely, they are conscious that they have not consulted everyone who might have an interest in these matters. The arrangements I am announcing today should be regarded as experimental. Although they will take immediate effect, they will be kept under review, and if they meet with general approval they will be formalised in a practice direction in due course.

#### 2. Availability of handed down judgments in advance of the hearing: new arrangements

Unless the court otherwise orders—for example if a judgment contains price-sensitive information—copies of the written judgment will now be made available in these cases to the parties' legal advisers at about 4 pm on the second working day before judgment is due to be pronounced on condition that the contents are not communicated to the parties themselves until one hour before the listed time for pronouncement of judgment. Delivery to legal advisers is made primarily to enable them to consider the judgment and decide what consequential orders they should seek. The condition is imposed to prevent the

outcome of the case being publicly reported before judgment is given, since the judgment is confidential until then. Some judges may decide to allow the parties' legal advisers to communicate the contents of the judgment to their clients two hours before the listed time, in order that they may be able to submit minutes of the proposed order, agreed by their clients, to the judge before the judge comes into court, and it will be open to judges to permit more information about the result of a case to be communicated on a confidential basis to the client at an earlier stage if good reason is shown for making such a direction.

If, for any reason, a party's legal advisers have special grounds for seeking a relaxation of the usual condition restricting disclosure to the party itself, a request for relaxation of the condition may be made informally through the judge's clerk (or through the associate, if the judge has no clerk).

A copy of the written judgment will be made available to any party who is not legally represented at the same time as to legal advisers. It must be treated as confidential until judgment is given.

Every page of every judgment which is made available in this way will be marked 'Unapproved judgment: No permission is granted to copy or use in court'. These words will carry the authority of the judge, and will mean what they say.

The time at which copies of the judgment are being made available to the parties' legal advisers is being brought forward 24 hours in order to enable them to submit any written suggestions to the judge about typing errors, wrong references and other minor corrections of that kind in good time, so that, if the judge thinks fit, the judgment can be corrected before it is handed down formally in court. The parties' legal advisers are therefore being requested to submit a written list of corrections of this kind to the judge's clerk (or to the associate, if the judge has no clerk) by 3 pm on the day before judgment is handed down. In divisions of the court which have two or more judges, the list should be submitted in each case to the judge who is to deliver the judgment in question. Lawyers are not being asked to carry out proof-reading for the judiciary, but a significant cause of the present delays is the fact that minor corrections of this type are being mentioned to the judge for the first time in court, when there is no time to make any necessary corrections to the text.

### *3. Availability of approved versions of handed down judgments: new arrangements*

This course will make it very much easier for the judge to make any necessary corrections and to hand down the judgment formally as the approved judgment of the court without any need for the delay involved in requiring the court shorthand writer, in courts which have an official shorthand writer, to resubmit the judgment to the judge for approval. It will always be open to the judge to direct the shorthand writer at the time of the hearing in court to include in the text of the judgment any last minute corrections which are mentioned for the first time in court, or which it has proved impractical to incorporate in the judgments handed down. In such an event the judge will make it clear whether the shorthand writer can publish the judgment, as corrected, as the approved judgment of the court without any further reference to the judge, or whether it should be resubmitted to the judge for approval. It will be open to judges, if they wish, to decline to approve their judgments at the time they are delivered, in which case the existing practice of submitting the judgment for their approval will continue.

#### 4. *Handing down judgment in court: availability of uncorrected copies*

- a When the court hands down its written judgment, it will pronounce judgment in open court. Copies of the written judgment will then be made available to accredited representatives of the media, and to accredited law reporters who are willing to comply with the restrictions on copying, who identify themselves as such. In cases of particular interest to the media, it is helpful if requests for copies
- b can be intimated to the judge's clerk, or the presiding lord justice's clerk, in advance of judgment, so that the likely demand for copies can be accurately estimated. Because there will usually be insufficient time for the judge's clerk to prepare the necessary number of copies of the corrected judgment in advance, in most cases these uncorrected copies will similarly bear the warning 'Unapproved Judgment: No permission is granted to copy or use in court'. The purpose of
- c these arrangements is to place no barrier in the way of accredited representatives of the media who wish to report the judgments of the court immediately in the usual way, or to accredited law reporters who wish to prepare a summary or digest of the judgment or to read it for the purpose of deciding whether to obtain an approved version for reporting purposes. Its purpose is to put a stop to the
- d dissemination of unapproved, uncorrected, judgments for other purposes, while seeking to ensure that everyone who is interested in the judgment (other than the immediate parties) may be able to buy a copy of the approved judgment in most cases much more quickly than is possible at present.

- e If any member of the public (other than a party to the case) or any law reporter who is not willing to comply with the restrictions on copying, wishes to read the written judgment of the court on the occasion when it is handed down, a copy will be made available for him or her to read and note in court on request made to the associate or to the clerk to the judge or the presiding lord justice. The copy must not be removed from the court and must be handed back after reading. The object is to ensure that such a person is in no worse a position than if the
- f judgment had been read aloud in full.

#### 5. *Availability of approved judgments*

- In courts without an official shorthand writer, the approved judgment should contain on its frontispiece the rubric 'This is the official judgment of the court and I direct that no further note or transcript be made'. (This will cover the
- g requirements of RSC Ord 68, r 1, in the cases to which that rule applies, and will provide for certainty in all other cases.) In future, all judgments delivered at the Royal Courts of Justice will be published in a common format.

- For cases decided in the two divisions of the Court of Appeal and in the Crown Office List, copies of the approved judgment can be ordered from the official
- h shorthand writers, on payment of the appropriate fee. In the other courts in the Royal Courts of Justice, copies of the approved judgment can be ordered from the Mechanical Recording Department, on payment of the fee prescribed for copy documents. Disks containing the judgment will also be available from the official
- j shorthand writers, and the Mechanical Recording Department, where relevant, on payment of an appropriate charge. It is hoped that in most cases copies of the approved judgment will be available from these sources on the same day as the judgment is handed down: they should no longer be sought from judges' clerks.

#### 6. *Restrictions on disclosure or reporting*

Anyone who is supplied with a copy of the handed down judgment, or who reads it in court, will be bound by any direction which the court may have given



in a child case under s 39 of the Children and Young Persons Act 1933, or any other form of restriction on disclosure, or reporting, of information in the judgment. a

#### 7. Availability of approved versions of *ex tempore* judgments

Delays have also been experienced in the publication of approved versions of *ex tempore* judgments, whether they are produced by the official shorthand writers or by contractors transcribing the tapes which have been mechanically recorded. b

Sometimes the delay is caused in courts without an official shorthand writer because a transcript is bespoken by one of the parties a long time after the judgment was delivered. If a transcribed copy of such a judgment is to be required, in connection with an appeal, for example, it should be ordered as soon as practicable after judgment was delivered. c

Delays are also sometimes caused in these cases because judgments are delivered to a judge for approval without supplying the judge with copies of the material quoted in the judgment. In future no judge should be invited to approve any such transcript unless the transcriber has been provided by the party ordering the transcript with copies of all the material from which the judge has quoted. If the transcript is ordered by a person who is not a party to the case (such as a law reporter), that person should make arrangements with one of the parties to ensure that the transcriber (and the judge) will have access to all the material quoted in the judgment. d

From time to time delays are also caused because judges have been slow in returning approved transcripts to the transcribers. I and the other heads of division have recently asked judges, as a general rule, that they should endeavour to return approved transcripts to the transcribers within two weeks of their being delivered to them for approval. If anyone encounters serious delay on this account, the relevant head of division should be informed. e

#### 8. Citation of authorities in court

For citation of authorities in court, the practice set out in the practice notes on citation of authorities (Court of Appeal (Civil Division)) [1995] 3 All ER 256, [1995] 1 WLR 1096 and [1996] 3 All ER 382, [1996] 1 WLR 854 are now to be followed in all courts to which this practice statement applies. For convenience of reference, the relevant parts of these practice notes read: f

'When authority is cited, whether in written or oral submissions, the following practice should in general be followed. If a case is reported in the official Law Reports published by the Incorporated Council of Law Reporting for England and Wales, that report should be cited. These are the most authoritative reports; they contain a summary of argument; and they are the most readily available. If a case is not (or not yet) reported in the official Law Reports, but is reported in the Weekly Law Reports or the All England Law Reports, that report should be cited. If a case is not reported in any of these series of reports, a report in any of the authoritative specialist series of reports may be cited. Such reports may not be readily available: photostat copies of the leading authorities or the relevant parts of such authorities should be annexed to written submissions; and it is helpful if photostat copies of the less frequently used series are made available in court. It is recognised that occasions arise when one report is fuller than another, g

h

j

a or when there are discrepancies between reports. On such occasions, the practice outlined above need not be followed. It is always helpful if alternative references are given. Where a reserved written judgment has not been reported, reference should be made to the official transcript (if this is available) and not to the handed-down text of the judgment.' (See [1995] 3 All ER 256, [1995] 1 WLR 1096.)

b 'Leave to cite unreported cases will not usually be granted unless counsel are able to assure the court that the transcript in question contains a relevant statement of legal principle not found in reported authority and that the authority is not cited because of the phraseology used or as an illustration of the application of an established legal principle.' (See [1996] 3 All ER 382, [1996] 1 WLR 854.)

c

### 9. Conclusion

d The purpose of these changes, which are being made on an experimental basis after full consultation with the Court Service, is to improve the quality of service rendered by the judges to those who use the courts. Any comments on these changes, or suggestions about further improvements in relation to the matters set out in this statement, should be addressed to Brooke LJ at the Royal Courts of Justice. They will be taken fully into account when the time comes to decide whether these arrangements should be formalised, with or without amendment, in a practice direction.

e 22 April 1998

LORD BINGHAM OF CORNHILL CJ.

## Practice Direction

### QUEEN'S BENCH DIVISION

*Practice – Admiralty and Commercial Registry – Setting down for trial – Time for setting down – Documents to be lodged – Time for delivery of skeleton arguments – RSC Ord 34, r 3(1) – Guide to Commercial Court Practice, para 6.5, App III, para (7), App V, para 5.*

1. This practice direction will come into force with effect from 6 March 1998.

#### *Setting down*

2. RSC Ord, 34, r 3(1) requires a party setting down to lodge two bundles containing the pleadings and the other documents listed in the rule 'subject to any order of the court to the contrary'.

3. The Commercial Court's Standard Directions in App V to the Guide to Commercial Court Practice (the Guide) (see *The Supreme Court Practice 1997* vol 1, pp 1294–1295, note 72/A29) fix the date for setting down by reference to the trial date.

4. In order to reduce the amount of documents which require to be lodged and held by the Admiralty and Commercial Registry and ensure setting down as early as possible, the Standard Directions will be varied by substituting para 5 with the following:

'5. The action will be tried in London by judge alone and set down within 28 days by lodging with the Admiralty and Commercial Registry one bundle of the documents required by Ord 34, r 3(1).'

#### *Skeleton arguments*

5. Paragraph 6.5 of the Guide currently requires skeleton arguments, authorities, chronologies and dramatis personae for summonses lasting up to half a day to be delivered to the listing office by 2.30 pm. The specimen timetable to be followed in summonses expected to last more than half a day set out in App III to the Guide requires the respondent's skeleton to be delivered by 2 pm on the day before the hearing: see *The Supreme Court Practice 1997* vol 1, p 1293, note 72/A27, para (7).

6. Delivery of skeleton arguments after 1 pm has caused difficulties and has resulted in some cases in the judge not being sufficiently prepared for the hearing of the summons. To avoid these problems all skeleton arguments, authorities, chronologies and dramatis personae for summonses lasting up to half a day must be delivered to the listing office by no later than 1 pm on the day before the hearing and para (7) of the specimen timetable contained in App III to the Guide will be amended to require the respondent's skeleton argument to be delivered by the same time.

6 March 1998

TUCKEY J  
CLARKE J.



## **Hodgson and others v Imperial Tobacco Ltd and others**

COURT OF APPEAL, CIVIL DIVISION

LORD WOOLF MR, ALDOUS AND CHADWICK LJJ

26 JANUARY, 12 FEBRUARY 1998

*Costs – Order for costs – Discretion – Pre-emptive order – Plaintiffs entering into conditional fee agreements with legal advisers – Judge refusing to make order debaring defendants from seeking order for costs against plaintiffs’ legal representatives personally – Whether judge right to do so.*

*Practice – Queen’s Bench Division – Chambers proceedings – Report of proceedings – Judge permitting directions made in chambers to be released to press but ordering parties and their advisers not to make any comments to media – Whether judge right to do so.*

The plaintiffs, who suffered from cancer, brought actions for damages against the defendants, alleging that their illness had been caused by smoking cigarettes manufactured by the defendants. The plaintiffs were refused legal aid and so entered into conditional fee agreements (CFAs) with their legal advisers. On 10 October 1997 the litigation came before the judge in chambers for directions. The plaintiffs’ legal advisers were concerned at the risk that they might be personally liable for costs, in a case where the plaintiffs were not protected by insurance in respect of any liability to which they might become subject to pay the defendants’ costs, and indicated that unless they had certainty as to any liability it would not be possible for them to continue to represent the plaintiffs. They accordingly sought an order that the defendants be debarred from seeking any order that the plaintiffs’ legal representatives be responsible for the costs of the action other than under s 51(6) of the Supreme Court Act 1981 and RSC Ord 62, r 11. The judge refused to grant the order, but did order that the directions made that day and any future directions made by the court in the actions might be released to the press, but that the parties and their advisers were not to make any comments to the media in relation to the litigation without the leave of the court. The plaintiffs appealed (i) against the refusal to make the ‘debarring’ order, and (ii) against the ‘gagging’ order.

**Held** – (1) The risk of a lawyer acting under a CFA being ordered to pay the costs of an action personally was, as a matter of law, no different from that of a lawyer acting on any other basis. The plaintiffs’ lawyers did not, therefore, need any special protection when acting for the plaintiffs in the instant litigation, and, furthermore, any protection which the courts could give would have to be subject to exceptions which would render it valueless to them. Accordingly, they were mistaken in thinking that, without such protection, they could not act for the plaintiffs, and the judge had been right to refuse to make the ‘debarring’ order (see p 679 e, p 681 c to e h j, and p 683 d, post).

(2) What happened during proceedings in chambers was private, not confidential or secret, and information about such proceedings and the judgment or order pronounced could, and in the case of any judgment or order should, be

made available to the public when requested. Moreover, apart from the exceptional situations identified in s 12(1) of the Administration of Justice Act 1960 or where the court, with the power to do so, ordered otherwise, to disclose what occurred in chambers did not amount to contempt provided any comment which was made did not substantially prejudice the administration of justice. In the instant case, the risk of the administration of justice being interfered with by communications with the press was far less than the risks which would follow from interference with the entitlement of the media to obtain information about the proceedings. The judge had accordingly been wrong to make the 'gagging' order. The appeal against the refusal to make the 'debarring' order would therefore be dismissed, but the appeal against the 'gagging' order would be allowed (see p 687 *e* to *g*, p 688 *fg* and p 689 *d*, post).

### Notes

For jurisdiction of the court to order costs against a legal representative personally, see 44(1) *Halsbury's Laws* (4th edn reissue) paras 167–174, and for cases on the subject, see 44 *Digest* (Reissue) 421–444, 4587–4831.

For conditional fee agreements, see 44(1) *Halsbury's Laws* (4th edn reissue) paras 188–189.

For the Administration of Justice Act 1960, s 12, see 11 *Halsbury's Statutes* (4th edn) (1991 reissue) 179.

For the Supreme Court Act 1981, s 51 (as substituted by s 4 of the Courts and Legal Services Act 1990), see *ibid* 1217.

### Cases referred to in judgment

*A B v John Wyeth & Brother Ltd* (No 2) (1993) 18 BMLR 38, CA.

*Forbes v Smith* [1998] 1 All ER 973.

*Gentile v State Bar of Nevada* (1991) 501 US 1030, US SC.

*R v Governor of Lewes Prison, ex p Doyle* [1917] 2 KB 254, DC.

*R v Lord Chancellor, ex p Child Poverty Action Group*, *R v DPP, ex p Bull* [1998] 2 All ER 755.

*Scott v Scott* [1913] AC 417, [1911–13] All ER Rep 1, HL.

*Tolstoy-Miloslavsky (Count) v Lord Aldington* [1996] 2 All ER 556, [1996] 1 WLR 736, CA.

### Cases also cited or referred to in skeleton arguments

*A-G v Guardian Newspapers Ltd* (No 2) [1988] 3 All ER 545, [1990] 1 AC 109, HL.

*Abraham v Thompson* [1997] 4 All ER 362, CA.

*Ackerman v Ackerman* [1972] 2 All ER 420, [1972] Fam 225, CA.

*Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira* [1986] 2 All ER 409, [1986] AC 965.

*Brind v Secretary of State for the Home Dept* [1991] 1 All ER 720, [1991] 1 AC 696.

*British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006, [1908–10] All ER Rep 146, CA.

*Clyne v New South Wales Bar Association* (1960) 104 CLR 186, Aust HC.

*Computer Machinery Co Ltd v Drescher* [1983] 1 All ER 153, [1983] 1 WLR 1379.

*Corby DC v Holst & Co Ltd* [1985] 1 All ER 321, [1985] 1 WLR 427, CA.

*Davy-Chiesman v Davy-Chiesman* [1984] 1 All ER 321, [1984] Fam 48, CA.

*Derby & Co Ltd v Weldon* (No 7) [1990] 3 All ER 161, [1990] 1 WLR 1156.

*Derbyshire CC v Times Newspapers Ltd* [1993] 1 All ER 1011, [1993] AC 534, HL.

*Fenston v Fenston* [1945] 2 All ER 700, [1946] P 70.

- Giles v Thompson* [1993] 3 All ER 321, [1994] 1 AC 142, HL.
- a** *Grovwewood Holdings plc v James Capel & Co Ltd* [1994] 4 All ER 417, [1995] Ch 80.  
*Hill v Archbold* [1967] 3 All ER 110, [1968] 1 QB 686, CA.  
*Kelly v London Transport Executive* [1982] 2 All ER 842, [1982] 1 WLR 1055, CA.  
*Lonrho plc, Re* [1989] 2 All ER 1100, [1990] 2 AC 154, HL.  
*Metalloy Supplies v MA (UK) Ltd* [1997] 1 All ER 418, [1997] 1 WLR 1613, CA.
- b** *Murphy v Young & Co's Brewery plc* [1997] 1 All ER 518, [1997] 1 WLR 1591, CA.  
*Myers v Elman* [1939] 4 All ER 484, [1940] AC 282, HL.  
*Nelson v Nelson* [1997] 1 All ER 970, [1997] 1 WLR 233, CA.  
*R v Secretary of State for the Home Dept, ex p Simms* [1997] EMLR 261.  
*Ridehalgh v Horsefield* [1994] 3 All ER 848, [1994] Ch 205, CA.
- c** *Schering Chemicals Ltd v Falkman Ltd* [1981] 2 All ER 321, [1982] QB 1, CA.  
*Sunday Times v UK* (1979) 2 EHRR 245, ECt HR.  
*Trendtex Trading Corp v Crédit Suisse* [1981] 3 All ER 520, [1982] AC 679, HL.  
*Vine Products Ltd v Green* [1965] 3 All ER 58, [1966] Ch 484.  
*Wallersteiner v Moir (No 2)* [1975] 1 All ER 849, [1975] QB 373, CA.
- d** *Westminster Airways Ltd v Kuwait Oil Co Ltd* [1950] 2 All ER 596, [1951] 1 KB 134, CA.  
*Yonge v Toynbee* [1910] 1 KB 215, [1908–10] All ER Rep 204, CA.

### Interlocutory appeal

**e** The plaintiffs, John Barry Hodgson and 42 others, appealed with leave from the decision of Popplewell J on 10 October 1997 whereby he (1) ordered that the directions made that day and any future directions made by the court in the plaintiffs' action for damages against the defendants, Imperial Tobacco Ltd, Gallaher Ltd and Hergall (1981) Ltd (in liq), might be released to the press, but that the parties and their advisers were not to make any comments to the media

**f** in relation to the litigation without the leave of the court, but (2) refused to make an order debarring the defendants from seeking any order that the plaintiffs' legal representatives be responsible for any of the costs of the action other than s 51(6) of the Supreme Court Act 1981 and RSC Ord 62, r 11. The facts are set out in the judgment of the court.

- g** *Daniel Brennan QC, Robin Oppenheim and Richard Hermer* (instructed by *Leigh Day & Co*) for the plaintiffs.  
*Jonathan Playford QC, Andrew Prynne QC, Charles Gibson and Toby Riley-Smith* (instructed by *Ashurst Morris Crisp*) for the first defendant.
- h** *Justin Fenwick QC, Janet Turner QC and Tom Weitzman* (instructed by *Simmons & Simmons*) for the second and third defendants.

*Cur adv vult*

12 February 1998. The following judgment of the court was delivered.

**j** **LORD WOOLF MR.** The appeal is from an interlocutory decision made by Popplewell J on 10 October 1997 in an action which the appellants have brought against three tobacco companies. The actions are for damages for the cancer from which the plaintiffs suffer which they allege was caused by smoking cigarettes manufactured by the defendants. The appeal raises two different issues.



The two issues are as follows. (1) Was the judge wrong to refuse to grant an order that 'the defendants be debarred from seeking any or any further order that the plaintiffs' legal representatives be responsible for any and all of the costs of the action other than under section 51(6) of the Supreme Court Act 1981 and RSC O. 62 r. 11'. (2) Was the judge right to order that the directions made on 10 October 1997 and 'any future directions made by the court in these actions may be released to the press, but the parties and their advisers are not to make any comments to the media in relation to this litigation without the leave of the court'.

The issues on this appeal involve questions of principle which do not depend upon the facts of these particular proceedings. However, it is nonetheless desirable that we should say something as to the background of the appeal.

### *Background*

There has been litigation against tobacco manufacturers in the United States for damages by those who allege that they have contracted diseases as a result of smoking. In July 1992 the plaintiffs' solicitors, Leigh Day & Co, made an application for legal aid on behalf of 227 proposed plaintiffs to bring proceedings in this country. In July 1996 the Legal Aid Board decided that legal aid would not be granted.

On 12 November 1996 Leigh Day & Co issued the first writ in the actions which are the subject of this appeal. This writ was subsequently followed by four others. There are currently approximately 43 plaintiffs. On 1 July 1997 the Senior Master was told that there would not be more than 50 plaintiffs. However on the application for directions which took place before the judge on 10 October 1997 there was an application to enlarge the number.

The plaintiffs are able to bring these actions because they have entered into conditional fee agreements (CFAs) with their legal advisers. A lawyer entering into a CFA is unable to recover the costs of representing a client unless the action is successful. If it is they can receive an uplift which is agreed of up to 100% of what would otherwise be the amount of their fees.

The plaintiffs' claims are confined to a period between about 1957 and 1971. It is contended that excess tar caused or materially contributed to the plaintiffs' cancer. Applications have been made to the Senior Master for a judge to be formally assigned to the litigation but so far no formal assignment has been made.

However the litigation came before Popplewell J on 25 July and again on 10 October 1997 when he gave directions.

At the hearing on 25 July 1997 Mr Brian Langstaff QC, on behalf of the plaintiffs, raised the question of publicity. He said:

'My Lord, the only other matter which has occurred to us at the bar was whether your Lordship would wish to say anything as to the circulation as might be given to these directions as such, these proceedings being, as they are, in chambers? My Lord, certainly those instructing me would wish to be able to refer to the directions, although they had no intention, may I make it plain, of making any press statement about them or the like.'

The judge responded by asking:

'Well, unless anyone makes the objection I see no reason why the press should not be given a copy of these directions. Shall I take silence for consent?'

a Mr Prynne QC, on behalf of Imperial Tobacco Ltd, then indicated that the defendants would have no objection to the press being given a copy of the directions, as long as no comment was made about them. He added 'the vice that tends to occur is when comments are made on one side which precipitate comments from the other and then litigation by media commences'.

b The judge made an order that the directions were to be given to the press and the press were also to be told that the judge 'has ordered that neither party should make any comment on them'.

c While the defendants have not gone so far as to suggest that Mr Martin Day, who is the partner in the firm of the plaintiffs' solicitors who has the conduct of the action, is guilty of contempt in relation to that order, they do contend that he has acted contrary to its spirit. Accordingly the question of publicity was again raised on 10 October 1997 with the intention that the judge should make a more specific order than he had on the 25 July 1997.

d From as early as the autumn of 1996, the defendants' solicitors have been requesting the voluntary disclosure of the CFAs. According to the skeleton argument of the second and third defendants (whose arguments are adopted by the first defendant) the contents of the CFAs are relevant potentially for four purposes:

e '(i) Upon the conclusion of the trial and/or in the event of the abandonment or dismissal of any claim, in deciding whether the court in its discretion should order that the costs of a successful defendant be paid by someone other than the plaintiffs themselves. (ii) In deciding whether, given the number of plaintiffs, the costs of trial and the sums likely to be recovered, and the overall prospects of success, these claims are "viable" in the sense given to that word by the Court of Appeal in the case of *A B v John Wyeth & Brother Ltd (No 2)* (1993) 18 BMLR 38. (iii) In deciding at an interlocutory stage of the action what directions should be made for trial in the light of the cost implications of such directions and/or what orders for costs should be made. (iv) In assessing whether in the respective CFA each plaintiff has agreed to bear contractual liability for costs of plaintiffs where claims are discontinued or dismissed before trial. In the absence of such a contractual liability no claim for one plaintiff's costs can be properly made by the solicitor for another plaintiff, nor can the other plaintiff include it in any claim for costs against the defendants. To do otherwise would be to offend the indemnity principle upon which Orders for Costs (subject to taxation) are founded.'

h The second defendants also contend that they are extremely concerned by the nature of the litigation and that they have difficulty understanding on what basis it can be reasonably brought and considered viable. However they would not wish to assert that the plaintiffs' legal advisers should bear any liability for costs until they know the nature of the arrangements between those advisers and the plaintiffs.

j From the correspondence which has taken place between the parties, it is apparent that the defendants have very much in mind that this is a case in which, in due course, they could decide to seek an order for costs making the plaintiffs' solicitors personally liable for the defendants' costs.

Shortly before the hearing on 25 July 1997, an additional firm of solicitors, Irwin Mitchell, were instructed to bring proceedings in related cases to those being conducted by Leigh Day & Co. On 23 July 1997, Leigh Day & Co wrote to

Ashurst Morris Crisp, solicitors acting on behalf of Imperial Tobacco Ltd, indicating that the two firms of solicitors were joining forces with regard to pursuing the generic cases and that all the cases were being dealt with under CFAs by solicitors and counsel, but no one apart from the legal advisers were contributing to the funding of the action and that the details of the CFAs were the same for both firms. a

Prior to the 10 October 1997 hearing, the plaintiffs' solicitors had been pressing the defendants to make their position clear as to whether they were going to make an application that the plaintiffs' solicitors should pay the costs personally. On 1 October 1997 Simmons & Simmons, the solicitors to the second and third defendants, faxed a letter to Leigh Day & Co saying that they could not reach a substantive decision on this point until— b

'such time as we have had sight of the conditional fee agreements. Accordingly, we shall be inviting the court to make an order to that effect on 10 October 1997. It would obviously save considerable time and cost if you disclose the conditional fee agreements in advance of that application.' c

On the following day Leigh Day & Co faxed a reply in which they reiterated their contention that the CFAs were covered by legal professional privilege and the plaintiffs were not prepared to waive that privilege. They went on, however, to summarise the information which they had provided as follows: d

'(1) All the plaintiffs have signed CFAs. The success fee is 100% and this is subject to a 25% of damages cap. (2) The legal team of Leigh Day & Co, Irwin Mitchell, Peter Maughan and counsel are all working on the case under CFAs. (3) Disbursements in the case are being met by the three law firms, with Leigh Day & Co and Irwin Mitchell being responsible for all the generic disbursements. (4) None of the experts is working on a "no win no fee" basis. (5) There are no outside funders of the action. There is no insurance cover. (6) The plaintiffs are fully aware that if their case is lost they will have to bear the defendants' costs. (7) The legal team are committed to taking these actions through to trial. As with any legal action, members of the plaintiffs' legal team are entitled to withdraw from the case on giving notice.' e

The costs involved in this litigation will be very substantial. There have been references to figures of £3m and upwards. Obviously, any risk that the plaintiffs' legal advisers might be liable for costs personally is a matter of immense concern to them. They indicate that unless they have certainty as to any liability it will not be possible for them to continue to represent the plaintiffs. It was for this reason that on 10 October 1997 the plaintiffs sought from the judge what has been referred to as the 'debarring order' which is identified at the outset of this judgment. It is the plaintiffs' legal advisers' contention that they have been independently advised by leading counsel as to the propriety of the CFA arrangements which have been made. Therefore they are entitled to know where they stand as to the costs in litigation of this kind. They wish to be free from the intimidating threat of wasted costs orders and the like without having to sacrifice the shield of privilege or be faced with satellite litigation. f

We understand these concerns. We also understand the position of the defendants. They contend that it would be premature to make any application for an order against the plaintiffs' legal advisers at this stage and that it is reasonable for them to leave open their position on the question of the personal liability for costs of the plaintiffs' legal advisers. They point out that this is a case g



a in which Leigh Day's clients, the plaintiffs, do not have the protection of insurance in respect of any liability to which they may become subject to pay the costs of the defendants. In the absence of such insurance, it is obvious that the prospects of the defendants being able to recover other than nominal sums by way of costs from the plaintiffs are remote.

b *The CFA issue*

c At the hearing on 10 October 1997 the judge, having heard argument, gave a judgment in which he clearly and succinctly set out his reasons for not being prepared to make the debarring order which the plaintiffs seek. He indicated that although he had not heard full argument, his initial reaction was that the plaintiffs at that stage were perfectly entitled to claim privilege for the CFA agreements as they had come into existence for the purpose of litigation in the ordinary way. In saying this he was agreeing to what he was told were the views of both the Law Society and the Bar Council. However, he went on to say that the position could be different at the end of the trial. This was on the hypothesis that the plaintiffs were unsuccessful in the action. He recognised that the rules did not cater for that situation. He thought that at that stage the court would be entitled to inquire into the propriety and legality or otherwise of the agreement so as to ensure that justice was done between the parties in relation to costs. This he considered would not be possible without seeing the agreement.

e We have no doubt that the judge was right to come to the decision not to make the debarring order. To understand our reasons for this conclusion it is desirable to begin by considering the legislation which authorises CFAs. Prior to that legislation it would have been improper conduct on the part of the plaintiffs' legal advisers to enter into CFAs.

f The statutory authority for CFAs is provided by the Courts and Legal Services Act 1990. Section 58(1) describes a CFA as 'an agreement in writing between a person providing advocacy or litigation services and his client ...' The agreement must not be of a kind which is mentioned in s 58(10) (which has no application to these proceedings). The agreement is required to provide that 'that person's fees and expenses, or any part of them, to be payable only in specified circumstances' (s 58(1)(b)). The CFA must also comply with any requirements prescribed by the Lord Chancellor (s 58(1)(c)).

g The CFA has to specify the percentage by which the amount of fees to which it applies are to be increased (s 58(2)).

h The ability to enforce a CFA is dealt with expressly by s 58(3). This subsection states 'subject to subsection (6), a conditional fee agreement which relates to specified proceedings shall not be unenforceable by reason only of its being a conditional fee agreement'.

j The Lord Chancellor, who is empowered to specify the proceedings for the purposes of s 58(3) (s 58(4)), did so by the Conditional Fee Agreements Order 1995, SI 1995/1674. Specified proceedings include actions for damages for personal injuries. Personal injuries cover any disease. In accordance with s 58(5) the 1995 order prescribes the maximum permitted percentage of the increase in fees as being 100%.

Section 58(8) prohibits an order for costs which is made in favour of a party including 'any element which takes account of any percentage increase payable under the agreement'.

Section 58(9) provides that rules of court may make provision with respect to the taxing of any costs which include fees payable under a CFA.

We should also refer to the Conditional Fee Agreements Regulations 1995, SI 1995/1675, which state that an agreement will not be a CFA unless it complies with the following requirements:

*'... Requirements of an agreement*

3. An agreement shall state—(a) the particular proceedings or parts of them to which it relates (including whether it relates to any counterclaim, appeal or proceedings to enforce a judgment or order); (b) the circumstances in which the legal representative's fees and expenses or part of them are payable; (c) what, if any, payment is due—(i) upon partial failure of the specified circumstances to occur; (ii) irrespective of the specified circumstances occurring; and (iii) upon termination of the agreement for any reason; (d) the amount payable in accordance with sub-paragraphs (b) or (c) above or the method to be used to calculate the amount payable; and in particular whether or not the amount payable is limited by reference to the amount of any damages which may be recovered on behalf of the client.

*Additional requirements*

4.—(1) The agreement shall also state that, immediately before it was entered into, the legal representative drew the client's attention to the matters specified in paragraph (2).

(2) The matters are—(a) whether the client might be entitled to legal aid in respect of the proceedings to which the agreement relates, the conditions upon which legal aid is available and the application of those conditions to the client in respect of the proceedings; (b) the circumstances in which the client may be liable to pay the fees and expenses of the legal representative in accordance with the agreement; (c) the circumstances in which the client may be liable to pay the costs of any other party to the proceedings; and (d) the circumstances in which the client may seek taxation of the fees and expenses of the legal representative and the procedure for so doing ...'

The information to be included in a CFA is therefore reasonably precisely prescribed and there should be no difficulty in reaching a view whether the statutory requirements have been complied with. If the statutory requirements are complied with the CFA will be valid and enforceable by the legal advisers against a client. If it materially departs from the legislative requirements it will not be enforceable and will not be a CFA which is protected by s 58(3). If a practitioner needs assistance in complying with the legislative requirements, then the precedents which we understand are made available to their members by the Law Society could be used.

Except that a CFA enables solicitors and counsel to enter into an agreement which they would not otherwise be able to make, the existence of a CFA does not alter the relationship between the legal adviser and his client. The solicitor or counsel still owes to the client exactly the same duties that he would owe to the client if he had not entered into a CFA. A solicitor or counsel acting under a CFA remains under the same duty to his client to disregard his own interests in giving advice to the client and in performing his other responsibilities on behalf of the client. This extends to advising the client of what are the consequences to the client of the client entering into a CFA. The lawyer also still owes the same duties to the court.

As the statutory position is clear, a legal adviser should have no difficulty in making a valid CFA with a client who wishes to do this. As we have sought to make clear, the fact that there is a CFA cannot justify the legal adviser coming to

a any additional or collateral arrangement which would not be permissible if there was no CFA. In the course of argument the possibility was raised of the lawyer including in the CFA a provision entitling the lawyer and not the client to decide whether or not an action should be discontinued or withdrawn, perhaps upon terms of compromise. An agreement taking responsibility for this decision away from the client and giving it to the legal adviser would not have been appropriate before 1993; and it has not become appropriate in consequence of the introduction of CFAs. The lawyer, as long as he puts aside any consideration of his own interests, is entitled to advise the client about commencing, continuing or compromising proceedings, but the decision must be that of the client and not of the lawyer. The lawyer has however the right, if the need should arise, to cease to act for a client under a CFA in the same way as a lawyer can cease to act in the event of there being a conventional retainer.

c There is no reason why the circumstances in which a lawyer, acting under a CFA, can be made personally liable for the costs of a party other than his client should differ from those in which a lawyer who is not acting under a CFA would be so liable. Any suggestion by the defendants' lawyers, and any concern of the d plaintiffs' lawyers, that the position of the plaintiffs' lawyers is different from that of any other legal adviser is misconceived. The existence of a CFA should make a legal advisers' position as a matter of law no worse, so far as being ordered to pay costs is concerned, than it would be if there was no CFAs. This is unless, of course, the CFA is outside the statutory protection.

e Of the four purposes identified by the defendants for which present disclosure of the contents of a CFA is said to be potentially relevant, the first three are misconceived. As to the fourth purpose, we find it difficult without having a concrete case to consider to identify why it should be of relevance to the defendants, at least until after the litigation has come to an end.

f We of course recognise that it was natural that the plaintiffs' lawyers should be concerned as to their position. It is obvious that as the defendants are likely to be unable to recover costs to which they would otherwise be entitled from the plaintiffs, in the absence of any insurance, they are going to give careful consideration as to whether there is any prospect of recovering costs elsewhere and the lawyers for the plaintiffs are an obvious target. However the plaintiffs' g lawyers are in no different position because they are acting under a CFA than they would be acting for a legally aided client with a nil contribution. In that case, also, the defendants would have no realistic possibility of recovering their costs from the plaintiffs and the lawyers would be an equally prominent target for an application that they pay the costs personally. Applications are not common in these circumstances and, so far as we are aware, there is no precedent for lawyers h acting for a legally aided client seeking a debarring order.

j Furthermore, even if it would otherwise be appropriate to grant a debarring order, any debarring order which it would be proper for a court to grant would not provide the plaintiffs' legal advisers with any practical protection. The order which the judge was asked to make and which is subject to the appeal was a qualified order. It was qualified so that it would not debar the defendants from making a wasted costs order under s 51(6) of the Supreme Court Act 1981. The plaintiffs, in accepting this qualification, recognise that legal advisers are capable of being guilty of conduct at any time which could make an application for a wasted costs order appropriate. If this were to happen it would be highly undesirable for the court to have granted what would be, in effect, advance immunity.



The parties now agree that the court has a limited additional jurisdiction to make an order for costs against legal advisers personally in circumstances in which it would not be possible to make a wasted costs order. This limited jurisdiction is only going to be relevant in a very small minority of cases.

The limited additional jurisdiction can arise under two heads. First there is the court's inherent jurisdiction to make such an order, at least against solicitors. Mr Brennan QC makes three submissions about this jurisdiction which are not controversial except in one respect. The first is that it is limited to orders against solicitors and does not extend to orders against counsel. The second is that it must be regarded as having been supplanted in circumstances falling within the statutory wasted costs jurisdiction; and the third is that it should not be exercised until after a consideration whether an order should be made under the wasted costs jurisdiction. The point which might be controversial is whether today the courts would take the view that the inherent jurisdiction is limited to orders against solicitors. This is not a point which we have considered and as it does not arise we express no opinion on it.

The second area of additional jurisdiction is that which arises under the general jurisdiction of the court as to costs contained in s 51(1) and (3) of the 1981 Act. This is a jurisdiction which cannot arise where a legal representative is acting only in that capacity in the context of legal proceedings.

There are therefore three possible heads of jurisdiction under which a legal representative may be made liable for costs. That this is the position was made clear by the decision of this court in *Count Tolstoy-Miloslavsky v Lord Aldington* [1996] 2 All ER 556, [1996] 1 WLR 736. For the very same reason that the plaintiffs concede that the debarring order would have to be qualified in relation to the wasted cost jurisdiction, so it would also have to be qualified in respect of the further heads of jurisdiction, although they are unlikely to arise in practice. That being the position, the debarring order would be an empty vessel because it would have to be qualified so as to exclude the only grounds upon which a court could make an order. In other words it would not debar any application which could have any prospect of success.

Before leaving this part of the appeal, there is one further matter with which we should deal. That is whether the defendants are entitled to inspect the CFAs. There is no doubt that the defendants were pressing to be shown the CFAs at one stage. However, before this court the defendants have as Mr Brennan contends made a 'significant retreat'. The defendants now do not seek to persuade us to order inspection. In the words of Mr Fenwick QC's skeleton argument on behalf of the second and third defendants they do not contend 'that the CFA should be disclosed now or at some future time or to put forward any positive case that persons other than (the plaintiffs) themselves should pay the costs of this litigation if it fails'. In this court, Mr Brennan repeated that both the Law Society and the Bar Council regarded CFAs as being subject to professional privilege and that they would be extremely concerned if it was suggested that the position was otherwise. We have already indicated the stance which the judge adopted.

We do not consider it would be appropriate to express any concluded view on the question of whether a CFA is at any stage of proceedings subject to professional privilege. Before expressing a view, we would like to have before us a claim for privilege specifying the grounds upon which it is based. We would also like to hear the full argument that was not presented on this appeal in view of the approach now adopted by the defendants to their seeking to inspect the CFAs. We recognise that a distinction might exist between the position in

a relation to any advice given to a client about the advisability of entering into a CFA and the document itself. However, what follows from what we have said as to the effect of CFAs means that, absent exceptional circumstances which we cannot envisage, unless and until the other party to the proceedings makes an application for an order making the legal advisers personally liable for costs, the existence or the terms of a CFA are of no relevance to the issues in the proceedings. They are therefore on that ground not required to be disclosed. Just as in *Count Tolstoy-Miloslavsky's* case it was made clear that it is in the public interest and perfectly proper for counsel and solicitors to act without fee, so it must now be taken to be in the public interest, and should be recognised as such, for counsel and solicitors to act under a CFA. There are no grounds for treating the party who is or has been represented under a CFA differently for any other party. The same is true of their lawyers. We can conceive of situations where the means of a party can be relevant. But absent an application, properly founded and raised, putting in issue the validity or the contents of the CFA, we cannot see that its terms are of any relevance. In this case the plaintiffs have voluntarily disclosed many of the terms of the CFA which they have entered into but not the document. This they were entitled to refuse to do.

d What we intend to make clear is that lawyers acting under CFAs are at no more risk of paying costs personally than they would be if they were not so acting. In addition, whether or not CFAs are properly the subject of professional privilege, they are not normally required to be disclosed.

e Before leaving this subject, we should make clear that we are not suggesting that the court has no jurisdiction to make a debarring order. On the contrary we note the careful consideration given to the question of making debarring or 'protective' or 'pre-emptive' orders on an application for judicial review in the judgment of Dyson J in *R v Lord Chancellor, ex p Child Poverty Action Group, R v DPP, ex p Bull* [1998] 2 All ER 755. Here the difficulty is not one of jurisdiction, but anticipating a case where it would be appropriate and desirable to provide protection for legal advisers prior to the end of a case.

#### *The order restricting comment to the media*

This litigation is of considerable interest to the media. There is an understandable interest on the part of the public to know whether tobacco manufacturers could be legally responsible to those who allege they are suffering from cancer in consequence of having smoked in the past. There are those who have strong feelings about the very fact of making available tobacco products so that they can be smoked. For those who contend that tobacco companies should be liable, the courts are available to adjudicate upon the issue. When the jurisdiction of the courts is invoked, there should be no interference with the ability of the courts to do justice between the parties to the litigation. If there is interference, then at least the usual remedy is that provided by the law of contempt. This is now mainly to be found in the Contempt of Court Act 1981. The Act clearly reveals the intention of Parliament as to where the line should be drawn if there is a conflict between the interests of the administration of justice and freedom of expression.

j Section 1 of that Act defines the 'strict liability rule' as meaning conduct 'tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so'.

In relation to that strict liability a defence is provided in respect of a 'fair and accurate report of legal proceedings held in public' (s 4(1)). Section 4(2) however,

authorises the court 'where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice ... [to] order that the publication of any report of the proceedings ... be postponed for such period as the court thinks necessary ...'

Section 11 is also relevant since it recognises the court's ability to, 'where a court (having power to do so)', prohibit publication of matters in connection with proceedings if it appears *to the court to be necessary*.

The present proceedings involve a number of plaintiffs whose individual situations attract great sympathy. The defendants are, however, entitled to have the issues involved determined by the courts without improper interference with the administration of justice. The situation is one in which it is easy to fan emotions which will make the task of the courts to resolve the complex issues involved and do justice between the parties more difficult. As Chief Justice Rehnquist pointed out in *Gentile v State Bar of Nevada* (1991) 501 US 1030, extra-judicial statements by legal representatives can be especially unhelpful since they are likely to be received by the media as specially authoritative even if they are inaccurate. The professionalism and the sense of duty of legal advisers who conduct litigation of this nature should mean that the courts are able to rely on the legal advisers to exercise great self-restraint when making comments to the press, while at the same time recognising the need for the media to be properly informed of what is happening in the proceedings. Sensible co-operation and an absence of excessive adversarial behaviour on the part of the legal advisers of all parties is essential if multi-party litigation such as this is to be conducted in the proportionate manner which the interests of their clients and justice require.

In accord with the usual practice in the Queen's Bench Division, interlocutory directions for the conduct of this litigation have been made in chambers. The defendants rely on this fact in support of the orders which have been made restricting communications between legal advisers and the media. Section 67 of the Supreme Court Act 1981 recognises the practice of the court of dealing with matters in chambers as opposed to in open court. As to s 67, the defendants rely upon *The Supreme Court Practice* 1997 vol 2, Pt 17, para 5276:

'The expression "in Chambers" used in this section in contrast to "in Court" means in private, secret, secluded behind closed doors, in proceedings at which only the parties and their advisers are entitled to be present and from which the public and the press are excluded unless invited to be present with the consent of the parties and the Court.'

This paragraph is attributed to the editorship of Sir Jack I H Jacob QC and therefore justifies great respect. However, in our judgment the paragraph does not by the use of the word 'secret' accurately reflect the significance of a hearing being in chambers rather than in open court. The present position is more accurately reflected in the judgment of Jacob J given on 21 November 1997 in *Forbes v Smith* [1998] 1 All ER 973 at 974, when he said:

'A chambers hearing is in private, in the sense that members of the public are not given admission as of right to the courtroom. Courts sit in chambers or in open court generally merely as a matter of administrative convenience. For example, in the Chancery Division the normal practice for urgent interlocutory cases is for the matters to be heard in open court, the application being made by way of motion. Corresponding applications in the Queen's Bench Division are normally made in chambers. There is no



a logic or reason as to why exactly the same sort of case in one Division should be in open court and, in another Division, in chambers.'

The views there expressed by Jacob J can be compared to those expressed more fully by Sir Jack I H Jacob in trenchant terms in his Hamlyn lecture as follows:

b 'The need for public justice, which has now been statutorily recognised, is that it removes the possibility of arbitrariness in the administration of justice, so that in effect the public would have the opportunity of "judging the judges": by sitting in public, the judges are themselves accountable and on trial. This was powerfully expressed in the great aphorism that, "It is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done." The opposite of public justice is of course the administration of justice in private and in secret, behind closed doors, hidden from the view of the public and the press and sheltered from public accountability. There are, indeed, two prevailing exceptions to the open public system of conducting civil proceedings, namely, (1) the hearing of pre-trial proceedings "in Chambers," at which only the parties and their advisers are entitled to be present and from which the public and the press are excluded, and (2) the hearing of proceedings or the trial or part thereof "in Camera," where the court or the trial judge orders that the court should be closed or cleared and the public and press excluded. Both these exceptions may be necessary in matters which require protection from publicity, such as matters concerning national security, those relating to persons under disability, *i.e.* minors and mental patients, or those relating to secret processes and other special matters, such as hearings before the Commissioners of Inland Revenue relating to tax affairs and such like matters. Subject to these exceptions, the principle of publicity should prevail throughout the whole range of civil proceedings. For this reason, the practice of hearing pre-trial applications in Chambers should be abrogated. The strange and perhaps indefensible contrast between the hearing of the interlocutory applications for an injunction, in open court in the Chancery Division, and in private in Chambers in the Queen's Bench Division, should be the first and immediate practice to be scrapped.' (See Hamlyn Lectures (38th series) *The Fabric of English Justice* p 22).

As s 12 of the Administration of Justice Act 1960 makes clear, the publication of information relating to proceedings held in *private* (ie chambers) is not in itself contempt except in the specific cases identified in s 12(1) (which do not apply here) unless the court makes an order prohibiting publication 'when it has power to do so' (s 12(1)(e)). Nor is the publication of the whole or part of the order made by a court sitting in *private* a contempt (s 12(2)).

The general position is that any judgment including a judgment in chambers is normally a public document. This is the position notwithstanding that under RSC Ord 63, r 4(1) there is no right to inspect a judgment so given without leave.

A distinction has to be clearly drawn between the normal situation where a court sits in chambers and when a court sits in camera in the exceptional situations recognised in *Scott v Scott* [1913] AC 417, [1911–13] All ER Rep 1 or the court sits in chambers and the case falls in the categories specified in s 12(1) of the 1960 Act (which include issues involving children, national security, secret processes and the like). Section 12(1) also refers to the court having prohibited

publication. Such proceedings are appropriately described as *secret*; proceedings in chambers otherwise are not appropriately so described. a

Proceedings in chambers, however, are always correctly described as being conducted in *private*. The word 'chambers' is used because of its association with the judge's room so as to distinguish a hearing in chambers from a hearing in open court. While the public in general are normally free to come into and go from a court (as long as there is capacity for them to do so) during court hearings the same is not true of chambers hearings. Other than the parties and their representatives the public need the permission of the judge to attend. b

Hearings in private in chambers already make an important contribution to the administration of justice. They allow issues to be determined informally and expeditiously. They allow less strict rules as to representation to apply. They allow matters to be discussed which the parties might not wish to discuss in open court. They encourage openness. They are less intimidating to litigants which is particularly important in the case of the small claims jurisdiction. With the movement which is now taking place in relation to case management chambers hearings are likely in the future to make a greater contribution to the administration of justice than they do already. As Jacob J correctly commented, there is at present an illogical difference in practice between the Chancery and Queen's Bench Divisions but the position will be rationalised by the new rules of court which are being drafted at present. c

Surprisingly, just what can be repeated in public about what occurs in chambers is virtually free from authority. The reasons for this could be at least twofold. First, the fact the great majority of the matters dealt with in chambers are of no interest to anyone except those immediately involved. Secondly, in the normal way the parties and, in particular, their legal advisers recognise that it is desirable to treat in a confidential manner what occurs in chambers, because it is in accord with the 'chambers culture' which has grown up over the years and which contributes to the efficient dispatch of the work of the courts. For the majority of lawyers to treat what happens in chambers in any other way would not be in accord with proper professional behaviour. d

However it remains a principle of the greatest importance that, unless there are compelling reasons for doing otherwise, which will not exist in the generality of cases, there should be public access to hearings in chambers and information available as to what occurred at such hearings. The fact that the public do not have the same right to attend hearings in chambers as those in open court and there can be in addition practical difficulties in arranging physical access does not mean that such access as is practical should not be granted. Depending on the nature of the request reasonable arrangements will normally be able to be made by a judge (of course we use this term to include masters) to ensure that the fact that the hearing takes place in chambers does not materially interfere with the right of the public, including the media, to know and observe what happens in chambers. Sometimes the solution may be to allow one representative of the press to attend. Another solution may be to give judgement in open court so that the judge is not only able to announce the order which he is making, but is also able to give an account of the proceedings in chambers. The decision as to what to do in any particular situation to provide information for the public will be for the discretion of the judge conducting the hearing. As long as he bears in mind the importance of the principle that justice should be administered in a manner which is as open as is practical in the particular circumstances, higher courts will not interfere with the judge's decision unless there is good reason for doing so. e

a With this guidance it should be possible to meet the concerns rightly emphasised by Sir Jack Jacob and at the same time retain most, if not all, the advantages provided by the informality of appearing in the judges' chambers for the disposal of interlocutory matters.

b The nature of the hearing being that which is indicated, while lawyers will be expected to continue to exercise self restraint as to what is said, any order, judgment or account of the proceedings in chambers can, except in the special cases, be communicated to those who did not attend without any concern that such a communication will create any risk of the imposition of a penalty. If the court wishes to restrain such communication, then it will have to make an appropriate order, when it has the power to do so. As to those situations it is important to take account of the judgment of Lord Reading CJ in *R v Governor of*  
c *Lewes Prison, ex p Doyle* [1917] 2 KB 254 at 271 where he drew attention to the fact that it was impossible to enumerate all the circumstances which would justify an exception to the general rule. As the practice of the courts alters, for example because of the developments in relation to alternative dispute resolution, so will the exceptions change.

d In relation to hearings in chambers the position may be summarised as follows. (1) The public has no right to attend hearings in chambers because of the nature of the work transacted in chambers and because of the physical restrictions on the room available, but if requested, permission should be granted to attend when and to the extent that this is practical. (2) What happens during the proceedings in chambers is not confidential or secret and information about what occurs in  
e chambers and the judgment or order pronounced can, and in the case of any judgment or order should, be made available to the public when requested. (3) If members of the public who seek to attend cannot be accommodated, the judge should consider adjourning the proceedings in whole or in part into open court to the extent that this is practical or allowing one or more representatives of the  
f press to attend the hearing in chambers. (4) To disclose what occurs in chambers does not constitute a breach of confidence or amount to contempt as long as any comment which is made does not substantially prejudice the administration of justice. (5) The position summarised above does not apply to the exceptional situations identified in s 12(1) of the 1960 Act or where the court, with the power to do so, orders otherwise.

g In this case the judge made his order about not communicating to the press as a result of the intervention of Mr Playford QC, who appears on behalf of the first defendants, just before the end of the hearing. He reminded the judge of the directions which he had made on the previous occasion and indicated that until 7  
h October, as far as he was aware that direction had been adhered to. However, he then referred to an article that had appeared in the Independent newspaper on that date and the fact that Mr Day had been giving interviews commenting about the hearing which was then about to take place. He suggested that there had been at least conduct on Mr Day's behalf which was 'wholly contrary to the terms' of the previous direction or 'at any rate the spirit of it'. He also referred to  
j a book which Mr Day had written. He then asked the judge to reiterate his order. The judge asked counsel as to whether he should give a blanket direction that until further order neither the parties nor their advisers were to make any comment about the progress of the proceedings. Both Mr Playford and Mr Fenwick indicated that they would welcome an order. Mr Brennan felt he should take instructions on the matter and did so over the luncheon adjournment. After the adjournment, he indicated to the judge that his instructing solicitors were



aware of their professional responsibility to the court and in relation to issues such as contempt of court and the like but they were not ready to accept any order. Mr Brennan also made it clear that Mr Day had given other interviews which could be subsequently published. The judge then made the order which is the subject of the appeal. Leave to appeal the order was refused but we granted leave at the commencement of the hearing of this appeal. The judge was also not prepared to give leave for the judgment which he had given about the CFAs to be treated as if it had been given in open court.

Before leaving what happened at the 10 October hearing, it is right that we should make clear that the judge did not investigate, nor have we investigated, whether Mr Day had contravened the previous order about communicating with the media. We certainly make no finding that he did since that previous direction was in very narrow terms. It only referred to the parties and was limited to restraining the parties making any comment on the directions that were given on that occasion.

As we have already indicated, the normal protection of the administration of justice is to be found in the law of contempt. To rely on the law of contempt for this purpose has the disadvantage that what does or does not amount to contempt cannot be identified with precision before all the circumstances are investigated. The advantage of an order of the class made by the judge on 10 October is that the parties and their legal advisers should know, so far as this can be achieved, precisely where they stand. The advantage of relying on the law of contempt in preference to a precise order of the sort which was made is that upon an application to commit for contempt, the court is required to weigh the conflicting public interests involved. Those interests include not only the need to protect the administration of justice but also the importance of not interfering with freedom of speech and the freedom of the press. Although the order was not made against the media, if they become aware of the terms of the order and become a party to any breach of the order they are liable to be cited for contempt.

Although we therefore recognise that advantages can flow from an order of this sort, we are quite satisfied that it was wrong to make this order. While we would much prefer lawyers not to become engaged in commenting about proceedings to the press (as opposed to communicating facts), we consider that in this case the risk, if any, of the administration of justice being interfered with by communications with the press are far less than the risks which would follow from interference with the entitlement of the media to obtain information about these proceedings. We appreciate that the defendants might find what is said to the media objectionable, but we do not accept that they will be deterred from defending these proceedings because of adverse publicity which could be generated by those comments.

The problem with the order is that it achieves certainty by imposing rigidity. If it is enforced, it will mean that instead of being judged as would normally be the case under the law of contempt the plaintiffs' legal advisers will be judged by whether they have not complied with the order. Whether there has been a failure to comply with the order will become the test for contempt instead of whether there has been unjustified interference with the administration of justice. To produce this result is wrong in principle and the order should not have been made.

What has happened since the order has been made strongly suggests that it would have been preferable to have given all the directions which were made on 10 October in open court, together with a judgment explaining why they were

a made, so that it would not have been necessary for the legal advisers to communicate with the media in order to explain what had happened.

b In litigation of this sort, it is difficult if not impossible for the court to seek to prevent direct or indirect communication with the media. In our judgment in this case the court should not have attempted to do so. The best way of avoiding ill-informed comments in the media in the case of this nature when the interest of the public is high, is for the court to be as open as is possible and practicable, not only in relation to the trial but also in relation to the interlocutory proceedings which have to take place prior to that trial. The other action which can be taken to reduce the risk of trial by media and the absence of co-operation between the parties affecting the conduct of the proceedings is to ensure that as soon as is practical a timetable is laid down for bringing the case to trial as early as possible and giving any directions to the parties which are necessary in order to require them to co-operate in achieving this. The longer the trial is delayed the greater the opportunity for both sides to engage in tactical manoeuvres which have nothing to do with achieving a fair trial.

c We very much hope that the parties will listen to what we have to say about the desirability of co-operation. However, the outcome of this appeal is that we refuse to make a debarring order and we quash the order restricting discussion with the media. The appeal will therefore be allowed in part.

d *Appeal allowed in part.*

Kate O'Hanlon   Barrister.

# Ward v Newalls Insulation Co Ltd and another a

COURT OF APPEAL, CIVIL DIVISION

BUTLER-SLOSS, HENRY AND POTTER LJJ

2, 3 DECEMBER 1997, 19 FEBRUARY 1998

*Damages – Personal injury – Loss of earning capacity – Partners entering into arrangement with their wives in relation to profits – Arrangement terminable at will and agreed with Inland Revenue – Partner bringing action for personal injury – Whether arrangement basis for measuring loss of earning capacity.*

The plaintiff, W, formed a successful partnership with E. In order to avail themselves of tax advantages, W and E declared there to be four partners, themselves and their wives. However, no formal partnership agreement was entered into and the arrangement was terminable at will. Neither Mrs W nor Mrs E played any part in the partnership business and, as partners, they were no more than nominees of their husbands. Any moneys drawn by W from the partnership were paid into a family joint account and no actual apportionment was made in respect of his wife's notional quarter share of profits. W brought a personal injury action against the defendants, his former employers, claiming damages for personal injury which he alleged had resulted in a loss of earning capacity. The judge held that the legal result of the partnership arrangement, which was agreed with the Inland Revenue, was that W's loss of earning capacity had to be reduced from 50% of the partnership's profits to 25%. W appealed, contending, inter alia, that his actual loss should be determined by his half-share of the partnership profits, regardless of how the arrangement was to be treated for tax purposes. b

**Held** – When assessing damages for the loss of earnings of a business partner, the court had to consider the reality of the partner's position with regard to his contribution to the running of that business. Thus, there was no reason and no power for a judge to trump reality in a personal injury claim by any internal allocation of the division of profits in a partnership which did not reflect the true value of the partner's contribution. In the instant case, the arrangement which was agreed with the Inland Revenue for tax purposes and which was terminable at will, provided no basis to measure the loss of earning capacity suffered by W. Accordingly, the real or actual loss suffered by W was 50% of the reduced partnership profits and no deduction had to be made with respect to his wife's contribution to the profitability of the partnership, since she had made no such contribution. The appeal would therefore be allowed (see p 698 *fj* to p 699 *a* and p 700 *j* to p 701 *a e*, post). c

*Taraporewalla v Berkery* [1983] 3 NSWLR 28 and *Kent v British Railways Board* [1995] PIQR Q42 considered. d

## Notes e

For partnership profits, see 35 *Halsbury's Laws* (4th edn reissue) paras 11–13. f

## Cases referred to in judgment g

*Chettiar v Chettiar* [1962] 1 All ER 494, [1962] AC 294, [1962] 2 WLR 548, PC. h

*Forsberg v Maslin* [1968] SASR 432, Aust SC.

*Gascoigne v Gascoigne* [1918] 1 KB 223, DC. i



- a *Jason v Batten (1930) Ltd, Jason v British Traders' Insurance Co Ltd* [1969] 1 Lloyd's Rep 281.  
*Kent v British Railways Board* [1995] PIQR Q42, CA.  
*Lee v Sheard* [1955] 3 All ER 777, [1956] 1 QB 192, [1955] 3 WLR 951, CA.  
*Pooley v Driver* (1876) 5 Ch D 458.  
*Taroporewalla v Berkery* [1983] 3 NSWLR 28, NSW SC.
- b *Tinker v Tinker* [1970] 1 All ER 540, [1970] P 136, [1970] 2 WLR 331, CA.  
*Tinsley v Milligan* [1993] 3 All ER 65, [1994] 1 AC 340, [1993] 3 WLR 126, HL.

### Cases also cited or referred to in skeleton arguments

- Anderson v Davis* [1993] PIQR Q87.  
*Badeley v Consolidated Bank* (1888) 38 Ch D 238.
- c *Davis v Davis* [1894] 1 Ch 393.  
*Duller v South West Lincs Engineers* [1981] CLY 585.  
*Wells v Wells* [1997] PIQR Q1, CA.

### Appeal

- d The plaintiff, Bryan Ward, appealed from the decision of Judge Fricker QC, sitting as a judge of the High Court, given on 9 July 1996, awarding him damages and interest of £440,167·10 against the defendants, Newalls Insulation Co Ltd and Cape Contracts Ltd, for a progressive lung disease caused by exposure to asbestos whilst employed by the defendants. The facts are set out in the judgment of the court.

e *Daniel Brennan QC* and *Andrew Spink* (instructed by *Irwin Mitchell*, Sheffield) for the plaintiff.

*Stephen Powles QC* (instructed by *Edward Lewis*) for the defendants.

f *Cur adv vult*

19 February 1998. The following judgment of the court was delivered.

- HENRY LJ.** The plaintiff appellant, Mr Ward, is now aged 48. His early working years, between 17 and 27, were spent working for the first and second defendants.
- g In the course of such employment, he was exposed to asbestos. As a result of the admitted negligence of the defendants, that exposure has caused him to suffer a progressive and restrictive lung disease. The symptoms of this disease were first observed at the end of 1988, and diagnosed in 1989. It is a condition that has got, and still is getting, progressively worse. Mr Ward's life expectancy is reduced,
- h and he may yet develop even more serious conditions, such as mesothelioma or lung cancer.

- He now appeals against an award of damages and interest of £440,167·10 awarded by Judge Fricker QC (sitting as judge of the High Court) on 9 July 1996, an award made on the assumption that he would not at some later date develop
- j lung cancer and/or mesothelioma as a result of his exposure to asbestos, with liberty to him to apply to the court for further damages if he did.

Thanks to the good sense and realism of counsel, many issues have been resolved by the parties without the intervention of the court. Consequently we are only concerned with two separate issues, one of principle (the partnership issue) and one of detail. We deal first with the partnership issue, and then with the detail.

On leaving the employment of the second defendants when he was 27, Mr Ward, in 1976, formed a partnership with Mr John Eid in the business of insulation contracting, a business that became active in 1978. He proved to be a good, economically prudent, and energetic businessman, and was extremely successful. The business of the partnership prospered and expanded. In all some five limited companies, each being a separate profit centre, were set up. Mr Ward and Mr Eid owned and controlled those companies 50:50. The judge described the situation in these terms:

'The partnership continued as the vehicle for the plaintiff and John Eid to draw their income, on the basis of equality between them. The companies in the group paid profits into the partnership account. The plaintiff's share of the partnership profits was taken by drawings from the partnership account by cheques made out to the plaintiff.'

It is clear that the partnership only received such profits as were allocated to the partners by the companies: ie some profits were retained in the companies.

The judge found that Mr Ward had been a healthy, vigorous and successful businessman. He was a workaholic, and the fortunes of all the companies which he owned 50:50 with Mr Eid depended to a large extent on him, his dynamism, his attention to detail, his personal supervision of the business, and his client base developed through all these qualities. The judge concluded that he was:

'A businessman of unusual competence, and his personal skills and commitment were a major factor in the degree of success of the group business.'

The judge was satisfied that without Mr Ward's illness, the group's business would have been more profitable than it had been, and in addition to that loss of profit, in certain regards it proved more expensive to carry on the group's business, because of the need to hire additional personnel.

Because of the numerous inter-company transactions, the expert accountants employed by both sides abandoned the idea of producing a consolidated balance sheet for the group as being too difficult, and agreed on a simpler 'broad brush' approach for establishing the total turnover figure for all the companies, and then deducting gross profits at 41% (less variable overheads at 3%) and then further deducting tax at 40%. That calculation resulted in the loss of profit figure sustained by the whole Ward/Eid partnership, for each year in question. If it were necessary to consider the pecuniary value of his contribution to the business (as it would be if he was claiming in a personal injury action for his loss of earnings and/or earning capacity), then, on the judge's findings, in the days of his two-man partnership with Mr Eid, his loss would be 50% of the total net profits.

So much is common ground. The issue here arises because Mr Ward and Mr Eid, on their accountant's advice and for tax purposes, made their wives partners. As the judge put it:

'However, on the advice of their accountant the plaintiff and Eid signed partnership accounts which declared that there were four partners, including their wives. The plaintiff, Eid and their wives paid tax on the basis of four separate and approximately equal incomes from the partnership profits.'

Neither Mrs Ward nor Mrs Eid played any part in the partnership business, nor did they put capital into the partnership, nor did they do any work for the partnership. As partners, they were no more than nominees of their husbands.

a Mr Ward always operated with cash rich businesses (remarkably, we are told that he never had a business overdraft) and when he drew money from the partnership, whether his or his wife's share, he simply paid it into the all-purpose family joint account. It seems the family was treated as an economic unit, and that no actual apportionment or allowance was being made to Mrs Ward in respect of her notional quarter share of the profits. That point was made, but it  
b was not explored in depth in the evidence. Nonetheless, the defendants successfully submitted to the judge that the legal result of that arrangement with the Inland Revenue is that Mr Ward's loss of earning capacity was reduced from 50% of the partnership's profits to 25% of those profits. The correctness of that conclusion is the principal issue in this appeal.

c Mr Powles QC for the defendants put the case as follows. The existence of the partnership of two (Mr Ward and Mr Eid) was plain. While there was no partnership deed for the partnership of four, each year both husbands and both wives had signed the accounts, and the tax assessments for that year showed the  
d wives as entitled to a share of the profits. Mrs Ward had claimed retirement annuity relief against her share in each year, and had had a 'company' car. Both husbands and wives had signed the normal return to the Revenue. Against that factual background Mr Powles referred to s 2 of the Partnership Act 1890 and in particular s 2(3), to the effect that receipt of a share of the profits was prima facie evidence of a partnership, and that the law will assume equality of profit share unless the contrary is shown. He submitted that whatever the reality of the  
e situation, this was a four person partnership in law. Before us he further submitted that, as it is always possible to be a dormant or sleeping partner, it makes no difference that a partner does no actual work. That submission seems to be right. In *Pooley v Driver* (1876) 5 Ch D 458 at 473 Jessel MR said:

f 'You can have, undoubtedly, according to English law, a dormant partner who puts nothing in—neither capital, nor skill, nor anything else. In fact, those who are familiar with partnerships know it is by no means uncommon to give a share to the widow or relative of some former partner who contributes nothing at all, neither name, nor skill, nor anything else. Therefore it is not quite accurate, as Chancellor *Kent* puts it, that they must contribute labour, or skill, or money, or some or all of them.'

g Before the judge, Mr Powles founded himself on the authority of *Kent v British Railways Board* [1995] PIQR Q42. There the plaintiff wife suffered serious  
h personal injuries in an accident for which the defendants were responsible. Part of her claim was for loss of the profits of her business in which she and her husband were both working partners. For taxation purposes it had been arranged with the Revenue that the husband and wife should be assessed on the profits of the business as to 60% on the husband and 40% on the wife. The husband had not been injured and had no claim against the defendant. But the master on the assessment of damages, in dealing with the past and probable future loss to the  
j partnership, awarded the wife 100% of that loss saying:

'I do not propose to make any apportionment as between the husband and wife. It would be entirely inappropriate to make such a distinction. The couple have decided to be assessed separately for income tax. The facts are that this is a small business run entirely as a joint venture and I do not propose to make any distinction as to shares.'



The court found that to be wrong in law, Sir John May saying (at Q45):

'... it is in my opinion trite law needing no authority that in the circumstances of the present case the respondent's husband had no claim against the appellants. They owed him no duty of care which they breached. From this I think it must follow that in law the plaintiff cannot recover the full amount of the loss of takings of the business. To allow her to do so would effectively afford her husband a right of recovery, where as a matter of law he clearly has none. In my opinion, hard though it may seem at first sight, it is necessary carefully to analyse the nature and legal incidents of the relationship between the plaintiff, and her husband and the business, to use a neutral phrase. Doing so, I must conclude that the plaintiff and her husband carried on the teashop and the bed and breakfast business in partnership.'

Sir John May then referred to s 24 of the 1890 Act with its presumption of equality in the division of the profits of the business, and on the basis of that equality reduced the award of 100% of the profits of the business to the wife to 50%—ie increasing to her benefit the share of the profits that she had agreed with the Revenue (40%).

For Mr Ward, Mr Brennan QC distinguished *Kent v British Railways Board* on the basis that there the plaintiff husband had been a working partner. He submitted that neither Mrs Ward nor Mrs Eid were partners because neither were 'carrying on a business in common [with their husbands and the other couple] with a view of profit' (s 1(1) of the 1890 Act). Neither of those ladies was carrying on a business at all. He then submitted: (1) the court should assess Mr Ward's actual loss. (2) His actual loss should be determined by his half-share of the partnership profits, however this may have been treated for tax purposes. (3) The only deduction from Mr Ward's 50% should be in respect of any sum which could properly be attributed to his wife's actual services to the partnership; as she did nothing for the partnership, nothing should be deducted. (4) Mr Ward and Mr Eid followed the accountant's advice as to how to treat the partnership income for tax purposes, but did not follow his advice about drawing up a partnership deed and did not intend to create a legal relationship of partnership with their wives.

This submission failed. The trial judge was clearly impressed by *Kent v British Railways Board*. He quoted Sir John May ([1995] PIQR Q42 at Q45):

'... hard though it may seem at first sight, it is necessary carefully to analyse the nature and legal incidents of the relationship between the plaintiff, and her husband and the business, to use a neutral phrase.'

He then continued:

'Mr Powles argued that a legal relationship of partnership has to exist before you can claim the tax benefit. By signing the partnership accounts and their separate tax returns, the plaintiff and his wife were declaring that they were partners. The plaintiff's wife had a partnership car. "At first sight this seems very unfair but it is a consequence of a conscious decision taken on advice to secure a positive benefit." (Closing submissions.) The plaintiff, Eid and their wives made a deliberate decision to divide between themselves the profits of the business on the basis that they were legally entitled and obliged to do so. This cannot be treated as a mere accounting advice which affects

a their rights and duties only when they choose. I adopt Mr Powles' argument and conclude that there was and is a partnership of four, including the wives, and Mr Ward is entitled to be compensated only for his quarter share. I also conclude that the plaintiff, Eid and their wives will prefer to retain the tax advantages of continuing to treat themselves as four partners.'

b The source of the reasoning in *Kent v British Railways Board* was *Lee v Sheard* [1955] 3 All ER 777, [1956] 1 QB 192. There, the plaintiff was injured in a motor car accident, and succeeded in negligence against the driver of the other car. He was one of the two working directors of a private limited company, the shares in which were divided between the two directors in the proportions 51:49. As a result of his injuries, the plaintiff was unable to work, and in consequence thereof the profits of the company were much lower than they would otherwise have been, and consequently the distribution of the proceeds to the two directors were less than they would otherwise have been. The defence was that the loss was the company's and the company had no claim. This defence failed. Lord Denning MR said ([1955] 3 All ER 777 at 778, [1956] 1 QB 192 at 196):

d 'In these circumstances I think that the plaintiff is entitled to recover his real loss [the £1,500 which the judge found the company would have paid him but for the accident]. So, too, a partner in a partnership would be entitled to recover his own real loss and no more.'

e The issue before us can be encapsulated in the question: 'what was Mr Ward's real loss of earnings and/or earnings capacity?'

For a point which has now assumed so central a prominence, there seems to have been very little evidence as to the setting up of the four-person partnership. On 19 March Mr Ward was being cross-examined by Mr Powles for the defendants. There was the following exchange:

f 'Q. Yes, Mr Ward, the last topic I wanted to ask you about was the financial arrangements of the partnership. As I understand the position, as you say in your proof at para 52, I am sure you agree the restructuring you put in hand was to try and guarantee the future? A. That's right.

g Q. And you also say, at para 21 that the purpose of the partnership is that it exists for investment only? A. Well it is a management—we derive our earnings through the partnership charged out to limited companies.

Q. The way your accountant puts it—vol 2 at p 44—is that the partnership levies management charges to meet the needs of the partners? A. That is correct ...

h Q. At the time of setting up of the partnership I understand your case to be that you were advised by your accountant to arrange for a share of the profits to go to your wives? A. To be allocated to the wives, yes, for taxation.

j Q. Yes, I am quite sure that you would not want to be involved in any way in anything dishonest, would you, it goes without saying. And so you were concerned to ensure that the information which you must have returned to the Inland Revenue would have been true? A. Yes.

Q. You would want to be sure about that. And so I take that the partnership was set up as a proper partnership? A. Yes.'

Mr Powles, perhaps with pride in a cross-examiner's art, attached importance to the answers to the last two questions. We do not share his view as to their

importance, for the simple reason that anyone, whether honest taxpaying man or dishonest tax evader, would give the same answer to the questions. a

However, as a result of those questions, the plaintiff clearly thought that the propriety of making the wives partners when they took no part in the business had been called into question and was upset by that suggestion. Thus, Mr Hunt, the accountant expert witness for the plaintiff, was asked about the partnership and the Revenue's attitude to it in his evidence in chief. He pointed out that an accountant with a married client would seek to take advantage of his or her spouse's tax allowances if that could be done within the confines of tax legislation. b  
The judge intervened at that stage to ask him about the Inland Revenue's attitude to such arrangements. In dealing with the Inland Revenue's stance to such arrangements the accountant said:

'It certainly allows the reality that in this particular instance Mrs Ward has no involvement whatsoever and yet the Revenue are prepared to accept for taxation purposes she is assessed at a quarter share of the profits of the business. The reality is that the Revenue wouldn't really care.' c

The judge confirmed that—'Legally the partner is entitled to divide up the ownership of the partnership as they think fit', to which the witness agreed. Then after another four questions the judge asked—'Would you accept that even if the Revenue knew that the wife's function was not actually active directly in the business they would nevertheless accept the division of the partnership profits into four, the wives declaring their quarters as separate income?' d

It seems that the witness got confused by the complexity of that question because he answered that he 'wouldn't accept it', when it was clear from his full answer that he would. What he said thereafter was— e

'I would say it is quite common.

Q. You are saying there is nothing peculiar about what actually happened in this case? A. There is nothing either peculiar ... [and then the judge intervened to ask a clarifying question and the witness after that continued:] f

A. Nothing unusual, nothing uncommon and nothing wrong or illegal about it. The Revenue in my experience aren't particularly interested as long as they are able to assess the total earnings of the partnership, the way in which those profits are allocated are not of any real concern to them as long as the number on which the assessable profits is based is accurate at that point of time. They tend to rather lose interest.' g

There that topic was left, and it was not explored in cross-examination. Nor was it suggested to Mr or Mrs Ward in their evidence that they had done anything wrong, nor anything other than act in sensible reliance on their accountant's advice. h

But we were told by Mr Brennan for Mr Ward that, in his submissions before the judge, Mr Powles continued to question the propriety of the arrangement. Certainly by the time that the matter came on appeal before us he was doing so, and taking an illegality point (*ex turpi causa non oritur actio*). The respondent's skeleton argument before us pulled no punches: j

'By this appeal, P seeks (in effect) to establish that the 4 partners have been engaged in tax evasion and hence that the partnership was illegal.' [Even giving poetic licence to the words "in effect", that was not correct. As Mr Powles eventually conceded, the plaintiff's stance has always been that there



a was nothing illegal or improper in the payment of 25% of the four-man partnership profit to Mrs Ward when she made no contribution to the partnership business.] 'Not only is this wholly contrary to the evidence but would result in P relying on his own illegality to establish a different partnership agreement which offends the principles of *Tinsley v Milligan* ([1993] 3 All ER 65, [1994] 1 AC 340).'

b He identified the kernel of what he relied on in *Tinsley v Milligan* [1993] 3 All ER 65 at 82, [1994] 1 AC 340 at 336 in Lord Jauncey's speech:

c 'Second: it is well established that a party is not entitled to rely on his own fraud or illegality in order to assist a claim or rebut a presumption. Thus when money or property has been transferred by a man to his wife or children for the purpose of defrauding creditors and the transferee resists his claim for recovery he cannot be heard to rely on his illegal purpose in order to rebut the presumption of advancement (see *Gascoigne v Gascoigne* [1918] 1 KB 223 at 226, *Chettiar v Chettiar* [1962] 1 All ER 494 at 498, [1962] AC 294 and *Tinker v Tinker* [1970] 1 All ER 540 at 543, [1970] P 136 at 143 per Salmon LJ).'

d Again, before this court, it was clear that Mr and Mrs Ward were very upset by the suggestion that they had been doing anything improper when they entered into this scheme at the suggestion of their accountants. Ultimately, Mr Powles recognised that the point he was seeking to make was a bad one. He withdrew it on the basis that it was quite clear that the reality was that Mr Ward was never asserting that his agreement with the Revenue was illegal or a sham or improper in any way. He was right to make that concession.

e But he still asserted that in calculation of Mr Ward's loss, he was tied to the 25% figure agreed with the Inland Revenue.

f Mr Brennan's first submission on behalf of Mr Ward was that Mrs Ward was not a partner because she did not, within the meaning of s 1(1) of the 1890 Act, carry on a business in common with her husband and the Eids with a view of profit. She had nothing to bring to the business, and brought nothing to the business. But, given the fact that the law still accepts sleeping partners (as to which see *Pooley v Driver* (1876) 5 Ch D 458, *Lindley and Banks on Partnership* (17th edn, 1995) para 2-003 and 35 *Halsbury's Laws* (4th edn reissue) para 2)) it seems to us that the only realistic finding is that Mrs Ward was a partner, albeit a sleeping partner.

g We have considered, but rejected, the argument that, partnership being a matter of contract, there was no intention to create legal relations between Mr and Mrs Ward. Both parties must have recognised that their arrangement with the Revenue would have legal consequences.

h One of those legal consequences would be that under s 111 of the Income and Corporation Taxes Act 1988 as originally enacted, trades carried on by two or more persons jointly were assessed on income tax by a joint assessment in the partnership name. So, in the event that the other partners failed to pay the tax, Mrs Ward would have been liable for it. So far from this arrangement putting a part of the family's assets out of the reach of creditors, it brought all the wife's property into the reach of all creditors of the partnership, including the Inland Revenue, or at any rate those creditors who had dealt with the partnership in reliance on the fact that the wife was a partner. In these circumstances, to portray the arrangements as a fraud on the Revenue ignores both the fact that the

Revenue accepts sleeping partnerships, and the advantages to the Revenue in the arrangement made. a

In the light of those matters, we have no difficulty in accepting the unchallenged evidence of Mr Hunt, the accountant called by Mr Ward that the Revenue was not concerned whether the division of the partnership assets agreed by them accurately reflected what was put into the partnership by way of partnership and labour. If at any time or for whatever reason the Revenue b became dissatisfied with the arrangement they had made, they could discontinue it. We regard it as fanciful to assume, as at one point Mr Powles was asking us to assume, that the Revenue agreed the arrangement on the basis that Mrs Ward was providing property and labour equal to that provided by her husband. Part III of the 1988 Act makes clear that the apportionment of profits is an internal c matter for the partners, and the presumption of entitlement to share equally in the capital and profits of the business and contribute equally toward the losses would arise only where there is no agreement between the partners as to the division of profits and liability for losses.

Though Mr Ward and Mr Eid made their wives sleeping partners, there was no formal partnership deed entered into between them. Given the informality of the d arrangements, this is not surprising. But given that informality, it is quite clear that the arrangements between the husbands and wives existed from year to year, and were terminable at will. Mr Ward and Mr Eid together controlled all of the five companies that were passing on the management fees, the partnership depended on them totally and consequently they could at any time have terminated any arrangements. In practice they could have apportioned to e themselves whatever percentage of the profits they thought fit, and obviously the arrangements made with the Revenue would not affect that in any way. The husbands would simply declare the change when it happened.

Against that background we can see no basis whatsoever for measuring Mr Ward's loss of earning capacity by an arrangement reached with the Revenue and f terminable at will, rather than on the realistic basis of the 50:50 split as between the two earning members.

First, we see no reason for assuming that, given the acceptance of sleeping g partnerships, the four-way division of income was either put forward to the Revenue as, or understood by the Revenue as, an agreement accurately representing the comparative value of each partner's contribution to the partnership. There certainly was no evidence to that effect.

Second, there is no public policy reason for holding the parties to that division of profits. The apportionment of profits is an internal matter for the partners h which does not affect anyone but them and the Revenue. It can at best be some evidence of each partners' contribution if the position is otherwise unclear.

Third, the apportionment of profits between the partners is terminable by them at will, year on year. There is no reason to look on it as an 'advancement' i for all time of half the profits of the partnership.

Fourth, we simply do not accept Mr Powles' submission that it is simply the j rub of the green, so that while the figures worked against Mr Ward and to the advantage of the defendants in this case, the defendants would have been equally bound to pay Mr Ward's 25% partnership share, if all he had contributed was 10%, of the property, time and skill which made the partnership profitable.

It follows that, unless constrained by authority to do otherwise, we would accede to propositions 1, 2 and 3 put forward by Mr Brennan, namely that Mr Ward's actual or 'real' loss (whether of earnings or earning capacity—we do not

a think it matters) is 50% of the reduced partnership profits, and the only deduction required to be made is one which reflects his wife's contribution to the profitability of the partnership. That, in the circumstances, is nil.

Not only have we been referred to no authority inconsistent with our conclusion, but we have been referred to Australian authority supporting it.

b We have had the benefit, which the trial judge did not, of being referred to *Taroporewalla v Berkery* [1983] 3 NSWLR 28, a decision of the Supreme Court of New South Wales presided over by Hutley JA. On its facts that case was very similar to this. The plaintiff's claim was for economic loss suffered as a result of personal injuries which arose partly from his loss of capacity to continue a profitable second source of employment, a partnership business in which his wife assisted him. She did some work, writing up the books, taking orders, and c making some deliveries. However, the greatest part of the work and in particular the physical work of the silk-screen printing process was done by the plaintiff. Under the partnership he and his wife were treated as equal partners. Each received 50% of the partnership profits. Mahoney JA (at 34–35) in the lead judgment found:

d 'The partnership was, I infer, formed to minimize income tax payable on the business income. The plaintiff's wife did some work in the business but the substantial income was and would have been derived because of the plaintiff's activities. Notwithstanding this, the profits were divided equally between them. The partnership was, as it was assumed in argument, e terminable at will. The Master assessed the plaintiff's damages on the basis that, in calculating the loss suffered by him in this regard, there should be attributed to the plaintiff 80 per cent of the business income. The defendant submitted that this was wrong and that the plaintiff's loss should be calculated by reference to only 50 per cent of that income.'

f In this case too, we conclude that the respective arrangements between husband and wife existed from year to year, and were terminable at will. The husbands controlled the companies that were passing on their management fees to the partnership, and they could simply have turned off the tap at any time.

Mahoney JA correctly identified the two principles:

g '... first, that the plaintiff is to be compensated only for the loss which he has actually suffered, in the past or prospectively; and, second, that that for which the plaintiff is to be compensated, in this regard, is his loss of capacity to derive reward from his efforts.' (See [1983] 3 NSWLR 28 at 35).

h The first principle is pure *Lee v Sheard* [1955] 3 All ER 777, [1956] 1 QB 192, and is non-controversial. The second is right in principle, but its application is the subject of controversy. Mahoney JA found that first the court had to be satisfied that the plaintiff would have used his earning capacity in his wholehearted commitment to the partnership had he not been injured. In both that case and this there is no doubt on that score. Then the real question for the court to j consider was whether the plaintiff's loss of earning capacity should be judged by the measure of what he put into the profitability of the business, or whether, however dominant his contribution to the success of the partnership was, his loss of earning capacity should be limited to only 50% of the potential partnership profits. The court made the following findings in relation to that partnership which would apply equally to Mr Ward's. Those findings were that: (i) the partnership had been formed for his convenience as a reduction in the tax payable



in respect of the business income; (ii) he could have rearranged the terms of the partnership; (iii) in practice he could have appropriated to himself such portion of the partnership profits as he saw fit. a

In those circumstances the court concluded:

'The plaintiff's relationship to the partnership and, as I infer, his capacity and practice to take whatever profits it earned, warranted the conclusion that his loss should be calculated by reference to the whole or substantially the whole of the profits which the partnership would have derived. Approaching the matter in this way, I do not think that the amount of past economic loss attributable to the partnership profits was excessive.' (See [1983] 3 NSWLR 28 at 39). b

So the court upheld a finding that the plaintiff was entitled to 80% of the profits of the business, even though the Partnership Act's presumption of equality, in a case where the partners had not made an individual agreement, would have afforded his wife 50%. c

Comparison can profitably be made with *Jason v Batten (1930) Ltd*, *Jason v British Traders' Insurance Co Ltd* [1969] 1 Lloyd's Rep 281, one of the too few reported cases decided by Fisher J. There the plaintiff was a market trader, the one man in a one-man business, a limited company. But he did not have the beneficial ownership of all the shares in that company. Fifty per cent of those shares were held in trust for his children. d

'The form in which he took the profits was by way of director's fees which were voted to him annually, but the amount so voted was decided by him, in consultation with his accountant, and was quite properly influenced by tax considerations.' (See [1969] 1 Lloyd's Rep 281 at 289). e

In that situation the judge found that the true measure of his loss was the reduction in the net profit of the company caused by his injuries, and was not restricted to 50% of those profits. It does not seem that the contrary was argued. f

In each of those two cases the court took into account the fact that for all practical purposes the plaintiff controlled the company that provided the remuneration for him. In the Australian case, as in our case, the agreement between Mr and Mrs Ward was not formal, in that there was no formal partnership agreement entered into, and nothing in the arrangement alleged committed the partnership to paying 25% of the profits to Mrs Ward for any period of time. Even accepting that this informal agreement between husband and wife was intended to create a legal contractual relationship between them, there could not conceivably be an implied term of that agreement that notice was required for termination of that arrangement. The reality was that it was Mr Ward's earning capacity that would have produced the lost profits, and on the evidence the money received as a result of Mr Ward's efforts ended up in the couple's joint account anyway. It was immaterial whether that money was credited to husband or wife: it would have ended in the joint account anyway. g

We have reread *Kent v British Railways Board* [1995] PIQR Q42 carefully, and do not find it in conflict with the conclusion we have reached. There Sir John May was dealing with a partnership to the success of which both husband and wife contributed. The judge declined to accept the apportionment agreed by the Revenue. And in adopting the presumption of equality in default of agreement under s 24 of the 1890 Act, he expressed himself as looking at the reality. We are sure that if the reality (of the plaintiff's loss measured by her contribution) had h

a been 70%, he would have found for that figure. There is no reason (and no power) for the judge to trump reality in a personal injury claim by any internal allocation of the division of profits in a partnership which does not reflect the true value of the partner's contribution.

b The expansion of the two-man partnership to a four-person partnership occurred in 1988. In 1989 Mr Ward first learned that he had sustained harm from his exposure to asbestos, and of the potential serious consequences to his health and enjoyment of life. If the defendants were right in their contention that paying 25% of the profits to his wife, a sleeping partner at most in the business, it would effectively halve the damages he would recover, then it is clear that that arrangement would have been terminated by agreement between him and his wife. As the marriage subsisted, there would have been no question of his wife c opposing that course. But even if the marriage were troubled at the time (which it was not) Mr Ward could have dissolved the format of the partnership under s 32(c) of the 1890 Act:

d 'Subject to any agreement between the partners, a partnership is dissolved ... (c) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.'

The reality is that Mr Ward could and would have reorganised his affairs if it had been suggested to him that the legal effect of this arrangement was to halve the damages to which he was otherwise entitled. Thankfully, that is not the law.

e Accordingly, we would allow the appeal on the partnership issue. There was, however, one further point taken (although never fully argued) which should be dealt with for completeness. In considering the incidence of future loss, the judge asked himself the conventional question in prospective loss of earnings cases, namely what would have happened to the partnership agreement between the parties had Mr Ward not been injured. He did not set out the question, but f resolved it tersely:

'I also conclude that the plaintiff, Eid and their wives will prefer to retain the tax advantages of continuing to treat themselves as four partners.'

g That conclusion was challenged (by way of an alternative ground) in the notice of appeal:

'a. The Learned Judge's finding that the Plaintiff, Mr Eid, Mrs Ward and Mrs Eid would after the date of his judgment prefer to retain the tax advantages of continuing to treat themselves as four partners was not founded on any evidence and/or was wrong. b. The Learned Judge should instead have inferred that the likely reaction of the Plaintiff, Mr Eid, Mrs Ward and Mrs Eid to finding by the Court that, contrary to their understanding of the situation, Bardon Insulation Partnership was a partnership of four, would be to resolve to dissolve such partnerships and reconstitute Bardon Partnership as a partnership of two, namely the plaintiff and Mr Eid. c. The Learned Judge should in consequence have found that, at least so far as the Plaintiff's future loss of earnings were concerned, his loss of earnings from Bardon Partnership should be assessed on the basis of a one half share of lost Bardon Partnership profits.'

As a result of an observation from the court Mr Brennan did not pursue that ground. So consequently it was never argued.

But, though the point taken did not initially appeal to us, it may be a good one.

Where a plaintiff was, for whatever reason, not earning at full pitch at the time of the accident, in looking to the future, it may be too simplistic simply to ignore the accident—it may be necessary to look at its consequences.

Take by way of illustration the Australian case of *Forsberg v Maslin* [1968] SASR 432. There the plaintiff only worked six months in the year, because for the rest of the year he chose to race speedway—but though a star, he made no profit from the racing. The accident made him unfit for both, and the general damage award reflected loss of earnings on a twelve month per year basis. If the accident were ignored, the answer to the question—‘Would the plaintiff have continued to work just six months a year’—would have been likely to have been Yes. But if the extra ingredient were added to the question—would he have continued only to work six months if he could not race speedway, the answer would have been quite different, and he would recover (as he did) on a 12-month basis.

By parity of reasoning, it seems to us that if in Mr Ward’s case the judge had asked himself the question—‘On injury, if the law was that the plaintiff’s loss was limited to his 25% share, and if he was so informed, what would he have done?—then the answer would be clear. He would have determined the arrangement, and reverted to the 50% his contribution entitled him to.

In assessing his damage, that would be the realistic answer to the alternative ground of appeal.

We have considered whether to suggest that the court should hear argument on this ground. But as it is merely an alternative ground, we have concluded that it is not necessary.

Having allowed this appeal on the partnership point, the consequence is that wherever, in calculating the total sum of the appellant’s award in the course of his judgment, the judge calculated a constituent figure on the basis of Mr Ward’s entitlement to a 25% partnership share only, such figure requires to be reworked on the basis of a 50% share. Counsel have informed us that they are content to effect such calculation.

So far as the constituent figures of the award are concerned, thanks to the narrowing of the issues in the course of argument and a number of concessions made by Mr Brennan in respect of calculations challenged in the original notice of appeal, there are but three points which remain in issue. We deal with them in isolation and without setting out such consequential adjustments to the award as will be required: again, counsel have informed us that they are content to finalise the figures on the basis of our findings.

#### (1) *The cost of employing Simon Ward*

It was the appellant’s case that, as a result of his illness, additional costs had been incurred by the need to employ his son, Simon Ward, as a contract manager. It was further his case (and this was not disputed) that Mr Eid had not been prepared to have such costs treated as costs of the partnership. In the course of his judgment which dealt quite shortly with the figures, the judge accepted that the cost to the appellant of employing Simon Ward was an additional cost arising as a result of the appellant’s illness but, in the succeeding section of his judgment headed ‘Assessment of loss to trial’, his calculations were based entirely on the appellant’s loss of income from the partnership, omitting the Simon Ward costs. This appears to have happened by simple oversight. Following a minor concession as to the quantum of those costs recoverable (£24,125.00 was claimed at trial) the figure claimed by Mr Ward is £18,125.00 and we are satisfied that the award should be increased accordingly.



a (2) *Loss of share of international profits*

b In 1987 the partnership, which had previously simply traded as Bardon Insulation Company, started to run its main business through a limited company, Bardon Insulation Co Ltd, of which Mr Ward and Mr Eid were the only directors and shareholders. In 1987 they also set up Bardon International Ltd in order to do sub-contracting work in Holland. The appellant managed the Dutch contracts from January 1988 and for two years or so the business of International thrived. However the company began to wind down and ceased to work altogether in Holland as the appellant's health deteriorated. The judge concluded in terms that—

c 'the Dutch arm of the group and its profits have been lost ... the Holland operation began to wind down in 1990 and ended in 1992. The Plaintiff's illnesses and absences from work meant that ... the Dutch activities of International could not continue without him'.

d Again, it is plain from the evidence and the figures that, under the heading 'Assessment of loss to trial' the judge failed to award any sum in respect of the loss of profits from International; nor did he award any for continuing loss from that source. He stated in his judgment that the figures from which he worked were figures in a table contained in the report of the defendant's accountant, Miss Hassel, which in turn were taken from a table in Mr Ward's accountant's report. Unfortunately, the judge appears to have overlooked the fact that those figures e did not include figures in respect of International's business. Given the judge's findings of fact and both sides' accountants' evidence, it is clear there was in effect an undisputed loss to the date of trial (on the basis of a 50% share of profits) of £21,152.00, which fell to be included in the award to the appellant.

f (3) *Adjustment for inflation*

The table which the judge himself drew up and set out in his judgment under the heading 'Assessment of loss to trial' showed a calculated annual loss for 1995 as '£9,000.00 (continuing)'. Beneath the table appeared the judge's observation that in the judge's view the figures related reasonably to the average profits stated in the report of the defendants' accountant for 1988 to 1991 compared with the average for 1992 to 1995. Mr Brennan has made a number of criticisms of the judge's calculation, based largely on speculation as to the precise meaning of that last observation; in particular the complaint is made that he did not make clear what his thought processes were in arriving at that figure. It is suggested that the quantum of the figure is such that no, or no sufficient, allowance appears to have h been made over the years of calculation for the effect of inflation upon the amount of Mr Ward's loss.

j It is unfortunate that the judge did not express his reasoning more clearly. However, in the light of what he did say, and in the light of the pattern of the evidence before him, it is reasonably plain to us what exercise he performed in order to reach that figure. He had stated in his judgment:

'I accept Miss Hassel's argument that fully adjusting the historical figures by RPI to 1995 prices is not appropriate, as it fails to take account of the recession. However, I cannot accept that there would not have been some increase of monetary turnover and profit following trends in inflation. Miss Hassel's schedule 2 prepared on 25 March 1996 provides what I accept is a

reasonable guide for the historical difference in actual sales turnover compared to the average for the years 1987–1990.’

It is clear therefore that the judge (a) accepted Miss Hassel’s figures as to the historical difference in actual sales turnover as between 1987–1990 (the years before the time at which the judge considered that the effects of the appellant’s illness started to operate) and 1991–1995 (the affected years), (b) rejected the idea that there should be a straight (ie full) RPI increase, because that would leave out of account the effects of the recession, but (c) indicated that, nonetheless, *some* uplift for inflation should be applied. In that connection he had before him the table of Miss Hassel to which we have referred, which showed an annual loss on the basis of a 25% partnership share of £4,488·00, and a further table containing similar figures adjusted up to 1995 by application of a full RPI adjustment. That table showed an annual loss for 1995 based on a 25% partnership share of £14,556·00. It seems clear to us, on the basis of the judge’s earlier reasoning, that he took the median of £9,000·00 (in round figures) as the appropriate adjusted figure for the annual loss in 1995 and continuing. Thus Mr Brennan’s point based on inflation is a bad one although the figure of £9,000·00 (continuing) will require upward revision to take account of the appellant’s successful arguments.

The consequent adjustments and necessary increases in the various heads of the award should be made in the light of our findings and, once agreed between counsel, we will give judgment in an appropriate sum.

*Appeal allowed. Leave to appeal to the House of Lords refused.*

Dilys Tausz Barrister.

# a Scott and others v National Trust for Places of Historic Interest or Natural Beauty and another

CHANCERY DIVISION

ROBERT WALKER J

b 18, 19, 20, 21 AUGUST 1997

*Judicial review – Availability of remedy – Alternative remedy available – National Trust taking decision to ban deer-hunting with hounds on its land – Plaintiffs seeking to challenge decision by way of judicial review – Whether alternative remedy available – Whether plaintiffs should be granted leave to move for judicial review.*

c *Charity – Proceedings – Parties – Permissible parties – Person interested in charity – National Trust taking decision to ban deer-hunting with hounds on its land – Members of hunts and tenant farmers bringing charity proceedings against National Trust – Whether plaintiffs persons ‘interested in the charity’ – Whether trustees’ decision-making flawed – Charities Act 1993, s 33(1).*

In line with its policy to end deer-hunting with hounds on its land, the National Trust decided not to renew licences to hunt red deer on certain parts of its Devon and Somerset estates. However, there was no question that the deer had to be culled from the estates by some means and various individuals, including members of the hunts affected by the decision and tenant farmers on the estates, applied for judicial review of the National Trust’s decision. The application was refused by the judge who held that the court did not have jurisdiction to entertain the application in the absence of leave by the Charity Commissioners. This had been refused on the grounds that the application to review the decision should have been brought as ‘charity proceedings’ within the meaning of s 33(8)<sup>a</sup> of the Charities Act 1993. The plaintiffs therefore obtained leave to commence proceedings by originating summons under the 1993 Act from the Charity Commissioners, who however refused to authorise an application for judicial review. The National Trust applied to strike out the proceedings claiming, *inter alia*, that the plaintiffs had no standing to bring charity proceedings under s 33(1)<sup>b</sup> of the 1993 Act as they were not ‘interested’ in the National Trust. The plaintiffs applied under s 33(5) of the 1993 Act for leave to take judicial review proceedings against the National Trust. They also applied for interlocutory injunctive relief.

**Held** – (1) A person was ‘interested’ in a charity within the meaning of s 33(1) of the 1993 Act if he had an interest materially greater than or different from that possessed by ordinary members of the public in securing its due administration. In the instant case, the huntsmen and tenant farmers could be considered to be partners with National Trust in the management of the land in question, and in the successful preservation of the red deer population on that land. Accordingly, since the preservation of deer could fairly be considered to be one of the Trust’s statutory purposes under s 4(1) of the National Trust Act 1907, the plaintiffs did have sufficient interest within s 33(1) of the 1993 Act to bring charity proceedings.

a Section 33(8) provides: ‘In this section “charity proceedings” means proceedings in any court in England or Wales brought under the court’s jurisdiction with respect to charities, or brought under the court’s jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes.’

b Section 33(1) is set out at p 712 h, post



The application to strike out the originating summons proceedings would therefore be dismissed (see p 714 *d e* and p 715 *c to h*, post); *Re Hampton Fuel Allotment Charity* [1989] Ch 484 applied; *Haslemere Estates Ltd v Baker* [1982] 3 All ER 525 distinguished. a

(2) In order to challenge the decision of a body by way of judicial review, that body had to be a public one, and, normally, there had to be no alternative remedy available. Since the National Trust was a charity of exceptional importance to the nation and its purposes and functions were of high public importance, as was reflected by the special statutory provisions which existed for its regulation, it had all the characteristics of a public body which was *prima facie* amenable to judicial review. However, since Parliament had laid down a special procedure for monitoring charities by way of charity proceedings under s 33 of the 1993 Act, and in all but the most exceptional cases that was the procedure that should be followed, there was no good reason for making an exception to the rule that judicial review would not normally be granted where an alternative remedy was available. Accordingly, the application for leave to take judicial review proceedings would be dismissed (see p 712 *b* and p 716 *f* to p 717 *f*, post); *R v Chief Constable of the Merseyside Police, ex p Calveley* [1986] 1 All ER 257 applied. b c

(3) In making decisions in exercise of their fiduciary functions, trustees had to act in good faith, responsibly and reasonably, and had to inform themselves, before doing so, of matters relevant thereto. If they failed to do so, the court would intervene. In the instant case, however, the evidence as to the National Trust's decision-making process was such that the court would not do so. The application for injunctive relief would therefore be dismissed (see p 717 *g* to p 718 *a* and p 719 *e*, post); dictum of Lord Reid in *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896 at 905 applied. d e

## Notes

For the meaning of 'charity proceedings', see 5(2) *Halsbury's Laws* (4th edn reissue) para 461.

For judicial review generally, see 1(1) *Halsbury's Laws* (4th edn reissue) para 60. f

For the National Trust Act 1907, s 4, see 32 *Halsbury's Statutes* (4th edn) (1996 reissue) 551.

For the Charities Act 1993, s 33, see 5 *Halsbury's Statutes* (1993 reissue) 916.

## Cases referred to in judgment

*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223, CA. g

*Benthall v Kilmourey (Earl of)* (1883) 25 Ch D 39, CA.

*Brooks v Richardson* [1986] 1 All ER 952, [1986] 1 WLR 385.

*Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935, [1985] AC 374, [1984] 3 WLR 1174, HL. h

*Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896, HL.

*Gunning v Buckfast Abbey Trustees Registered* (1994) Times, 9 June.

*Hampton Fuel Allotment Charity, Re* [1989] Ch 484, [1988] 3 WLR 513, CA.

*Haslemere Estates Ltd v Baker* [1982] 3 All ER 525, [1982] 1 WLR 1109.

*Hastings-Bass (dec'd), Re, Hastings v IRC* [1974] 2 All ER 193, [1975] Ch 25, [1974] 2 WLR 904. i

*IRC v Educational Grants Association Ltd* [1967] 2 All ER 893, [1967] Ch 993, [1967] 3 WLR 41, CA.

*IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93, [1982] AC 617, [1981] 2 WLR 722, HL.

*Jones v Williams* (1767) Amb 651, 27 ER 422.

- Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513, [1990] 1 WLR 1587.
- a** *National Anti-Vivisection Society v IRC* [1947] 2 All ER 217, [1948] AC 31, HL.
- R v Chief Constable of the Merseyside Police, ex p Calveley* [1986] 1 All ER 257, [1986] QB 424, [1986] 2 WLR 144, CA.
- R v London CC, ex p London and Provincial Electric Theatres Ltd* [1915] 2 KB 466, CA.
- R v Panel on Take-overs and Mergers, ex p Datafin plc (Norton Opax plc intervening)* [1987] 1 All ER 564, [1987] QB 815, [1987] 2 WLR 699, CA.
- b** *R v Somerset CC, ex p Fewings* [1995] 1 All ER 513; *aff'd* [1995] 3 All ER 20, CA.
- Rendall v Blair* (1890) 45 Ch D 139, CA.
- Stannard v Fisons Pensions Trust* [1992] IRLR 27, CA.
- Verrall, Re, National Trust for Places of Historic Interest or Natural Beauty v A-G* [1916] 1 Ch 100, [1914–15] All ER Rep 546.
- c** *Wilkes' (Beloved) Charity, Re* (1851) 3 Mac & G 440, 42 ER 330, LC.

### Cases also cited or referred to in skeleton arguments

- A-G of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd* [1987] 2 All ER 387, [1987] AC 114, PC.
- Baker v Baker* (1993) 25 HLR 408, CA.
- d** *Bradshaw v University College of Wales* [1987] 3 All ER 200, [1988] 1 WLR 190.
- Brittain v Overton* (1877) 25 Ch D 41n.
- Burrows v Sharp* (1989) 23 HLR 82, CA.
- Combe v Combe* [1951] 1 All ER 767, [1951] 2 KB 215, CA.
- Dodsworth v Dodsworth* (1973) 228 EG 1115, CA.
- e** *Gee v National Trust for Places of Historic Interest or Natural Beauty* [1966] 1 All ER 954, [1966] 1 WLR 170, CA.
- Gisbourne v Gisbourne* (1877) 2 App Cas 300, HL.
- Harries v Church Comrs* [1993] 2 All ER 300, [1992] 1 WLR 1241.
- Income Tax Special Purposes Comrs v Pemsel* [1891] AC 531, [1891–4] All ER Rep 28, HL.
- Jorden v Money* (1854) 5 HL Cas 185, [1843–60] All ER Rep 350, 10 ER 868.
- f** *Klug v Klug* [1918] 2 Ch 67.
- Leisure Data v Bell* [1988] FSR 367, CA.
- Locabail International Finance Ltd v Agroexport* [1986] 1 All ER 901, [1986] 1 WLR 657, CA.
- Manisty's Settlement, Re* [1973] 2 All ER 1203, [1974] Ch 17.
- g** *Page v Hull University Visitor* [1993] 1 All ER 97, [1993] AC 682, HL.
- R v Birmingham City Council, ex p Ferrero Ltd* [1993] 1 All ER 530, CA.
- R v Chief Rabbi of the United Hebrew Congregation of GB and the Commonwealth, ex p Wachmann* [1993] 2 All ER 249, [1992] 1 WLR 1036.
- R v Disciplinary Committee of the Jockey Club, ex p Massingberd-Mundy* [1993] 2 All ER 207, DC.
- h** *R v Jockey Club, ex p RAM Racecourses Ltd* [1993] 2 All ER 225, DC.
- Roebuck v Mungovin* [1994] 1 All ER 568, [1994] 2 AC 234, HL.
- Rooke v Dawson* [1895] 1 Ch 480.
- Shepherd Homes Ltd v Sandham* [1970] 3 All ER 402, [1971] Ch 340.
- Tabor v Brooks* (1878) 10 Ch D 273.
- j** *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1981] 1 All ER 897, [1982] QB 133.

### Applications

The plaintiffs, Diana Mary Scott, Donald Summerskill, Martin Watts, Tracey Ann Andrews, William Charles Fewings and Richard Down, in charity proceedings commenced by originating summons on 29 July 1997 against the defendants, the National Trust for Places of Historic Interest or Natural Beauty and the Attorney

General, challenging the validity of the decision of the Trust on 10 April 1997 to end deer-hunting with hounds on Trust land, and the plaintiffs in similar proceedings commenced by writ on 4 August 1997 against the Trust alone, applied for interlocutory relief. The plaintiffs in the originating summons proceedings also applied under s 33(5) of the Charities Act 1993 and RSC Ord 108, r 3 for leave to take proceedings for judicial review against the Trust. The Trust applied to strike out both sets of proceedings under Ord 18, r 19 or under the inherent jurisdiction on the ground that they disclosed no reasonable cause of action or were an abuse of the process of the court and to strike out the originating summons proceedings on the alternative ground that the plaintiffs were not 'interested' within the meaning of s 33(1) of the 1993 Act. The facts are set out in the judgment.

*Charles Aldous QC, John Brisby QC, Andrew Lloyd-Davies and Robert Miles* (instructed by *Knights, Tunbridge Wells*) for the plaintiffs.

*Michael Douglas QC and Simon Henderson* (instructed by *Winckworth & Pemberton*) for the National Trust.

*Judith Jackson QC* (instructed by the *Treasury Solicitor*) for the Attorney General.

**ROBERT WALKER J.** I have before me interlocutory applications in two sets of existing proceedings, and one set of would-be proceedings, with overlapping but not identical parties. First, there are proceedings commenced by originating summons issued on 29 July 1997 in which there are six individual plaintiffs. The first defendant is the National Trust for Places of Historic Interest or Natural Beauty (the National Trust). The second defendant is Her Majesty's Attorney General. Then there are proceedings commenced by a writ issued on 4 August 1997 in which there are five individual plaintiffs (two of whom are also plaintiffs in the originating summons proceedings): the National Trust is the only defendant. Finally, there is also before me an application (under s 33(5) of the Charities Act 1993 and RSC Ord 108, r 3) by the six plaintiffs in the originating summons proceedings for leave to take proceedings for judicial review against the National Trust. A previous application by them (without leave under s 33 of the Charities Act) for leave to take judicial review proceedings against the National Trust, was dismissed by Tucker J on 16 July 1997.

That is enough to indicate that this matter (or amalgam of matters) raises technical and procedural questions of some complexity, to which I fear I shall have to return at length. Behind all the technicalities is an issue about which there are very strong and sincerely held views on both sides, that is the hunting of red deer on Exmoor and the Quantock Hills in North Devon and Somerset. The immediate cause of the litigation has been the decision of the council of the National Trust, taken at a meeting on 10 April 1997, to end deer-hunting with hounds on National Trust land; and in particular, not (after the end of the last season on 30 April 1997) to renew for the 1997-98 (or any later) season, licences to hunt red deer on those parts of the National Trust's land on Exmoor and the Quantocks on which the National Trust owns the sporting rights. This decision followed closely on and was admittedly very largely influenced by a report (the Bateson report) published on 9 April 1997, after some 18 months' fieldwork and research by himself and his assistant, by Professor Patrick Bateson. Professor Bateson is a distinguished zoologist specialising in animal behaviour. He became a Fellow of the Royal Society in 1983. Since 1984 he has been Professor of Ethology (ie animal behaviour) at the University of Cambridge. Since 1988 he has been Provost of King's College Cambridge.

I should make clear that the question for the court is not today (and will not be at trial) whether the court would have reached the same decision as the council of the



a National Trust, or whether that decision was right (if that deceptively simple question admits of any possible answer). The question is whether the decision was lawful and valid and should be given effect to. In this regard I respectfully echo (though I will not repeat) what was said by Laws J at the beginning of his judgment in *R v Somerset CC, ex p Fewings* [1995] 1 All ER 513 at 515–516.

b The land with which this case is concerned is some of the most beautiful in England, inland of the A39 which runs westward from Bridgwater to Watchet, Dunster, Minehead, Porlock and Lynton. The Quantocks lie between Bridgwater, Taunton and Watchet. These hills are designated as an area of outstanding natural beauty and the National Trust owns lands there which, although not very large in area (about 400 hectares) is of strategic importance to the operations of the Quantock staghounds. To the west of the Quantocks are the Brendon Hills and then c Exmoor itself. Both Exmoor and the Brendon Hills are included in the Exmoor National Park, which comprises about 70,000 hectares and extends as far west as Coombe Martin and as far south as Dulverton. The National Trust has several holdings of land in the National Park, of which the most important for present purposes are the adjacent Holnicote and Dunkery estates. These together comprise d over 5,000 hectares and extend from the sea near Selworthy Beacon to near Exford, where the kennels of the Devon and Somerset staghounds are located. The National Trust owns, in total, about one-tenth of the land in the National Park. The whole of the National Park is included in the Devon and Somerset's country, which extends to the edge of Barnstaple. The country of the Quantock staghounds extends to the edges of Bridgwater and Taunton, but the Quantock hills are the heart of their e country. To the south of the Devon and Somerset's country is that of the Tiverton staghounds, but they are not directly involved in this litigation.

The plaintiffs in the originating summons proceedings (and in the application under s 33(5) of the Charities Act 1993) are (in order), firstly, a joint master of the Devon and Somerset staghounds (who is a member of the National Trust), Mrs f Diana Scott, secondly, the huntsman employed by the Devon and Somerset staghounds, thirdly, a whipper-in employed by the Devon and Somerset staghounds, fourthly, a tenant farmer on the National Trust's Holnicote estate, who is chairman of the estate farmers' group and a member of the Devon and Somerset Executive Committee, fifthly, a joint master of the Quantock staghounds, who is also a member of the National Trust, Mr William Fewings, and, sixthly, the g huntsman employed by the Quantock staghounds. I single out the joint masters by name not for reasons of social class distinction, but because they play a large part in the sequence of events. The plaintiffs in the writ action are Mrs Scott and Mr Fewings, the present chairmen of the Devon and Somerset staghounds' and the Quantock staghounds' respective executive committees and the recently retired h former chairman of the Quantock staghounds' executive committee. They all live within the general area which I have described.

Exmoor and the Quantocks are a patchwork of moorland, woodland and land used for stock farming, mostly on small tenanted farms. There are many areas of high ground and many steep, narrow coombes and valleys. The features which make it so attractive to visitors mean that it is not land which is easy to farm j profitably. The tenant farmers' difficulties are increased by the indigenous population of deer (especially red deer) which can break down hedges and fences and consume or damage crops and grass. All the affidavit evidence before me (and there is a very large volume of it) is in general agreement that the red deer in the area must be culled, both in the interests of preserving the deer population as healthy and genetically sound herds and in the interests of the farming community. In the past legitimate culling has been carried out either by hunting deer with hounds (the deer

being killed, when at bay, by shooting with a modified shotgun or occasionally a humane killer) or by shooting by marksmen who stalk the deer. There is also some poaching. The proportion of deer which meet their deaths by hunting in the course of a year as against all other causes of death (legitimate culling by shooting, traffic accidents, poaching and natural causes) is probably between 10 and 20%. The experts agree that exact quantification is difficult. About one half of hunted deer are killed at the end of the chase. The others escape but may or may not have suffered lasting injury from stress. Methods of taking and killing deer are regulated by the Deer Act 1991 (consolidating the Deer Act 1963 as amended).

In practical terms the essential issue between the parties is whether the National Trust has lawfully, properly and reasonably decided that, in future, culling of deer on its land on Exmoor and the Quantocks will be carried out only by shooting. There is a short, objective description of both hunting and stalking deer in annex D to the Bateson Report. There is also a clear and helpful account of the history and organisation of the Devon and Somerset staghounds (which have been in existence since 1855) in the first affidavit of Mrs Scott. The Quantock staghounds are not quite so ancient, but have been in existence since 1917. They are described in the first affidavit of Mr Fewings, who was himself involved in the *Somerset CC* case.

I have briefly identified the interests of the various plaintiffs, or would-be plaintiffs, in the various applications. I must now say something about the National Trust. It was incorporated in 1894 as a company limited by guarantee, but then reincorporated in 1907 by a private Act of Parliament (the National Trust Act 1907). It is now regulated by a series of Acts (mostly private, but one public) the latest being the National Trust Act 1971, which amended its constitution.

The National Trust is a body formed for charitable purposes: see *Re Verrall, National Trust for Places of Historic Interest or Natural Beauty v A-G* [1916] 1 Ch 100, [1914–15] All ER Rep 546. It is moreover a charity whose special place in the affairs of the nation has been recognised by tax exemptions and reliefs (especially in connection with capital taxation) going well beyond those accorded to charities generally. It is also in a special position as regards powers of compulsory acquisition of land.

The general purposes of the National Trust remain as set out in s 4(1) of the National Trust Act 1907:

‘The National Trust shall be established for the purposes of promoting the permanent preservation for the benefit of the nation of lands and tenements (including buildings) of beauty or historic interest and as regards lands for the preservation (so far as practicable) of their natural aspect features and animal and plant life.’

I should, for the sake of completeness, say that those objects have been extended by statute so as to cover more extensively what are sometimes called ‘stately homes’ and their contents, but that point is not material for present purposes. Section 4(2) confers on the National Trust wide powers of managing its land consistently with its statutory purposes.

[His Lordship then recorded that the National Trust has about two million members but is managed by a council of 52 members. He referred to the wishes of donors of land and summarised the history of the controversy within the National Trust about deer hunting and continued:]

On 4 July 1997 the plaintiffs in the originating summons proceedings (which were then not yet on foot) applied under Ord 53, r 3 for leave to apply for judicial review. That important (and increasingly important) jurisdiction is, as its name implies, the

a means by which the court can review and control decisions taken in the public law field by public officers or public bodies. A successful application for judicial review is generally founded on the public officer or body in question exceeding his or its statutory powers or on procedural irregularity or unfairness, or unreasonableness in the extreme sense indicated by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223—see generally the speech of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 950–951, [1985] AC 374 at 410–411 (the *GCHQ* case).

b Under s 31(3) of the Supreme Court Act 1981, reflected in Ord 53, r 3(7) an applicant for judicial review must have a sufficient interest in the matter covered by the application. Mrs Scott and her co-plaintiffs applied for leave (the necessary first step under Ord 53) with a view to having the council decision taken on 10 April 1997, c quashed.

d On 16 July, after a hearing on 14 July (at which the National Trust as well as the applicants were represented by leading counsel, though different leading counsel from those engaged before me) Tucker J refused the application. There is a transcript of his judgment prepared by official shorthand writers, but not, unfortunately, approved by the judge. It appears from that transcript that Tucker J was satisfied that the applicants had a sufficient interest in the matter, but he rejected the application because the National Trust is a charity and is subject to (Tucker J is reported as having said ‘protected by’) the Charities Act 1993. He was not persuaded by a passage quoted from de Smith, Woolf and Jowell *Judicial Review of Administrative Action* (5th edn, 1995) para 3-025, which says: ‘Public functions need not be the exclusive domain of the state. Charities, self-regulatory organisations and other nominally private institutions ... may in reality also perform some types of public function ...’ followed, in the textbook, by a reference to the judgment of Donaldson MR in *R v Panel on Take-overs and Mergers, ex p Datafin plc* (*Norton Opax plc intervening*) [1987] 1 All ER 564 at 576–577, [1987] QB 815 at 838–839. I shall have to come back to the surprisingly difficult question of exactly what Tucker J did decide.

f That was how matters stood a fortnight before the start of the long vacation, which was also the start of the deer-hunting season for the Devon and Somerset staghounds (the Quantock staghounds start on 1 September). The plaintiffs were determined to press on along the lines indicated by Tucker J. On 21 July they applied for and on 28 July obtained consent from the Charity Commissioners for England and Wales (the Charity Commissioners) to commence the originating summons proceedings. The terms of the consent are slightly different from the eventual form of the originating summons, but I do not regard that as important, at least for present purposes.

g By a separate letter dated 28 July the Charity Commissioners declined to authorise an application for judicial review on the ground that they would not be charity proceedings.

h On 31 July (the last day of the legal term) there was a hearing before Lightman J, who—on a motion for interlocutory relief in intended proceedings and on undertakings by the plaintiffs to issue the proceedings—stood over the interlocutory applications until Monday, 18 August (ie Monday of this week) with directions as to evidence and the delivery of a statement of claim in the writ action. In fact, the originating summons and a notice of motion had already been issued on 29 July. The application under s 33 of the Charities Act was issued on 30 July and the writ on 4 August.

i On 13 August the National Trust issued its own notices of motion to strike out the originating summons upon the ground that the plaintiffs had no standing or, alternatively, under Ord 18, r 19 or under the inherent jurisdiction; and to strike out



the writ and the statement of claim under Ord 18 r 19 or under the inherent jurisdiction. The first notice of motion also sought a stay until the National Trust's costs of their successful opposition before Tucker J had been paid or sufficiently secured. That last matter, however, has been resolved and has not been effective before me.

Those, therefore, are the items which have been the agenda before me. But before plunging into the details of the submissions made to me, I think it useful (in order to try to see the wood despite the trees) to reflect briefly on the public element which is, as Donaldson MR stressed in the *Datafin* case, so important in judicial review cases. He said ([1987] 1 All ER 564 at 577, [1987] QB 815 at 838):

'Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction.'

It is easy to recognise a public element in charitable institutions, and especially in a charitable institution which is regulated by Act of Parliament and is of such great national importance as the National Trust. Charitable trusts were being commonly referred to as 'public' trusts long before the expression 'public law' was in common use. As long ago as 1767 Lord Camden LC began his definition of charity as a 'gift to the general public use': see *Jones v Williams* Amb 651, 27 ER 422. In *IRC v Educational Grants Association Ltd* [1967] 2 All ER 893 at 898, [1967] Ch 993 at 1011 Harman LJ quoted that definition and commented that the 'word "public" there runs through all the charity cases'.

The questions of how the law should monitor charities, and of how the law should monitor those public officers and non-charitable bodies which are obviously amenable to judicial review, raise similar problems, to which the law has, it seems to me, provided similar although by no means identical solutions.

The way in which these entities exercise their powers and discretions may affect directly or indirectly many different sections of the public; and even members of the general public who are not personally affected financially or otherwise in any way, may still have very strong and sincerely-held views about the rights or wrongs of decisions, whether by a charity or a local authority on a subject such as hunting. The court has jurisdiction to prevent misuse of public powers either by judicial review or (in the case of a charity) by charity proceedings (as that expression is defined in s 33(8) of the Charities Act 1993). In each case the complainant must have a sufficient interest, either under s 33(1) of the Charities Act 1993 or under s 31(3) of the Supreme Court Act 1981, which in effect gives statutory force to the decision of the House of Lords in *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93, [1982] AC 617. Section 33(1) of the Charities Act 1993, provides:

'Charity proceedings may be taken with reference to a charity either by the charity, or by any of the charity trustees, or by any person interested in the charity, or by any two or more inhabitants of the area if it is a local charity, but not by any other person.'

'Local charity' is defined in s 96(1). It has not been suggested before me that the National Trust can be regarded as a 'local charity'.

Moreover, in each case there is a 'protective filter'—as Nicholls LJ put it in one case that I shall come back to—of the need to get over the preliminary threshold of consent under Ord 53, r 3, of a judge taking the Crown Office List (for judicial review) or of the Charity Commissioners or a judge of the Chancery Division under

a s 33(2) or (5) of the Charities Act 1993 (for charity proceedings). This protective filter is intended to protect public officers, public bodies and charities from being harassed by a multiplicity of hopeless challenges (as has nevertheless occurred, in one series of cases which will be well known to the Attorney General's counsel, in connection with the trusts of the Royal Masonic Hospital). The efficacy of the protective screen is, of course, enhanced by the need for the complainant to have a sufficient interest or an interest in the charity.

b Just as the 'sufficient interest' referred to in s 31(3) of the Supreme Court Act 1981 reflects an old (but developing) body of law on prerogative writs and orders—see especially Lord Wilberforce's and Lord Diplock's speeches in the *Self-Employed* case [1981] 2 All ER 93 at 96–97 and 103–104, [1982] AC 617 at 630–631 and 639–642—so c s 33(1) of the Charities Act 1993 reflects law that goes back at least to ss 17 and 43 of the Charitable Trusts Act 1853. In the old days when education and healthcare was more generally provided through charities, the question whether a schoolmaster or resident medical officer appointed and paid by charity trustees had lawfully been dismissed could be seen either as a matter of employment law or as a matter of the proper administration of charitable trusts. In some nineteenth century cases referred to by Miss Judith Jackson, QC (for the Attorney General) the Court of Appeal d decided that whether the litigation constituted charity proceedings (or rather, the equivalent phrase in the 1853 Act) depended on the nature of the relief sought—see *Benthall v Earl of Kilmourey* (1883) 25 Ch D 39 and *Rendall v Blair* (1890) 45 Ch D 139. It is rightly conceded that the originating summons proceedings are charity proceedings. No such concession is made in relation to the writ proceedings. A e similar concession seems to have been made in a much more recent case before Arden J, *Gunning v Buckfast Abbey Trustees Registered* (1994) Times, 9 June. Those were proceedings brought by parents complaining of the closure of a fee-paying boarding-school run by charity trustees. On a preliminary issue as to the parents' interest the trustees submitted, unsuccessfully, that because their relationship with f the parents was founded in contract, the parents' only interest in the charity was an interest adverse to the charity and that they were therefore not persons interested in the relevant sense. As I say, that submission failed.

The *Buckfast Abbey* case is the most recent case in which the court has had to grapple with the phrase 'interested in the charity' in s 33(1) and its predecessor, s 28(1) of the Charities Act 1960. The court (including the Court of Appeal) has g shown a marked reluctance to embark on any comprehensive definition or explanation of that difficult phrase. But *Re Hampton Fuel Allotment Charity* [1989] Ch 484—the one recent case which has gone to the Court of Appeal—does, in the judgment of Nicholls LJ, give some guidance. The whole passage in Nicholls LJ's judgment ([1989] Ch 484 at 490–494) calls for careful study, but I will read some h crucial passages:

j "The words "interest" and "interested" are words which bear widely differing meanings according to their context. Although section 28 of the Act of 1960 contains no definition, the context does provide a little guidance on what Parliament must have had in mind. First, the context is that of standing to bring charity proceedings with reference to a particular charity. So that the person needs to have some good reason for bringing the matter before the court. Second, whilst there may be special historical reasons for this, it is to be noted that in the case of local charities, any two or more inhabitants of the area of the charity are competent plaintiffs. So there the net is spread widely. Third, a protective filter exists in respect of charity proceedings, in that persons competent to bring charity proceedings under section 28(1) generally require

approval from the Charity Commissioners or the court, under section 28(2) [or] (5). So that concern to avoid charities being vexed with frivolous and ill founded claims does not dictate that "person interested" must be given a narrow meaning. Fourth and importantly, the historic role of the Attorney General, representing the Crown, is preserved in relation to charity proceedings by section 28(6).' (See [1989] Ch 484 at 493–494.)

Then, after a reference to some observations by Lord Macnaghten, Nicholls LJ continued (at 494):

'Again, as Lord Simonds observed in *National Anti-Vivisection Society v. Inland Revenue Commissioners* ([1947] 2 All ER 217 at 232, [1948] AC 31 at 62), it is the right and duty of the Attorney-General to intervene and inform the court if the trustees of a charitable trust fall short of their duty. Thus the interest which ordinary members of the public, whether or not subscribing to a charity, and whether or not potential beneficiaries of a charity, have in seeing that a charity is properly administered is a matter in respect of which the Attorney-General remains charged with responsibilities. He can institute proceedings *ex officio* or *ex relatione*. This suggests, therefore, that to qualify as a plaintiff in his own right a person generally needs to have an interest materially greater than or different from that possessed by ordinary members of the public such as we have described. In our view that may be as near as one can get to identifying what is the nature of the interest which a person needs to possess to qualify under this heading as a competent plaintiff. It is not a definition. But charitable trusts vary so widely that to seek a definition here is, we believe, to search for a will-o'-the-wisp. If a person has an interest in securing the due administration of a trust materially greater than, or different from, that possessed by ordinary members of the public as described above, that interest may, depending on the circumstances, qualify him as a "person interested." It may do so because that may give him, to echo the words of Sir Robert Megarry V.-C. in *Haslemere Estates Ltd. v. Baker* ([1982] 3 All ER 525 at 537, [1982] 1 WLR 1109 at 1122): "some good reason for seeking to enforce the trusts of a charity or secure its due administration ..." We appreciate that this is imprecise, even vague, but we can see no occasion or justification for the court attempting to delimit with precision a boundary which Parliament has left undefined.'

As to Nicholls LJ's fourth point, I would, with diffidence, comment that although the power (and on appropriate occasions the duty) of the Attorney General to intervene is beyond question, there may often be occasions when (on grounds of expense to public funds, or uncertainty as to the outcome or otherwise) the Attorney General may perfectly properly decide not to intervene. By enacting s 33 of the Charities Act 1993 and its predecessors, Parliament has plainly intended not to give the Attorney General a monopoly of proceedings for judicial monitoring of charities. As Nicholls LJ said in his second and third points, the net is spread widely and there is a protective filter (though perhaps those metaphors do not, with great respect, sit very happily together). The purpose of the filter is, as I have said, to protect charities from being harassed and put to expense by a multiplicity of claims, which may or may not be well-founded, by persons who may or may not fairly be described as 'busybodies' (compare the argument in the *Self-Employed* case [1982] AC 617 at 627).

The Court of Appeal in the *Hampton* case emphasised (as did the House of Lords, in the judicial review context, in the *Self-Employed* case) that the question of interest is not simply a bare question of law, but depends on all the circumstances of the particular case. Counsel for the National Trust (Mr Michael Douglas QC, with Mr



a Simon Henderson) rely on the decision of Megarry V-C in *Haslemere Estates Ltd v Baker*, for excluding as a sufficient interest that of a person claiming adversely to the charity. That case was a claim by a property developer against the trustees of Dulwich College. It was a wholly commercial dispute which had no real connection with the internal or functional administration of charitable trusts. The nineteenth century cases about schoolmasters and medical officers, and the *Buckfast Abbey* case, b show that the position may be different when the complainant, although having some sort of contractual link with the charity trustees which might, on analysis, be described as adverse, is really complaining about the way in which the charity is performing its essential functions. In the *Hampton* case [1989] Ch 484 at 492 it is recognised that if land is functional land of a charity, that may make an important difference.

c In this case the Devon and Somerset staghounds and the Quantock staghounds have been hunting deer on Exmoor and the Quantocks since long before the National Trust owned land there. Whether their activities are regarded as laudable or deplorable, the affidavit evidence makes out a strong case that they are an important part of the rural economy in contributing to deer culling, in providing a d service in destroying and removing sick and injured beasts, and generally in deer management—the need for which was recognised and strongly emphasised in the Savage working party recommendations. They contribute to the local economy through livery stables, bed-and-breakfast accommodation and in other ways. They freely co-operated with the research carried out over an 18-month period by Professors Bateson and Dr Bradshaw on behalf of the National Trust. Their e co-operation is clearly still needed, and hoped for, by the National Trust in any modified schemes of deer management which may be needed as a result of deer-hunting ceasing on National Trust land (except for the 750 hectares or thereabouts of the Dunkery Estate).

f I find it quite impossible to equate the plaintiffs' position with that of the commercial property developer in the *Haslemere Estates* case. It seems to me that until this year and for many years the hunts and the tenant farmers have been in a loose, but nevertheless, a real sense, partners with the National Trust in the management of its land on Exmoor and the Quantocks, and in the successful preservation of the red deer population, whose preservation can fairly be regarded as one of the National Trust's statutory purposes under s 4(1) of the National Trust g Act 1907.

For those reasons I conclude that the plaintiffs in the originating summons proceedings have a sufficient interest (within the meaning of s 33(1) of the Charities Act 1993) to bring charity proceedings in the form of the originating summons. I h need not decide whether the fact that individuals pay ordinary annual subscriptions as members of the National Trust (as Mrs Scott and Mr Fewings do) would by that alone give them a sufficient interest. There are about two million members of the National Trust, so that would be to cast the net very wide indeed, and what Nicholls LJ said in the *Hampton* case [1989] Ch 484 at 493 seems to me to be fairly definitely against it. The apparent concession is *Brooks v Richardson* [1986] 1 All ER 952, [1986] j 1 WLR 385 (which is one of the numerous reported and unreported cases concerned with the Royal Masonic Hospital), even if it was approved, or half-approved, by Warner J in that case, it cannot, it seems, be regarded as sound.

I have thought it right to go into the point on s 33(1) before considering the plaintiffs' application for leave to apply for judicial review, because there is (as I have tried to show) an obvious though not exact parallel between charity proceedings aimed at an alleged misuse of decision-making power by a statutory charity and

judicial review proceedings aimed at an alleged misuse of decision-making power by a public officer or body. a

Tucker J's judgment on 16 July (in a form, it must be noted, which has not been corrected and approved by the judge) has been the subject of much debate during the course of the hearing. I must say that the longer the debate went on, the less sure I felt of exactly how far Tucker J's judgment went. On the assumption that the unapproved transcript is correct, I perceive that Tucker J accepted that the plaintiffs b had a sufficient interest for the purposes of judicial review, but neither expressly accepted nor expressly and unequivocally rejected the proposition that 'charities such as the National Trust are amenable to judicial review'. The learned judge concluded that he had no jurisdiction to entertain the application but (especially in view of his comments that the question of the National Trust's status was 'for another day') I think he must have reached his conclusion on jurisdiction simply and c solely because of the absence of leave under s 33 of the Charities Act 1993.

So the practical consequence was that Tucker J told the plaintiffs that judicial review proceedings would be charity proceedings within s 33, but then the Charity Commissioners declined to give leave because in their view judicial review d proceedings would not be charity proceedings. This most unfortunate impasse seems to have arisen from differing approaches to a very abstract question of categorisation. Tucker J must, I think, have seen jurisdiction in practical terms, that is in terms of the High Court's power to grant particular relief in respect of a particular cause of action (that is, a particular set of facts). The Charity Commissioners seem to have looked, rather, at 'pigeonholes' into which the e business of the High Court has traditionally been allocated—compare the reference by Megarry V-C in *Haslemere Estates Ltd v Baker* [1982] 3 All ER 525 at 536, [1982] 1 WLR 1109 at 1121 to 'the age-old equitable jurisdiction over charities and charitable trusts'.

Over 120 years after the Supreme Court of Judicature Act 1875 and with judges of the Chancery Division now regularly sitting to take Crown Office work, the view of f Tucker J is, in my respectful opinion, to be preferred. But I do not, in the end, find it necessary to reach a concluded view about that, for reasons that will appear. I do not think it is helpful, or even possible, to consider the broad question of whether any charity, or even any charity specially established by statute, is subject to judicial review. Charities are, as Nicholls LJ said, many and various. But the National Trust g is a charity of exceptional importance to the nation, regulated by its own special Acts of Parliament. Its purposes and functions are of high public importance, as is reflected by the special statutory provisions (in the fields of taxation and compulsory acquisition) to which I have already referred. It seems to me to have all the characteristics of a public body which is, prima facie, amenable to judicial review, h and to have been exercising its statutory public functions in making the decision which is challenged.

However, it is well established that judicial review will not normally be granted where an alternative remedy is available, whether by way of appeal or otherwise—see *R v Chief Constable of the Merseyside Police ex p Calveley* [1986] 1 All ER 257 at 261–262, 263–264 and 267, [1986] QB 424 at 433–434, at 435–437 and 440 per Donaldson j MR, May LJ and Glidewell LJ respectively. There are exceptions to the general rule, as that case shows. But it seems to me that Parliament has laid down a special procedure—charity proceedings in the Chancery Division—for judicial monitoring of charities, and that in all but the most exceptional cases that is the procedure which should be followed. A possible exception (and this is mere speculation) might be where a local authority held land on charitable trusts and questions about its dealings

a with that land were caught up with other questions about its dealings with land which it owned beneficially (though subject, of course, to statutory constraints). But I can see no good reason for making an exception in this case. The plaintiffs, whatever false starts they made, are now some considerable way down the road of their originating summons proceedings and I have held that they have a sufficient interest to do so. It seems to me that it would be less convenient, not more, if they were now to have to go through the double filter of s 33 of the Charities Act 1933 and s 31 of the Supreme Court Act 1981 in order to bring the substance of their complaint before the High Court. I can readily understand why, after their unsuccessful application in the Crown Office List, the plaintiffs have thought it right to take every precaution against what they may regard as being thwarted again by a technicality. But it seems to me that the right course is for the plaintiffs to proceed with their charity proceedings—that is the originating summons—and that to have parallel judicial review proceedings would simply be wasteful duplication. I do not however, for myself, regard the protective filter and the need for a sufficient interest as matters of technicality, but (for reasons which I have tried to explain) as a sensible and necessary requirement in the public law field, including the law of public (or charitable) trusts.

d Mr Aldous submitted to me that his point on legitimate expectation (again, something I shall have to return to) would or might prosper better in the fresher air of the Crown Office List. That may possibly be so. But even if there would be (in the language of *forum conveniens*) a legitimate juridical advantage, I do not think that Mr Aldous (in the argot of *forum conveniens*) can go forum-shopping in the Chancery Division and the Crown Office List simultaneously. I shall not, therefore, grant leave to the plaintiffs for judicial review proceedings. In the event of an appeal by the National Trust against my decision on s 33(1) of the Charities Act 1993, the plaintiffs will no doubt consider the possibility of a cross-appeal on the judicial review issue. That comment should not be taken as an advance ruling on any application for leave to appeal.

f [His Lordship then referred to the principles regulating the grant of interlocutory injunctions and continued:]

I have heard a lot of submissions about the duties of trustees in making decisions in exercise of their fiduciary functions. Certain points are clear beyond argument. Trustees must act in good faith, responsibly and reasonably. They must inform themselves, before making a decision, of matters which are relevant to the decision. These matters may not be limited to simple matters of fact but will, on occasion (indeed, quite often) include taking advice from appropriate experts, whether the experts are lawyers, accountants, actuaries, surveyors, scientists or whomsoever. It is however for advisers to advise and for trustees to decide: trustees may not (except in so far as they are authorised to do so) delegate the exercise of their discretions, even to experts. This sometimes creates real difficulties, especially when lay trustees have to digest and assess expert advice on a highly technical matter (to take merely one instance, the disposal of actuarial surplus in a superannuation fund).

h So the general principle is clear. In *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896 (a Scottish appeal in the House of Lords, which nevertheless seems also to reflect the law of England) Lord Reid (at 905) said that even where trustees are expressed to have an absolute discretion—

j 'If it can be shown that the trustees considered the wrong question, or that, although they purported to consider the right question they did not really apply their minds to it or perversely shut their eyes to the facts or that they did not act



honestly or in good faith, then there was no true decision and the court will intervene.'

The development of these principles is, I think, still continuing, especially in cases connected with pension schemes: see *Re Hastings-Bass (decd)* [1974] 2 All ER 193, [1975] Ch 25 (a case on a private family trust) and *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513, [1990] 1 WLR 1587 and *Stannard v Fisons Pensions Trust* [1992] IRLR 27 (both pensions cases).

In an imperfect world trustees (like other decision-makers) do often make decisions which are based on less than complete information and less than full analysis and discussion, and there is real difficulty in formulating the test for determining when a decision is so flawed as to be invalid. The authorities just mentioned are not completely clear as to whether the test is whether the trustees, if properly advised and informed, *would* have acted otherwise, or whether it is that that they *might* have acted otherwise. There is also the question of how materially different the trustees' decision would or might have been (for instance, on the facts of this case, the council of the National Trust might have decided on a ban, even contrary to donors' memoranda of wishes, but might have decided to defer the ban for a full year, that is until the end of the current season). To impose too stringent a test may impose intolerable burdens on trustees who often undertake heavy responsibilities for no financial reward; it may also lead to damaging uncertainty as to what has and has not been validly decided.

There are two other general points that I would mention. In reaching decisions as to the exercise of their fiduciary powers, trustees have to try to weigh up competing factors, ones which are often incommensurable in character. In that sense they have to be fair. But they are not a court or an administrative tribunal. They are not under any general duty to give a hearing to both sides (indeed in many situations 'both sides' is a meaningless expression), and I think that some of Mr Aldous' submissions on this point were put too high. Nevertheless, if (for instance) trustees (whether of a charity, or a pension fund, or a private family trust) have for the last ten years paid £1,000 per quarter to an elderly, impoverished beneficiary of the trust it seems at least arguable that no reasonable body of trustees would discontinue the payment, without any warning, and without giving the beneficiary the opportunity of trying to persuade the trustees to continue the payment, at least temporarily. The beneficiary has no legal or equitable right to continued payment, but he or she has an expectation. So I am inclined to think that legitimate expectation may have some part to play in trust law as well as in judicial review cases (where it plainly has an enormously important part to play—see the *GCHQ* case [1984] 3 All ER 935 at 943–944 and 949, [1985] AC 374 at 401 and 408).

The other general point that I want to mention is as to the statement of reasons for trustees' decisions. The minutes of the meeting on 10 April (which were no doubt drafted and considered with exceptional care) record that there was a long discussion by the council (with an added reference, in the corrected minutes, to the impact of the decision on the local community), but there are no details. This probably reflects a widely-held view that trustees need not, and if well advised, should not, give reasons. There is probably a lot of good sense in that, in the general run of cases, but I think the true position was put succinctly by Lord Normand in the *Dundee Hospitals* case [1952] 1 All ER 896 at 900, when he said:

'It was said for the appellants that the courts have greater liberty to examine and correct a decision committed by a testator to his trustees, if they choose to give reasons, than if they do not. In my opinion, that is erroneous. The

a principles on which the courts must proceed are the same whether the reasons for the trustees' decision are disclosed or not, but, of course, it becomes easier to examine a decision if the reasons for it have been disclosed. LORD TRURO's judgment in *Re Wilkes's (Beloved) Charity* ((1851) 3 Mac & G 444, 42 ER 330) ought not to be construed as going beyond that.'

b If a decision taken by trustees is directly attacked in legal proceedings, the trustees may be compelled either legally (through discovery or subpoena) or practically (in order to avoid adverse inferences being drawn) to disclose the substance of the reasons for their decision. Mr Prideaux has already, in his affidavits, provided quite a lot of detail about the decision-making process. If these matters proceed, further evidence about it is likely and it seems likely that there will be cross-examination. c But council members need not fear that everything said in the hurly-burly of debate will be taken as a ground of decision. In *R v London CC, ex p London and Provincial Electric Theatres Ltd* [1915] 2 KB 466 at 490–491 Pickford LJ said:

d '... probably hardly any decision of a body ... could stand if every statement which a member made in debate were to be taken as a ground of decision. I should think that there are probably few debates in which someone does not suggest as a ground for decision something which is not a proper ground.'

[His Lordship then considered the evidence as to the council's decision-making process and declined to grant an injunction and continued:]

e I shall not therefore grant any injunction nor, as I have said, am I going to order the National Trust to hold another council meeting to reconsider the question. But I do think it right to express the view that the National Trust should give serious consideration to that course. The decision on 10 April 1997 seems to me have been rushed, to say the least. The procedure of holding a press conference the day before the meeting, however well-intentioned, seems to me very questionable. It would f not to my mind be any sort of admission of impropriety, or sign of weakness, for the council to take that course. But it will be a matter for the council and its advisers. If a further meeting is to be held to reconsider the decision, the council will not, I think, be under any duty to invite formal representations from the hunts or from their tenant farmers, simply because the views of the hunts and the tenant farmers have come over loud and clear in the submissions which Mr Aldous has been making to g me this week and which are recorded (however inadequately) in this judgment.

h If that suggestion were to be followed (and let me repeat that it is a suggestion, not a direction) it might conceivably—whatever the outcome—enable this litigation to be brought to an end. It is most regrettable that this very expensive and time-consuming litigation should have occurred between the two groups both of which (whatever has been said in the heat of controversy this week) share many admirable aims. I appreciate (first) that no very early decision can be taken on the suggestion and (secondly) that it may have some bearing on any application which the parties might be minded to make for a speedy trial in both or either of the extant proceedings.

j *Strike-out application refused. Leave to apply for judicial review refused. Injunction refused.*

## Mohamed v Alaga & Co (a firm)

CHANCERY DIVISION

LIGHTMAN J

16, 25 MARCH 1998

*Contract – Illegality – Enforceability of contract – Contract with firm of solicitors for payment of share of fees in consideration for introduction of clients – Alleged contract prohibited by rules having effect of subordinate legislation – Plaintiff ignorant of prohibition – Claim for sums outstanding under contract – Whether contract enforceable – Whether alternative claim in restitution available – Solicitors Act 1974, s 31 – Solicitors’ Practice Rules 1990, r 7.*

The plaintiff, a leading member of the Somali community living in the United Kingdom, brought an action against the defendant firm of solicitors, claiming payment of sums under an oral contract which he alleged he had entered into with the defendant. The terms of that contract were, inter alia, that the plaintiff would introduce Somali refugees to the defendant, who would apply for legal aid and represent the refugees on their asylum applications, and that he would help the defendant in preparing and presenting the applications; and in consideration for those services the defendant would pay commission equivalent to one half of any fees received by it from the Legal Aid Board in respect of any Somali nationals who became clients of the firm and who sought and obtained legal aid. Although it was common ground that the alleged agreement was contrary to r 7<sup>a</sup> of the Solicitors’ Practice Rules 1990 made under s 31 of the Solicitors Act 1974, the plaintiff contended that the contract was nevertheless valid and enforceable, and that, if it was not, that he had a valid claim for restitution. The defendant denied that any such agreement had been made, but contended that if it had been it was as a result illegal and unenforceable and a claim in restitution was likewise barred. On an application under RSC Ord 14A the master found in favour of the plaintiff. The defendant appealed. At the hearing of the appeal, the court assumed in favour of the plaintiff that the agreement had been made and that the plaintiff had been unaware at the time of the prohibition in the rules.

**Held** – The court would not enforce a contract which was expressly or impliedly prohibited by statute, and that was so whether the illegality arose directly under the statute or under subordinate legislation. As the 1990 rules constituted subordinate legislation, it followed that the alleged contract was not enforceable; it was of no answer that the plaintiff had been ignorant of the rules when he entered into the contract, since although it was the professional duty of any solicitor to whom an arrangement in breach of the rules was proposed to inform the other party of that fact before entering into the contract, a failure to do so could not validate what was otherwise an illegal contract. Furthermore, although there were circumstances where the law, in order to avoid the defendant being unjustly enriched, could impute to him an obligation to pay the reasonable value of services provided by a plaintiff who was prevented from proceeding with a claim in contract, no such remedy was available where it

a Rule 7, so far as material, is set out at p 723 h j, post



would have the effect of nullifying a statutory prohibition. Accordingly, the plaintiff's alternative claim for restitution also failed and the appeal would be allowed (see p 725 c to j, p 726 c d h j and p 727 f g, post).

*Re Mahmoud and Ispahani* [1921] All ER Rep 217, *Boissevain v Weil* [1950] 1 All ER 728 and *St John Shipping Corp v Joseph Rank Ltd* [1956] 3 All ER 683 applied.

## b Notes

For contracts prohibited by statute, see 9 *Halsbury's Laws* paras 423–426, and for cases on the subject, see 12(1) *Digest* (2nd reissue) 519–531, 4034–4109.

For the rules regulating introductions and referrals to solicitors, see 44(1) *Halsbury's Laws* paras 504–507.

For the Solicitors Act 1974, s 31, see 41 *Halsbury's Statutes* (4th edn) (1995 reissue) 55.

## Cases referred to in judgment

*Boissevain v Weil* [1950] 1 All ER 728, [1950] AC 327, HL.

*Mahmoud and Ispahani, Re* [1921] 2 KB 716, [1921] All ER Rep 217, CA.

*Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, Aust HC.

*St John Shipping Corp v Joseph Rank Ltd* [1956] 3 All ER 683, [1957] 1 QB 267, [1956] 3 WLR 870.

*Sinclair v Brougham* [1914] AC 398, [1914–15] All ER Rep 622, HL.

*Swain v Law Society* [1982] 2 All ER 827, [1983] 1 AC 598, [1982] 3 WLR 261, HL.

## Cases also cited or referred to in skeleton arguments

*Anderson Ltd v Daniel* [1924] 1 KB 138.

*Archbolds (Freightage) Ltd v S Spanglett Ltd (Randall, third party)* [1961] 1 All ER 417, [1961] 1 QB 374, CA.

*Bank für Gemeinwirtschaft AG v City of London Garages Ltd* [1971] 1 All ER 541, [1971] 1 WLR 149, CA.

*Nelson v Nelson* (1995) 132 ALR 133, Aust HC.

*Shaw v Groom* [1970] 1 All ER 702, [1970] 2 QB 504, CA.

*Tinsley v Milligan* [1993] 3 All ER 65, [1994] 1 AC 340, HL.

*Vita Food Products Inc v Unus Shipping Co Ltd (in liq)* [1939] 1 All ER 513, [1939] AC 277, PC.

## Appeal

The defendant, Alaga & Co, a firm of solicitors, appealed from the decision of Master Bragge on 4 November 1997 on an application under RSC Ord 14A, that the contract which the plaintiff, Ali Mohamed, alleged he had entered into with the defendant under which it would pay to the plaintiff a proportion of the fees obtained from the Legal Aid Board in respect of clients introduced to the firm by the plaintiff, was legally enforceable. The facts are set out in the judgment.

*Gerwyn Samuel* (instructed by *Jansons*) for the plaintiff.

*Sir Godfray Le Quesne QC* and *Paschal Welsh* (instructed by *Alaga & Co*) for the defendant.

25 March 1998. The following judgment was delivered.

**LIGHTMAN J.**

*I. Introduction*

On 19 June 1997 Deputy Master Price ordered that an issue arising on the pleadings in this case be determined pursuant to RSC Ord 14A. On 4 November 1997 Master Bragge determined that issue in favour of the plaintiff and this is an appeal by the defendant against that decision. The issue is short, but of some public importance, namely whether an agreement with a solicitor for the payment of a share of the fees earned by that solicitor in consideration of the introduction of clients and the provision of other associated services is legally enforceable, and if it is not legally enforceable, whether the other party has a claim against the solicitor in restitution for the value of the introductions and the services which he has rendered.

Under Ord 14A, the court can decide any question of law at any stage of the proceedings if that question is suitable for determination without a full trial of the action and such determination will finally determine the entire action or any claim or issue therein. Order 14A is accordingly not apt for determining a question which involves a question of fact. There are two issues of fact in this case. The first is whether the agreement alleged by the plaintiff was ever made: the defendant denies this. The second is whether the plaintiff, when (as he alleges) he entered into the agreement, was aware of the prohibition on a solicitor entering into such agreements contained in the Solicitors' Practice Rules 1990 (the rules) made under the Solicitors Act 1974. The plaintiff claims that he was not: the defendant does not admit that this was so. What I am invited to do for the purpose of this application is to assume in favour of the plaintiff both these facts and to decide the legal effect of the agreement if made and if entered into by the plaintiff innocently. I accept this invitation since the question of law is suitable for determination without a full trial and the determination will finally determine the action if the defendant succeeds and will in any event finally determine this issue of law.

*II. Facts*

The plaintiff according to his statement of claim is 'a leading member of the Somali community living in the United Kingdom ... who from time to time assisted refugee Somali Nationals with their applications for asylum and/or residence in the United Kingdom'. He pleads that this status and role in his community led to his entry into an oral contract with the defendant (a firm of solicitors), the terms of which were as follows: (1) the plaintiff would introduce Somali refugees to the defendant, who would apply for legal aid and represent the refugees on their applications for asylum; (2) the plaintiff would help the defendant in various ways in preparing and presenting the applications; (3) in consideration for these services, the defendant would pay commission equivalent to one half of any fees received by it from the Legal Aid Board in respect of any Somali nationals who became clients of the firm and who sought and obtained legal aid; and (4) the defendant would regularly disclose copies of all payments received by it from the Legal Aid Fund in respect of the Somali nationals who became clients of the firm.

The plaintiff claims that pursuant to this contract he has introduced some 243 Somali nationals as clients to the defendant, on whose behalf the defendant has made application for, and obtained, legal aid to assist in their applications for

a asylum, and in return the defendant has already paid him £18,887·18. The plaintiff however claims that further sums are outstanding and due to him and by this action he seeks payment of these sums. In short his case is that the plaintiff and the defendant agreed to exploit the plaintiff's leadership of his community for their mutual profit and have developed a substantial business in the referral by the plaintiff of Somali immigrants to the defendant in return for a substantial reward.

b It is common ground that the alleged agreement is contrary to r 7 of the rules. The plaintiff contends that none the less the contract is valid and enforceable, and that, if even it is otherwise, the plaintiff none the less has a valid claim in restitution. The defence is that no such agreement was made and that, if it was made, because of such breach the agreement is any event illegal and unenforceable and that for the same reason a claim in restitution is likewise barred. The issue is accordingly whether the breach of r 7 debars a claim to enforce the agreement and a claim in restitution.

### III. Law Society Rules

d The material provisions of the 1974 Act read as follows:

‘... 31.—(1) ... the Council [of the Law Society] may, if they think fit, make rules, with the concurrence of the Master of the Rolls, for regulating in respect of any matter the professional practice, conduct and discipline of solicitors.

e (2) If any solicitor fails to comply with rules made under this section, any person may make a complaint in respect of that failure to the [Solicitors Disciplinary] Tribunal [set up under s 46 of the Act] ...

f 37.—(1) The Council, with the concurrence of the Master of the Rolls, may make rules ... concerning indemnity against loss arising from claims in respect of any description of civil liability incurred [by a solicitor or an employee of a solicitor] ...’

The rules, made by the Council of the Law Society with the concurrence of the Master of the Rolls pursuant to s 31(1) of the 1974 Act, (so far as material) provide as follows:

g ‘... 3. Solicitors may accept introductions and referrals of business from other persons and may make introductions and refer business to other persons, provided there is no breach of these [Practice] rules and provided there is compliance with a Solicitors' Introduction and Referral Code ...

h 7.(1) A solicitor shall not share or agree to share his or her professional fees with any person except: (a) a practising solicitor; (b) a practising foreign lawyer ... (c) the solicitor's *bona fide* employee, which provision shall not permit under the cloak of employment a partnership prohibited by paragraph (6) of this rule; or (d) a retired partner or predecessor of the solicitor ...’

j The Solicitors' Introduction and Referral Code (the code) promulgated under r 3 of the rules contains the following section (the section):

‘2 ... (3) Solicitors must not reward introducers by the payment of commission or otherwise. However, this does not prevent normal hospitality.’



A non-compliance with the section constitutes a breach of r 3, for under the terms of r 3 the acceptance of an introduction or referral otherwise than in compliance with the section constitutes a breach of r 3. a

Disciplinary jurisdiction over solicitors who commit breaches of the rules is vested concurrently in the Tribunal and the High Court (see s 50(1) of the 1974 Act). The powers given to the Tribunal by the Act to punish for breach include striking off the roll, suspending from practice and ordering payment of a penalty not exceeding £5,000 which shall be forfeit to the Crown (see s 47). b

In exercising the statutory power conferred by s 31, the Law Society is acting in a public capacity for the protection of the public and the rules which it makes have the effect of subordinate legislation. The House of Lords decided that this was the case in respect of the rules made under s 37 and made it quite clear that this was equally the position in respect of the rules made under s 31: see *Swain v Law Society* [1982] 2 All ER 827 at 830, 834–835, [1983] 1 AC 598 at 608, 614. c

The rule-making power contained in s 31 is conferred for the purpose of securing the public interest in the integrity and independence of the solicitors profession. The primary concern of s 31, the rules and the code is the protection of clients, but that is not its only concern. It is to be noted that neither r 3 nor r 7 nor the section admit of an exception if the clients consent. The section places a blanket ban on solicitors giving a reward in any form (including e.g. the reciprocal referral of clients) for the introduction of business. Rules 3 and 7 place a blanket ban on solicitors sharing or agreeing to share fees subject only to four very limited exceptions. How necessary these regulations are to protect the interests of clients and the interest of the public is easy to see. It is most undesirable that there should be a trade in referrals to a solicitor, where the sole consideration in the mind of the person making the referral should be the best interests of the persons referred and not personal gain. The existence of an agreement to give a reward or to share fees creates the unacceptable risk of exploitation of those in need of legal advice and assistance and of referrals and introductions which are not in the clients' interest being made for pecuniary gain. The existence of the agreement and the relationship of the solicitor and the other party to the agreement may be incompatible with the duty of undivided loyalty owed by the solicitor to the client, and creates the risk of the solicitor being influenced by his fee-sharer into giving advice which is not in the particular client's best interests in order not to offend the fee-sharer (see *Cordery on Solicitors* (1997 edn) vol 1, E, para 233). Further the client may be expected to bear in one form or another the cost of the consideration which the solicitor has agreed to furnish. As an example, in this case where (if the alleged agreement was indeed made) the share of the fees agreed to be paid is one half of that earned by the solicitor, there must be substantial grounds for anxiety that either the clients will only receive one half of the services to which they are entitled or the defendant will be charging (in this case the legal aid fund) double what it should. It is however unnecessary to explore further the purpose behind the rules and section: it is sufficient that the legislature through its chosen delegate, the Council of the Law Society, has perceived the mischief and banned it. So far as solicitors are concerned, the general rule is that clients are not merchantable commodities to be bought and sold. d  
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#### IV. Claim in contract

The plaintiff's case is that there is nothing illegal or inherently wrong in a solicitor agreeing to share his fees or to pay an introduction fee for work; that the

a provisions of rr 3 and 7 are merely designed to regulate the professional conduct of solicitors and, in the event of breach, to give rise to disciplinary offences by the solicitors concerned; that they are not intended to penalise third parties innocently dealing with solicitors unaware that the solicitors are acting in breach of the rules of their profession or to enable the solicitors, by invoking the rules, to retain at the expense of the third parties the benefit of the services rendered without paying anything for them; and that accordingly the rules do not render b the contract illegal or unenforceable. None of these considerations however can have any force if the rules have statutory force and prohibit the entry into or performance of such contracts.

The applicable principle stated by Devlin J in *St John Shipping Corp v Joseph Rank Ltd* [1956] 3 All ER 683 at 687, [1957] 1 QB 267 at 283 is well-established law:

c '... the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not.'

d It is equally clear that it makes no difference whether the illegality arises directly under statute or under subordinate legislation: see *Re Mahmoud and Ispahani* [1921] 2 KB 716 at 728, [1921] All ER Rep 217 at 222 and *Boissevain v Weil* [1950] 1 All ER 728, [1950] AC 327.

e As I have already said, the rules do constitute subordinate legislation. The question to be determined is accordingly whether r 7 prohibits the making by a solicitor of a contract for the sharing of fees. The answer is plainly in the affirmative. The rule expressly prohibits a solicitor both from entering into such contracts and from making any payment in performance of such a contract. If the plaintiff were to succeed in this claim, the court would be sanctioning the entry into agreements for payment which are forbidden and would be requiring f the solicitor to do what statute forbids him from doing (ie paying). I should add that the entry into the contract and its performance are likewise prohibited by r 3 for non-compliance with the section: for they constitute the agreement to reward and the rewarding of the plaintiff for the introduction of clients.

g It is no answer for the plaintiff to say that this practice of sharing fees or the giving of such a reward is countenanced in other professions not equally regulated in this regard by statute or would be countenanced but for the rules and the code. Nor is it an answer that the plaintiff was ignorant of the rules and the code when he entered into the contract (see Devlin J in the *St John Shipping* case). It is highly blameworthy of a solicitor to enter into such a contract, and the more so if he fails to warn a party with whom he deals of the provisions of the rules: h any competent solicitor fit to practise law should know the rules and, if he knows of the rules, honesty and his professional duty require him before entering into any such contract to inform any person who makes to him proposals of arrangements which involve a breach of the rules that they indeed do so. I do not have to consider whether the failure to make disclosure can give rise to a cause j of action on the part of the other party to a transaction. There may be a duty on the part of the solicitor to disclose the ban on such agreements and a claim against the solicitor in damages may be available for breach of this duty. But it is clear that such failure cannot validate what is otherwise an illegal contract.

I should add that, if (as I am bound to assume) the plaintiff was ignorant of rr 3 and 7 and the consequences of breach of these rules, and if this ignorance is prevalent, it is to be hoped that this judgment will dissipate that ignorance so that

such a claim as the present and such a plea of ignorance will not again be made and any current practice of rewarding introductions and of sharing fees (unless the agreement falls within the statutory exceptions) and indeed of paying commissions will be brought to an immediate and summary end. This is particularly important in such sensitive areas as immigration where the clients are likely to be peculiarly susceptible to exploitation.

#### V. *Claim in restitution*

The plaintiff claims that by reason of the provisions of r 7, if the contract is illegal and cannot be enforced, the court should recognise and enforce an obligation on the part of the defendant to pay the reasonable value of the introduction and services rendered.

There are circumstances where a plaintiff, disabled from proceeding with a claim in contract, can none the less recover the fair value of the services which he has provided and of the benefit which the other party has accepted pursuant to the contract. The law may in these circumstances impute to the other party an obligation to pay the reasonable value of those services to avoid him being unjustly enriched. The principle is pithily stated by Deane J in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 (a case where a quasi contractual claim was upheld in face of a statute which declared the contract unenforceable by the plaintiff but not the defendant). He said (at 256):

'The quasi-contractual obligation to pay fair and just compensation for a benefit which has been accepted will only arise in a case where there is no applicable genuine agreement or where such an agreement is frustrated, avoided or unenforceable. In such a case, it is the very fact that there is no genuine agreement or that the genuine agreement is frustrated, avoided or unenforceable that provides the occasion for (and part of the circumstances giving rise to) the imposition by the law of the obligation to make restitution.'

Deane J went on to explain that, though the action is founded on an obligation arising independently of the unenforceable contract, that does not mean that the existence or terms of the contract are necessarily irrelevant. It will ordinarily be permissible for the parties to refer to the contract as evidence (but as evidence only) on the questions whether what was done was done gratuitously and what is the appropriate amount of compensation; and the defendant will be entitled to rely on the contract to limit the amount that is recoverable as fair and reasonable remuneration to the contract sum. I would add that the defendant must likewise be entitled to rely on the provision in the contract which limits the remuneration to payment out of a specified fund or source of funds available to the defendant.

In my view, a claim in restitution is barred in this case for the following reasons.

(a) No such claim is available where the statute forbids the making of the contract and the grant of this remedy is a method of nullifying the statutory prohibition. In *Boissevain v Weil* [1950] 1 All ER 728, [1950] AC 327 a plaintiff sought to recover the sterling equivalent of a loan made in French francs in breach of the Defence (Finance) Regulations 1939, SR & O 1939/950. The House of Lords rejected the claim. Lord Radcliffe said:

'If reg. 2 did extend to this transaction, it forbade the very act of borrowing, not merely the contractual promise to repay. The act itself being forbidden,



a I do not think that it can be a source of civil rights in the courts of this country. It is very well to say that the respondent ought not in conscience to retain this money and that that consideration is enough to found an action for money had and received, but there are two answers to this. Firstly, when the transaction by which the money has reached the respondent is actually an offence by our laws, the matter passes beyond the field in which the requirements of the individual conscience are the determining consideration. Secondly ... if this claim based on unjust enrichment were a valid one, the court would be enforcing on the respondent just the exchange and just the liability, without her promise, which the Defence Regulation has said that she is not to undertake by her promise. A court that extended a remedy in such circumstances would merit rather to be blamed for stultifying the law than to be applauded for extending it. I would borrow the words which LORD SUMNER used in *Sinclair v. Brougham* ([1914] AC 398 at 452, [1914–15] All ER Rep 622 at 648): “The law cannot *de jure* impute promises to repay, whether for money had and received or otherwise, which, if made *de facto*, it would inexorably avoid”. His principle is surely right whether the action for money had and received does or does not depend on an imputed promise to pay.’ (See [1950] 1 All ER 728 at 734–735, [1950] AC 327 at 341.)

e (b) A claim in restitution must be limited (by virtue of the provisions of the contract) to a payment out of the fees received from the referred clients, and any such payment must therefore involve a sharing of those fees, which is itself prohibited by rr 3 and 7.

f (c) Even if the payment were not necessarily to be paid out of the fees received, none the less it would in substance be a payment in consideration of the introduction of clients: such payment accordingly would be in non-compliance with the section and accordingly in breach of r 3.

#### VI. Conclusion

I therefore answer the question raised in the sense that the pleaded agreement, if made, is illegal and unenforceable and that an alternative claim in restitution is not maintainable. I accordingly allow the appeal and dismiss the action.

g *Appeal allowed.*

Celia Fox Barrister.

## Nessa v Chief Adjudication Officer

COURT OF APPEAL, CIVIL DIVISION

MORRITT, THORPE LJJ AND SIR CHRISTOPHER STAUGHTON

5, 9 DECEMBER, 5 FEBRUARY 1998

*Social security – Income support – Entitlement – Person from abroad only entitled to income support if habitually resident in United Kingdom – Meaning of habitually resident – Social security appeal tribunal finding claimant from Bangladesh habitually resident on date of arrival in United Kingdom – Tribunal failing to consider whether claimant resident for an appreciable period of time – Whether tribunal wrong in failing to do so – Income Support (General) Regulations 1987, reg 21(3), Sch 7, para 17.*

On 22 August 1994 N, who had lived all her life in Bangladesh, arrived in the United Kingdom, where her husband had lived and worked from 1962 until his death in 1975. On 6 September 1994 she made a claim for income support, to which, by virtue of reg 21(3)<sup>a</sup> of and para 17 of Sch 7 to the Income Support (General) Regulations 1987, as amended, she was only entitled if she was habitually resident in the United Kingdom. The adjudication officer refused N's claim on the ground that she was not habitually resident, but the social security appeal tribunal allowed her appeal, finding that she was habitually resident on the date she arrived in the United Kingdom. The adjudication officer appealed to the social security commissioner, who allowed the appeal and referred the matter to a differently constituted tribunal for determination, holding that the tribunal had erred in law by only considering whether N had adopted residence in the United Kingdom voluntarily and for settled purposes and had failed to consider whether there had been an appreciable period of residence. N appealed.

**Held** – (Thorpe LJ dissenting) In order to be habitually resident in the United Kingdom for the purposes of the 1987 regulations, as amended, a claimant for income support had not only to be in the country voluntarily and for settled purposes, but also for an appreciable period of time. What was an appreciable period depended on the facts of each individual case, but since the purpose of the amendment was to impose some restriction on entitlement to income support of those who came from abroad, it followed that a person could not be habitually resident on the day of arrival in the United Kingdom. Accordingly, the appeal would be dismissed (see p 731 *fg*, p 733 *d* to *g*, p 742 *j* and p 743 *a* to *f*, post).

Dictum of Lord Brandon of Oakbrook in *C v S* (*minor: abduction: illegitimate child*) [1990] 2 All ER 961 at 965 applied.

### Notes

For income support, see 44(2) *Halsbury's Laws* (4th edn reissue) paras 176–201.

### Cases referred to in judgments

*Bell v Kennedy* (1868) LR 1 Sc & Div 307, HL.

*C v S* (*minor: abduction: illegitimate child*) [1990] 2 All ER 961, sub nom *Re J* (*a minor*) (*abduction: custody rights*) [1990] 2 AC 562, [1990] 3 WLR 492, HL; *affg* [1990] 2 All ER 449, [1990] 2 AC 562, [1990] 3 WLR 492, CA.

<sup>a</sup> Regulation 21(3), so far as material, is set out at p 730 *g* to *j*, post

*F (a minor) (child abduction), Re* [1992] 1 FLR 548, CA.

*Hack v Hack* [1976] FLJ 177.

*IRC v Lysaght* [1928] AC 234, [1928] All ER Rep 575, HL.

*Kapur v Kapur* [1984] FLR 920.

*Lewis v Lewis* [1956] 1 All ER 375, [1956] 1 WLR 200.

*M (minors) (residence order: jurisdiction), Re* [1993] 1 FLR 495, CA.

*M v M (abduction: England and Scotland)* [1997] 2 FLR 263, CA.

*Macrae v Macrae* [1949] 2 All ER 34, CA.

*Shah v Barnet London BC* [1983] 1 All ER 226, [1983] 2 AC 309, [1983] 2 WLR 16, HL.

*S (a minor) (custody: habitual residence), Re* [1997] 4 All ER 251, [1997] 3 WLR 597, HL.

*V v B (a minor) (abduction)* [1991] 1 FLR 266.

#### **Case also cited or referred to in skeleton arguments**

*Cameron v Cameron* 1996 SLT 306, Ct of Sess.

#### **Appeal**

Mrs Joybun Nessa appealed with leave of Simon Brown LJ granted on 25 November 1996 from the decision of Mr Commissioner Mesher on 6 June 1996 whereby he allowed an appeal by the adjudication officer from the decision of a social security tribunal on 6 December 1994 allowing the appellant's appeal from the adjudication officer's decision refusing her claim for income support on the ground that she was not habitually resident in the United Kingdom for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, as amended by the Income-related Benefits Schemes (Miscellaneous Amendments) (No 3) Regulations 1994, SI 1994/1807. The facts are set out in the judgment of Sir Christopher Staughton.

*Richard Drabble QC and Nathalie Lieven* (instructed by T V Edwards) for the appellant.

*Nicholas Paines QC* (instructed by the Solicitor to the Department of Social Security) for the respondent.

*Cur adv vult*

5 February 1998. The following judgments were delivered.

**SIR CHRISTOPHER STAUGHTON** (giving the first judgment at the invitation of Morritt LJ). Mrs Nessa arrived in this country on 22 August 1994. She was then 55 years old, and has lived all her life in Bangladesh. But she had been the wife of Mr Mobarik Ali. He had lived and worked in this country from 1962 until his death in 1975. It was presumably for that reason that she had the right of abode here when she arrived 19 years later. She was not Mr Ali's only wife; nor were her three children the only children fathered by him.

Just over a fortnight later, on 6 September 1994, Mrs Nessa made a claim for income support. An adjudication officer decided that the claim failed on the ground that she was not habitually resident in the United Kingdom during the period for which income support was claimed.

There was an appeal to a social security appeal tribunal. Its decision was as follows:



'The tribunal finds upon the evidence that the appellant is habitually resident *as on the date of arrival* in the United Kingdom and entitled to income support therefrom. The tribunal accepts the evidence of the appellant in that she decided in Bangladesh to be habitually resident in the United Kingdom. She made of her own volition the necessary arrangements regarding her immigration status in the United Kingdom. That her centre of interest is in the United Kingdom and she is here for no other purpose than to be habitually resident here. The tribunal had regard to the case law and commissioners' decision.' (My emphasis.)

A further appeal followed, and was heard by Mr Commissioner Mesher. He held that the social security appeal tribunal had erred in law, for these reasons:

'It is evident that it considered only whether the claimant had adopted residence in the United Kingdom voluntarily and for settled purposes and did not ask whether there had been an appreciable period of residence. It also erred in finding that the claimant was actually entitled to income support without having dealt with all the conditions of entitlement. There is no alternative to referring the appeal to a differently constituted social security appeal tribunal for determination. Although there was some evidence before the appeal tribunal of 6 December 1994 about what the claimant had done between the date of claim and 6 December 1994, for instance the registration with a GP and the taking of DNA tests, I am not in a position to make the necessary findings of fact to give a decision.'

There is now an appeal by Mrs Nessa to this court, after leave was granted by Simon Brown LJ.

Mrs Nessa's entitlement to income support on 6 September 1994 (for that is the relevant date) depended amongst other things on reg 21(3) of the Income Support (General) Regulations 1987, SI 1987/1967, which had recently been amended by the Income-related Benefits Schemes (Miscellaneous Amendments) (No 3) Regulations 1994, SI 1994/1807. It provided:

'... "person from abroad" also means a claimant who is not habitually resident in the United Kingdom, the Republic of Ireland, the Channel Islands or the Isle of Man, but for this purpose, no claimant shall be treated as not habitually resident in the United Kingdom who is—(a) a worker for the purposes of Council Regulation (EEC) No. 1612/68 or (EEC) No. 1251/70 or a person with a right to reside in the United Kingdom pursuant to Council Directive No. 68/360/EEC or No. 73/148/EEC; or (b) a refugee within the definition in Article 1 of the Convention relating to the Status of Refugees done at Geneva on 28th July 1951, as extended by Article 1(2) of the Protocol Relating to the Status of Refugees done at New York on 31st January 1967; or (c) a person who has been granted exceptional leave to remain in the United Kingdom by the Secretary of State.'

By virtue of para 17 of Sch 7 to the regulations the applicable amount of a person from abroad who is a single claimant (as in this case) is nil. It follows that Mrs Nessa was not entitled to income support on 6 September 1994 unless she was then habitually resident here.

The issue on this appeal is whether it is enough to show that the claimant was here voluntarily and for settled purposes. Or must it also be proved that she had

a fulfilled those two conditions for an appreciable period of time, before she could claim to be habitually resident here?

Left to myself and guided only by the ordinary English meaning of words, I would say that a person is not habitually resident here on the day when she arrives, even if she takes up residence voluntarily and for settled purposes. 'Habitually', to my mind, describes residence which has already achieved a degree of continuity. I can illustrate that by this imaginary conversation: Q. Do you habitually go to church on Sunday? A. Yes, I went for the first time yesterday. That does not make sense to me.

b The same view was taken by Lord Brandon of Oakbrook in *C v S (minor: abduction: illegitimate child)* [1990] 2 All ER 961, [1990] 2 AC 562. Lord Donaldson of Lynton MR ([1990] 2 All ER 449 at 454, [1990] 2 AC 562 at 571) in this court had described it as a very interesting question. But Lord Brandon said ([1990] 2 All ER 961 at 965, [1990] 2 AC 562 at 578):

d 'In considering this issue it seems to me to be helpful to deal first with a number of preliminary points. The first point is that the expression "habitually resident", as used in art 3 of the convention, is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. The third point is that there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leave it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B. The fourth point is that, where a child of J's age is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers.'

Mr Drabble QC, for Mrs Nessa, argues that this passage is both obiter and wrong. He relies on two other decisions of the House of Lords where the words in question were 'ordinary residence' or 'ordinarily resident', *IRC v Lysaght* [1928] AC 234, [1928] All ER Rep 575 and *Shah v Barnet London BC* [1983] 1 All ER 226, [1983] 2 AC 309. In the second, which was concerned with education and where there had already been a period of three years' residence, Lord Denning MR and Lord Scarman each equated 'ordinarily' with 'habitually', which (Lord Scarman said) had 'two necessary features ... namely residence adopted voluntarily for settled purposes' (see [1983] 1 All ER 226 at 234, [1983] 2 AC 309 at 342). But he said ([1983] 1 All ER 226 at 236, [1983] 2 AC 309 at 344):

j '... if there be proved a regular, habitual mode of life in a particular place, the continuity of which has persisted despite temporary absences, ordinary residence is established provided only it is adopted voluntarily and for a settled purpose.'

I do not regard that case as plain authority that no appreciable period is required before residence can be described as habitual. a

There were a number of other cases cited by Mr Drabble, mainly in the family jurisdiction. Thus in *Macrae v Macrae* [1949] 2 All ER 34 at 36, which was concerned with the Summary Jurisdiction (Separation and Maintenance) Acts, Somervell LJ said: 'Ordinary residence is a thing which can be changed in a day.' The decision in that case, as Mr Drabble accepts, was that it changed between 25 June and 15 July. b

In *Lewis v Lewis* [1956] 1 All ER 375, [1956] 1 WLR 200 Willmer J was prepared to hold that the wife was ordinarily resident in this country from the time when she boarded a ship to come here from Australia. There were, however, two significant features in that case. First, the wife was returning to a place where she had been ordinarily resident in the past. That may well be a distinguishing feature from the case where, as here, an entirely new residence is adopted. Secondly, the statute there required that a period of ordinary residence should elapse before a certain event could take place, that is to say the invocation of the court's jurisdiction under the Matrimonial Causes Act 1950. That, as it seems to me, may well allow different treatment; it may be right to look back and say that, with hindsight, there was habitual residence from day one. It is different from the present case, where the regulations require there to be habitual residence on the day when the claim for income support is made. c

*Kapur v Kapur* [1984] FLR 920 was another case where a period of residence was required to establish jurisdiction, although it now had to be habitual residence. The conclusion of Bush J was (at 926): d

'... "habitually" means settled practice or usually, or, in other words, the same as for ordinary residence—a voluntary residence, with a degree of settled purpose.' e

In *Hack v Hack* [1976] FLJ 177 Arnold J repeated what Willmer J had said in *Lewis v Lewis*: 'Unless one led a nomadic life, one had to be habitually resident somewhere ...' f

In *V v B (a minor) (abduction)* [1991] 1 FLR 266 at 272 Sir Stephen Brown P, having referred to *Kapur v Kapur* and *Shah's* case, said:

'... a sufficient degree of continuity of residence has been established ... to justify the application of the phrase "habitually resident immediately before removal" in this case.' g

There are then four cases decided after *C v S (minor: abduction: illegitimate child)*. Of these the most important is *Re S (a minor) (custody: habitual residence)* [1997] 4 All ER 251, [1997] 3 WLR 597. There the deputy judge at first instance had said ([1997] 4 All ER 251 at 255, [1997] 3 WLR 597 at 601): '... I bear in mind that it takes time in general to establish a new habitual residence.' h

*C v S* was cited in the speech of Lord Slynn in the House of Lords, apparently without disapproval. Indeed I would say that it was accepted as law, although distinguished. Lord Slynn did however say that habitual residence may change very quickly (see [1997] 4 All ER 251 at 257, [1997] 3 WLR 597 at 603). j

In *Re F (a minor) (child abduction)* [1992] 1 FLR 548 what Lord Brandon said in *C v S* was cited in this court and, as it seems to me, accepted as good law. Butler-Sloss LJ (at 555) said that with a settled intention 'a month can be ... an appreciable period of time'. She emphasised that there had if possible to be a habitual residence for the successful operation of the Child Abduction



a Convention (The Hague, 25 October 1980; TS 66 (1986); Cm 33). Some might say that the same is true for income support, others that it is not.

In *Re M (minors) (residence order: jurisdiction)* [1993] 1 FLR 495 at 500 Balcombe LJ expressly accepted what Lord Brandon had said in *C v S*, and expressed grave doubts (but did not actually decide) whether the children in that case had regained a habitual residence in England. Steyn LJ agreed with b Balcombe LJ, but Hoffmann LJ would have taken a different view—on the ground that the children were moving into a home which was already the habitual residence of the parent who lived there. That may well be a special case.

Finally there is *M v M (abduction: England and Scotland)* [1997] 2 FLR 263. That, as it seems to me, was a case about settled intention, and not about the need for an appreciable period of time. It is true that Butler-Sloss LJ (at 267) regarded c *Shah's* case as 'the most relevant passage of all in the numerous authorities'. She did however add (at 267):

'This court has found periods of only a few months, even as short as one month, have been sufficient in the right circumstances to be treated as a habitual residence.'

d The period in that case was two years.

I can understand that a requirement of some appreciable period of time may cause difficulty in family cases. But in my judgment we ought to follow what was said by Lord Brandon in *C v S*, for six reasons. (1) It accords with the ordinary English meaning of the words in the regulation. (2) It has since been accepted by e this court in *Re F (a minor)*, *Re M (minors)* and *M v M*. (3) It was cited by the House of Lords without disapproval, and I would say accepted as law, in *Re S (a minor)*. (4) The draftsman should be taken to have had in mind the established meaning of 'habitually resident' at the time when those words were introduced by amendment in 1994. (5) If an appreciable period is required in family cases, there f is if anything a stronger argument for that result in the regulation of income support, since there was evidently an intention to impose some restriction on the immediate recourse of those who come from abroad. (6) Lord Brandon's observations, whether obiter or not, were a considered view and should be departed from, if at all, only by the House of Lords.

g I would dismiss this appeal.

**THORPE LJ.** Residence has had a prominent part in family law statutes. Jurisdiction to grant a divorce might depend on the residence of a party. Under the Matrimonial Causes Act 1950 the statutory requirement was three years ordinary residence. However the Domicile and Matrimonial Proceedings Act h 1973 introduced the alternative of one year of habitual residence (*Kapur v Kapur* [1984] FLR 920 established that the change of adjective was not intended to change the nature or quality of what had to be established. Although a first instance decision it has frequently been cited with approval). These statutes, together with others such as the Summary Jurisdiction (Separation and j Maintenance) Acts and the Family Law Act 1986, have spawned innumerable decisions in which the statutory words have been considered in a wide variety of factual circumstances. The density of the footnotes to sections 5.3 and 5.4 of Rayden and Jackson *Divorce and Family Matters* (16th edn, 1991) illustrate that. Many of the cases cited are not family law cases since revenue statutes and welfare statutes have used the same expressions. The cases establish: (1) the words have the same meaning in the different fields of law; and (2) there is no

material distinction between ordinary and habitual residence: *Shah v Barnet London BC* [1983] 1 All ER 226, [1983] 2 AC 309. a

The ease and rapidity of travel has necessitated much development in the field of international family law. It now seems curious to read that the wife in *Lewis v Lewis* [1956] 1 All ER 375, [1956] 1 WLR 200 took 54 days on board ship to travel from Australia to England. The English concept of domicile is not acceptable to civil law systems and all international conventions are likely to adopt the test of habitual residence. The continuing stream of family law cases where habitual residence is argued are mainly drawn from the Child Abduction and Custody Act 1985 incorporating the Hague Convention (Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980; TS 66 (1986); Cm 33). So there has been some shift from an investigation of the date upon which the period of residence commenced (the jurisdiction cases) to whether habitual residence was established by a given date (the abduction cases). In order to uphold the efficacy of the Hague Convention there may be some tendency to find habitual residence established and consequently to lean against the vacuum in transition between the termination of one habitual residence and the acquisition of another. b

Against that background I approach the principal point argued on this appeal, namely whether three sentences in the speech of Lord Brandon in *C v S (minor: abduction: illegitimate child)* [1990] 2 All ER 961, [1990] 2 AC 562 are to be adopted or rejected. The sentences can be isolated by my added emphasis to the complete passage ([1990] 2 All ER 961 at 965, [1990] 2 AC 562 at 578–579): c

‘The third point is that there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long term residence in country B instead. *Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B.*’ d

The sentences emphasised are clearly obiter as is noted in *Dicey and Morris on the Conflict of Laws* (12th edn, 1993) p 162, footnote 36. Indeed Mr Paines QC concedes they are obiter. I accept Mr Drabble QC’s submission that they do not rest on the foundation of earlier authority. Indeed they are contrary to the earlier authorities of *Shah v Barnet London BC* and specifically *Macrae v Macrae* [1949] 2 All ER 34 and *Lewis v Lewis*. In *Shah’s* case [1983] 1 All ER 226 at 234 and 235, [1983] 2 AC 309 at 342 and 343 Lord Scarman said: e

‘I agree with Lord Denning MR that in their natural and ordinary meaning the words mean “that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration”. The significance of the adverb “habitually” is that it recalls two necessary features mentioned by Lord Sumner in *Lysaght’s* case ([1928] AC 234, [1928] All ER Rep 575), namely residence adopted voluntarily and for settled purposes ... Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that “ordinarily f

a resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.'

In *Macrae v Macrae* [1949] 2 All ER 34 at 36–37 Somervell LJ said:

b 'Ordinary residence is a thing which can be changed in a day. A man is ordinarily resident in one place up till a particular day. He then cuts the connection he has with that place—in this case he left his wife; in another case he might have disposed of his house—and makes arrangements to make his home somewhere else. Where there are indications that the place to which he moves is the place which he intends to make his home for at any rate an indefinite period, then as from that date he is ordinarily resident at the place to which he has gone.'

c These authorities were not cited to Lord Brandon for the obvious reason that the point as to the date at which the parent in transition acquired the new habitual residence in substitution for the old was not in issue. In these circumstances I conclude that the approach of Lord Donaldson MR in the Court of Appeal was preferable. He specifically left the point open for later decision when he said ([1990] 2 All ER 449 at 454, [1990] 2 AC 562 at 571):

d 'I think it is a very interesting question whether James and his mother could establish habitual residence in this country as at the moment when they arrived in this country in circumstances in which they had every intention of staying here indefinitely and of settling here. But I do not think, with respect to the argument, that that is the point. The question is: did James's habitual residence in Australia, which certainly existed up to 21 March, continue thereafter? It may take time (I do not say it does) to establish habitual residence, but I cannot see that it takes anytime to terminate it.'

f Nor do I think that subsequent authority advances the law. As Staughton LJ observed in argument, Butler-Sloss LJ in *Re F (a minor) (child abduction)* [1992] 1 FLR 548 preferred to find her way round *C v S* rather than to confront it. Although Balcombe LJ adopted the critical sentences from Lord Brandon's speech in his third proposition in *Re M (minors) (residence order: jurisdiction)* [1993] 1 FLR 495 at 500, he had not heard a full blown attack on the speech as we have. Hoffmann LJ adopted a more questioning approach where he said (at 503):

g 'I should say that if it were necessary for the decision of this case, I would have less difficulty than Balcombe LJ in holding that on 13 July 1992 the children were habitually resident in Oxford. Until the mother changed her mind, the children's presence in Oxford was for a temporary or transient purpose, namely for a holiday from Scotland. Once she decided that they should stay, they became resident and because they were in the mother's settled home and she intended they should remain there, I think they became at once habitually resident. In a case like *Re J (A Minor) (Abduction: Custody Rights)* ([1990] 2 AC 562), sub nom *C v S (A Minor) (Abduction: Illegitimate Child)* ([1990] 2 All ER 961) in which mother and child arrive in a new country together and have to find a settled home, it may be that although they have lost their old residence, it is necessary for some time to keep an open mind on whether their new residence is habitual. But where a child comes into a home which is undoubtedly the habitual residence of the



parent or other person to be responsible for his care and the intention of the parent or parents with parental responsibility is that the child's stay should not be merely transient or temporary, I do not see why the child's residence should not forthwith be treated as habitual.' a

Thus I conclude that the seeming authority in the House of Lords is not binding and the question of whether an appreciable period is an essential ingredient of habitual residence is open for consideration on this appeal. b

I am firmly of the view that it is not. Particularly since this is an important coin in the international family law currency I consider that it should not be confined, defined or refined with judge made rules that may not run very far afield. In every case the judge or tribunal should be free to determine the essential question. That of course is a question of fact, as Lord Brandon said in *C v S* [1990] 2 All ER 961 at 965, [1990] AC 562 at 578, in the passage immediately preceding that already cited: c

'The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case.' d

The need to leave the tribunal unrestricted is underlined by the persistent resistance of the Hague Conference to the definition of the concept of habitual residence and by the following commentary of *Dicey and Morris on the Conflict of Laws* (12th edn, 1993) p 162: e

'There is a regrettable tendency of the courts, despite their insistence that they are not dealing with a term of art, to develop rules as to when habitual residence may and may not be established.'

In those cases where the court surveys the past retrospectively to establish when a period of residence commenced neither common sense nor authority requires an appreciable period to demonstrate the habitual nature of the residence. With the advantage of hindsight the court determines the quality and if satisfied declares that quality from the date of commencement and not from the date of completion of some notional appreciable period. f

Where there is no opportunity for a retrospective survey it is of course attractive to suggest that any assessment of the requisite habitual quality must await the passage of an appreciable period. No doubt in many cases the tribunal or the judge would lack the confidence to declare the quality of the residence without that reassurance. But to say that an appreciable period is an absolute requirement in all cases in which the residence in issue is at its inception is to introduce an undesirable restriction. g h

Even where the residence is at its inception there will be a history to survey. In the present appeal relevant features in the appellant's history include the following. (1) Her husband lived in the United Kingdom from 1962 until his death in 1975 and she has a consequential right of abode here. (2) She made the necessary immigration arrangements to enable her to leave Bangladesh and to come to the United Kingdom for good. (3) She travelled on a one-way ticket bringing all her worldly goods with her. (4) She joined her brother-in-law and his family in London and her only closer relatives are her three adult children in Bangladesh. (5) She has made the necessary application for them to join her here. DNA testing is in progress. j

a Of course that history suggests that there was an appreciable period prior to her physical departure during which she had committed herself to leaving Bangladesh for good. However the formation of the intention to sever all ties has not been suggested as terminating the previous habitual residence. Termination is only achieved by physical departure coupled with the necessary intent. If the physical move rather than the formation of intent signals termination, I do not see why physical arrival with the necessary intent should not signal acquisition.

b Mr Paines submits that if the appeal were to succeed liability to pay benefit would extend to anyone declaring on arrival a subjective intention to stay. I agree with Mr Drabble that that submission caricatures his case. Where a domicile of choice is asserted the court is well used to testing an animus manendi, probing for the real intention in the light of all the surrounding circumstances.

c The avowed intention counts for little if it conflicts with other factors.

d Of course it can be said that the effect of Mr Drabble's submissions is to erode the distinction between the acquisition of a domicile of choice and a habitual residence. The acquisition of a domicile of choice depends upon proof of the necessary intention coupled with residence. But the judicial focus is primarily on the intention. Residence means no more than presence and its duration is immaterial. In *Bell v Kennedy* (1868) LR 1 Sc & Div 307 at 319 Lord Chelmsford said:

e 'It may be conceded that if the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile.'

Thus the transition from one domicile of choice to another requires no more than physical transition supported by the essential intention. But there are already parallels between the two concepts. For example the revival of a domicile of origin has its parallels in the case of the returning national who more readily establishes habitual residence in the United Kingdom than does a foreigner. Nor do I consider that some degree of erosion is premature. Certainly in the field of family law the relevance of the concept of domicile diminishes. If the current negotiations to agree the Brussels II Convention proceed to fruition then domicile as a basis for jurisdiction in divorce will be much reduced within the European Union. Indeed I anticipate that one of the consequences of the need to harmonise family law systems throughout Europe and beyond will be the adoption of the concept of habitual residence as the generally accepted test of what connects an individual to a particular society. That process will be impeded unless the concept is given a common construction. If habitual residence is to be the dominant concept then it should not be so construed as to permit a vacuum for persons in transition. No such vacuum between domicile of origin and domicile of choice or between domiciles of choice is possible in law. It is particularly undesirable that there should be a vacuum between habitual residences for children who would be temporarily deprived of rights, protection, or benefits.

j Since writing the above I have had the advantage of reading the judgments of Morritt LJ and Sir Christopher Staughton. Despite their powerful reasoning I maintain my dissent partly because there seems little likelihood of the concept of habitual residence being given different values in social security and family law and partly because what I regard as an aberration generated by Lord Brandon is in a family law case. For the family lawyer perhaps the adjective habitual does not in this context carry its literal sense so much as the sense of the quality of the

connection of the individual to the relevant society for the purpose of the convention or legislation to be applied. The adjective ensures that that connection is not transitory or temporary but enduring and the necessary durability can be judged prospectively in exceptional cases. a

For all these reasons I would allow this appeal and hold both that the commissioner was wrong in law to conclude that habitual residence could not be achieved before the expiration of an appreciable period after arrival. b

**MORRITT LJ.** By virtue of the Income Support (General) Regulations 1987, SI 1987/1967 as amended by the Income-related Benefits Schemes (Miscellaneous Amendments) (No 3) Regulations 1994, SI 1994/1807, reg 21, income support is not payable to a 'person from abroad', as defined in sub-para (3) of that regulation. With effect from 1 August 1994, and subject to immaterial exceptions, such a person includes one 'who is not habitually resident in the United Kingdom'. Mrs Nessa arrived in the United Kingdom from Bangladesh on 22 August 1994. She had never been to the United Kingdom before but was entitled to a right of abode because her husband had lived and worked here until his death in 1975. c

The tribunal accepted the evidence of Mrs Nessa. They found that she had decided in Bangladesh to be habitually resident in the United Kingdom; that she had of her own volition made the necessary arrangements regarding her immigration status in the United Kingdom; that her centre of interest was then in the United Kingdom and that she was in the United Kingdom for no other purpose than to be habitually resident in the United Kingdom. On those facts they decided that Mrs Nessa was habitually resident in the United Kingdom as on and from the date of her arrival in the United Kingdom, 22 August 1994, and so entitled to income support as from that date. d

The commissioner disagreed. He thought that the tribunal had erred in law. He said: e

'It is evident that it considered only whether the claimant had adopted residence in the United Kingdom voluntarily and for settled purposes and did not ask whether there had been an appreciable period of residence.' f

The reference to an appreciable period of residence is a reference to the speech of Lord Brandon of Oakbrook in *C v S (minor: abduction: illegitimate child)* [1990] 2 All ER 961, [1990] 2 AC 562. That case concerned the meaning of the words 'habitually resident' in art 3 of the Hague Convention (Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980; TS 66 (1986); Cm 33)) enacted as part of the law of the United Kingdom by the Child Abduction and Custody Act 1985. The relevant passage has been quoted in full and I need not repeat it. It is sufficient to refer to the three sentences where Lord Brandon of Oakbrook said ([1990] 2 All ER 961 at 965, [1990] 2 AC 562 at 578): g

'A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so.' h

For Mrs Nessa counsel submit that that part of the speech of Lord Brandon of Oakbrook was obiter and wrong with the consequence that the error of law had i



a been committed by the commissioner not the tribunal. They ask that the decision of the tribunal be restored.

The essence of the argument for Mrs Nessa is that Lord Brandon of Oakbrook had not been referred to a number of relevant authorities which established that 'habitual residence' is to be equated with 'ordinary residence' and that ordinary residence may be acquired in the course of a single day and without the lapse of any appreciable period. Therefore, so it is said, habitual residence may be so acquired also. It is also contended that subsequent authorities have reached a different conclusion to that of Lord Brandon of Oakbrook. It is suggested that if it is necessary in all cases that there should have been an appreciable period of time before residence may become habitual residence then such requirement will be productive of injustice and inconsistent with Community law. The injustice is said to arise in the cases of the permanent immigrant, the returning national and the resident who comes to the United Kingdom for a clearly defined period and purpose. The inconsistency with Community law relied on arises from the use of the expression 'habitual residence' in Council Regulation (EEC) 1408/71. This is used to define residence for the purpose, amongst others, of art 3. That article equates the position of a resident to that of a national of the member state in which he resides for the purpose of imposing obligations and creating entitlements to benefits under the social security legislation of that state.

For my part I do not find any help in the cases relied on by Mrs Nessa which were decided before the decision of the House of Lords in *C v S*. They do not invalidate the observations of Lord Brandon of Oakbrook as to the ordinary and natural meaning of the words 'habitual residence'. Thus in *Macrae v Macrae* [1949] All ER 34 the Court of Appeal was concerned with the application of the words 'ordinary residence' on 15 July to one who had left the matrimonial home in England on 25 June with the intention of making his home in Inverness. The Court of Appeal stated that a man can and generally does change his ordinary residence in the course of a day. But that was not the issue before the court. The question was whether the husband was ordinarily resident in Scotland at the time the summons was reissued and served on him on 15 July. On any view there had been an appreciable period of time between the two dates.

In *Lewis v Lewis* [1956] 1 All ER 375, [1956] 1 WLR 200 the issue was whether the wife had been ordinarily resident in England for three years before she presented her divorce petition on 15 October 1954. Three years earlier she had left her husband in Australia to return to England where she had been born and brought up. She had embarked on 11 September 1951 and docked in England on 4 November 1951. Willmer J held that in those circumstances she had been ordinarily resident in England for the full period for the act of boarding the ship amounted to a resumption of her ordinary residence in England. This conclusion is hardly surprising given the concession that she was ordinarily resident in the United Kingdom when she landed on 4 November.

In *Hack v Hack* [1976] FLJ 177 Arnold J was concerned with the question whether the husband had been habitually resident in the United States at the time he obtained a divorce in the State of Missouri so that the validity of that decree should be recognised pursuant to s 3 of the Recognition of Divorces and Legal Separations Act 1971. In concluding that he was the judge stated that quality of residence was more important than its length, that intention though required was not determinative and that unless one was a nomad one had to be habitually resident somewhere. I do not think that this case is of any assistance in determining the issues on this appeal.

In *Shah v Barnet London BC* [1983] 1 All ER 226, [1983] 2 AC 309 the issue was whether the claimants for education awards had been ordinarily resident in the United Kingdom for the requisite period of three years preceding the first year of the course in question. In the case of Nilish he had arrived in the United Kingdom on 7 August 1976 and his course began on 2 October 1979. The dates in respect of the other four applicants appear to have been similar. In none of them was the issue when the period of ordinary residence had begun. Lord Scarman equated ordinary with habitual residence ([1983] 1 All ER 226 at 233, [1983] 2 AC 309 at 340) and considered that such residence had two necessary features, namely voluntary adoption and for settled purposes ([1983] 1 All ER 226 at 234 and 234, [1983] 2 AC 309 at 342 and 343). He summarised the effect of all the necessary features in these words:

‘For if there be proved a regular, habitual mode of life in a particular place, the continuity of which has persisted despite temporary absences, ordinary residence is established provided only it is adopted voluntarily and for a settled purpose.’ (See [1983] 1 All ER 226 at 236, [1983] 2 AC 309 at 344.)

In *Kapur v Kapur* [1984] FLR 920 the issue was whether the husband had been habitually resident in England throughout the period of one year immediately preceding the presentation of the petition for divorce. He had come to England on 2 August 1981 and presented his petition on 1 October 1982. Bush J considered that there was no real distinction to be drawn between ordinary and habitual residence and that the husband had been habitually resident in England for the necessary period. In reaching that conclusion it was unnecessary for him to decide when the husband became habitually resident.

The last case relied on before the decision of the House of Lords in *C v S* is *V v B (a minor) (abduction)* [1991] 1 FLR 266. In that case the issue was whether a child who had been taken by his parents from England to Australia in November 1989 whence he was abducted by the father on 22 January 1990 had become habitually resident in Australia by the latter date. Sir Stephen Brown P decided that he had. He considered, among other cases, the decisions in *Kapur v Kapur* and *Shah v Barnet London BC*. It seemed to Sir Stephen Brown P—

‘to be quite apparent that a sufficient degree of continuity of residence has been established by the parties with the infant boy, to justify the application of the phrase “habitually resident immediately before removal” in this case.’ (See [1991] 1 FLR 266 at 272.)

I find nothing in the decision of any of these cases inconsistent with the statement of Lord Brandon of Oakbrook in *C v S*. In each of them there was the lapse of an appreciable period of time which Lord Brandon of Oakbrook thought to be necessary before a person could become habitually resident in another place. I agree that the statement of Lord Brandon with regard to the acquisition of habitual residence was obiter and, therefore, not binding on this court but I do not, for reasons I will explain later, agree that it was wrong. Before doing so it is convenient to consider the subsequent cases relied on as indicating a different view.

The first was *Re F (a minor) (child abduction)* [1992] FLR 548. In that case the parents had left their habitual residence in England with their 11-month-old son for Australia (via the United States) on 10 April 1991. On 10 July 1991 the mother abducted the child and returned to England. The issue was whether the child had been habitually resident in Australia immediately before his abduction. The

a judge answered that question in the affirmative. The Court of Appeal concluded that the evidence had justified the judge's conclusion that the family intended to emigrate from England and settle in Australia. Butler-Sloss LJ, having earlier referred to the material passage in *C v S (minor: abduction: illegitimate child)*, said (at 555): 'With that settled intention, a month can be, as I believe it to be this case, an appreciable period of time.' In my view that statement amounts to an acceptance and application of the dictum of Lord Brandon of Oakbrook.

b In *Re M (minors) (residence order: jurisdiction)* [1993] 1 FLR 495 the children had gone to live with their paternal grandparents in Scotland on 11 September 1991 following the break up of their parents' marriage. On 13 July 1992 the mother refused to return the children after a period of staying contact with her in England. On 23 July 1992 the mother applied to the court in England for a residence order in respect of each child. The only issue was that of the jurisdiction of the court in England to entertain the application of the mother. c That depended on whether the children were habitually resident in England on 23 July 1992 or present in England but not habitually resident in Scotland. The judge answered that question in the affirmative and the grandparents appealed. d The Court of Appeal dismissed the appeal on the ground that the children were present in England and not habitually resident in Scotland. Balcombe LJ cited the passage from the speech of Lord Brandon of Oakbrook in *C v S* which I have quoted and he described as the third proposition and observed (at 501):

e 'As stated in the passage from Lord Brandon's speech in *Re J* which is the third proposition above it is easy to lose an habitual residence: it is much more difficult to acquire one. It is sufficient to say that I entertain grave doubts that the children had by 23 July 1992 regained an habitual residence in England.'

f Hoffmann LJ was not so doubtful as Balcombe LJ in the case of a child with his mother returning with her to her home with the settled intention to remain there. He said (at 503):

g 'Until the mother changed her mind, the children's presence in Oxford was for a temporary or transient purpose, namely for a holiday from Scotland. Once she decided that they should stay, they became resident and because they were in the mother's settled home and she intended they should remain there, I think they became at once habitually resident. In a case like *Re J (A Minor) (Abduction: Custody Rights)* ([1990] 2 AC 562), sub nom *C v S (A Minor) (Abduction: Illegitimate Child)* ([1990] 2 All ER 961) in which mother and child arrive in a new country together and have to find a settled home, it may be h that although they have lost their old residence, it is necessary for some time to keep an open mind on whether their new residence is habitual. But where i a child comes into a home which is undoubtedly the habitual residence of the parent or other person to be responsible for his care and the intention of the parent or parents with parental responsibility is that the child's stay should not be merely transient or temporary, I do not see why the child's residence should not forthwith be treated as habitual.'

In my view this case also is entirely consistent with the dictum of Lord Brandon of Oakbrook in relation to the arrival of an adult in a country where he or she had never previously been.

The third case relied on is *Re S (a minor) (custody: habitual residence)* [1997] 4 All ER 251, [1997] 3 WLR 597. In that case it was contended that the child, born in



January 1995 was habitually resident with his mother in Ireland from 4 September 1995 to 16 January 1996. On the latter date the mother brought the child to England. On 10 March the mother died in England. It was admitted that on that date she and the child were habitually resident in England. On 11 March the maternal grandparents, who had come to England from Eire to look after the child, returned with him to Eire. On 13 March a High Court judge in England gave interim care of the child to the father and ordered the grandparents to return the child to England. The issue was whether the High Court judge had had jurisdiction to make that order. The resolution of that issue depended on whether the child was habitually resident in England on 13 March. The conclusion of Lord Slynn of Hadley, with whom the other members of the Appellate Committee agreed, was:

‘... two days with the appellants in Ireland is not sufficient of itself to result in his existing habitual residence being lost and a new one gained. The position is quite different in the case of a mother, with parental rights and on whose habitual residence the child’s habitual residence depends. If she leaves one country to go to another with the established intention of settling there permanently her habitual residence and that of the child may change very quickly.’ (See [1997] 4 All ER 251 at 257, [1997] 3 WLR 597 at 603.)

Once again that case is consistent with the need for the lapse of an appreciable period of time for the acquisition of an habitual residence by an adult. In summary, therefore, I find nothing in the authorities relied on by Mrs Nessa to cast doubt on the statement of principle of Lord Brandon of Oakbrook.

The question for determination is not what the words mean in the context of family law but in the context of the amendment made in August 1994 to the Income Support (General) Regulations 1987, SI 1987/1967, as amended by the Income-related Benefits Schemes (Miscellaneous Amendments) (No 3) Regulations 1994, SI 1994/1807. It would appear that the purpose of the amendment was to enlarge the definition of ‘a person from abroad’ by the inclusion of all who are not habitually resident in the United Kingdom so as thereby to restrict those entitled to income support. In seeking to impose a restriction of that nature the draftsman had available the legislative precedents of ‘ordinary residence’ usually used in the context of taxation and ‘habitual residence’ by then usually used in the context of family law. Clearly there is a substantial measure of overlap between the two but I do not think that they are necessarily the same in relation to the time when residence of the appropriate quality starts.

Sir Christopher Staughton has given as an example the imaginary conversation with the churchgoer to illustrate the normal meaning of the word ‘habitual’. I would also cite another example he gave in the course of argument. The youngster is not an habitual smoker when having his first cigarette. The ordinary meaning of the word habitual requires either an inherent disposition, such as in the phrase ‘habitual liar’ or the product of repetition or continuation, such as in the phrase ‘habitual prisoner’. In neither case can a person who has never been to the United Kingdom before be sensibly described as habitually resident here at the time when she disembarks from the aircraft.

In addition to the ordinary meaning of the word ‘habitual’ the draftsman of the amending regulation must be taken to have been aware of the statement of Lord Brandon of Oakbrook in *C v S*. If he had intended that the ‘residence’ for which he sought to make provision should not be conditional on the lapse of an

a appreciable period of time as well as a settled intention he would not have used the adjective 'habitual' without qualification.

In addition to the ordinary meaning of the word 'habitual' and the judicial and legislative background to its use it is permissible to take account of the purpose for which and the context in which it is used, namely to impose a restriction on entitlement to income support reasonably capable of being applied. It does not seem to me that physical presence in the United Kingdom together with a settled intention to remain but without the lapse of any appreciable period of time since arrival is best calculated to introduce the restriction intended. The additional requirement for the lapse of an appreciable period of time since arrival adds to the fact of physical presence a further fact more easily ascertainable than and confirmatory of a settled intention to remain.

c I see no necessary injustice in the three cases relied on by Mrs Nessa, namely the permanent immigrant, the returning national and the resident for a defined purpose and period. What is an appreciable period will depend on the facts of each individual case for all that is required is what is necessary to give to the fact of residence the quality of being habitual in accordance with the normal meaning of that word. There is no reason why in the three cases relied on 'the appreciable period' should be so long as to cause hardship or injustice. Further the use of the same phrase in the Council Regulation to which counsel referred us is in no sense determinative as there has been no determination by the European Court of Justice of the meaning of the word in that context.

d I appreciate the problems to which Thorpe LJ has referred. Nevertheless I do not think that they justify giving to the word 'habitual' in this regulation a meaning at variance with the normal meaning of that word, as expounded by Lord Brandon and apparently applied by this court in the other cases to which I have referred. I agree with Sir Christopher Staughton that this appeal should be dismissed.

e  
f *Appeal dismissed. Leave to appeal to the House of Lords granted.*

Dilys Tausz Barrister.

## R v Uddin

COURT OF APPEAL, CRIMINAL DIVISION

BELDAM LJ, JOHNSON AND WRIGHT JJ

9 FEBRUARY, 19 MARCH 1998

*Criminal law – Murder – Concerted action – Joint unlawful enterprise – One party to joint enterprise killing victim in manner which other parties could not have suspected – Spontaneous and irrational attack – Degree of foresight required by secondary parties to impose liability for murder.*

The appellant was one of six men who, using poles or bars, had joined in an attack on another man after an argument over the way in which one of the attackers had been driving his car. The victim had died of a stab wound inflicted in the course of the attack by one of the appellant's co-accused, T, who had apparently produced a flick-knife as he had joined in the attack. Apart from the evidence of one witness, who said he had heard someone shout 'Stab him!', there was no evidence that any of the others knew that T had a knife. Five of the attackers were arrested and tried for murder. The appellant and T were convicted of murder, and the other three co-accused were acquitted of murder but convicted of manslaughter. The appellant appealed against conviction on the ground, *inter alia*, that in dealing with the question of joint enterprise, the trial judge had failed to direct the jury that in order to convict the appellant of murder they had to be sure that, as a secondary party to the killing, he had foreseen the use of a knife as a possibility.

**Held** – Where a group of irrational individuals spontaneously attacked a common victim, each intending to inflict serious harm by any means at their disposal, if the victim died as a result of the actions of one participant of a type completely different from those contemplated by the others (eg the use of a lethal weapon) they would not be parties to the killing, although they might be guilty individually of offences of wounding or causing grievous bodily harm. However, if, in the course of the concerted attack, a weapon was produced by one of the participants and the others, knowing that he had it in circumstances where he might use it in the course of the attack, participated or continued to participate in the attack, they would be guilty of murder if the weapon was used to inflict a fatal wound. In the instant case, the jury's attention had not been specifically focused on the use of the knife by T, and whether, on the evidence, they were sure that his co-accused had been aware that he might use it. Accordingly, it would be unsafe to allow the appellant's conviction of murder to stand. The appeal would therefore be allowed, but since there was evidence from which a properly directed jury could have concluded that the appellant was guilty of murder, a retrial would be ordered (see p 751 *b c h* to p 752 *e*, p 753 *h j* and p 754 *d*, post).

*R v Powell*, *R v English* [1997] 4 All ER 545 considered.

### Notes

For joint enterprise in cases of homicide, see 11(1) *Halsbury's Laws* (4th edn reissue) para 435, and for cases on the subject, see 14(1) *Digest* (2nd reissue) 109–110, 134, 866, 1082.



**Cases referred to in judgment**

- a *Chan Wing-siu v R* [1984] 3 All ER 877, [1985] AC 168, [1984] 3 WLR 677, PC.  
*R v Anderson and Morris* [1966] 2 All ER 644, [1966] 2 QB 110, [1966] 2 WLR 1195, CCA.  
*R v Hyde* [1990] 3 All ER 892, [1991] 1 QB 134, [1990] 3 WLR 1115, CA.  
*R v Powell*, *R v English* [1997] 4 All ER 545, [1997] 3 WLR 959, HL.

b

**Case also cited or referred to in skeleton argument**

*R v Putnam* (1990) 93 Cr App R 281, CA.

**Appeal**

- c The appellant, Rejan Uddin, appealed against his conviction for murder on 11 July 1996 before Dyson J and a jury at the Crown Court at Luton for which he was sentenced to custody for life. The facts are set out in the judgment of the court.

- d *Roy Amlot QC* and *Michael Levy* (assigned by the Registrar of Criminal Appeals) for the appellant.  
*Michael Pert QC* and *Isabel Delamere* (instructed by the Crown Prosecution Service, Luton) for the Crown.

*Cur adv vult*

- e 19 March 1998. The following judgment of the court was delivered.

**BELDAM LJ.** The appellant appeals against his conviction for the murder of Mark Sharp.

- f At about 1750 hrs on the afternoon of Sunday, 27 August 1995, as Mr Mark Sharp was driving his motor car in Haverlock Road, Luton, he was forced to brake sharply when a black Nova motor car driven by Mr Abdul Shahid stopped suddenly in front of him. Displeased by the actions of the driver of the Nova car, Mark Sharp overtook, making a rude gesture as he did so. Shortly afterwards he parked his car in High Town Road near a launderette. The Nova car pulled up beside him and the four Asian occupants, Shahid the driver, Mr Jomir Miah, Mr Forid Miah and Mr Abdul Tahid, got out and confronted Sharp. An argument ensued and one of the four who had been travelling in the Nova car returned to the car to make a call on a mobile telephone. Shortly afterwards, two other Asians, Mr Rejan Uddin and Mr Abdul Abbadin, and possibly two others, joined the four occupants of the Nova car. They were obviously friends. The two new arrivals appeared to Mr Hughes, a witness, to be older and bigger than the original four. Sharp and the six Asians were all on the pavement and close to a wall. Mr Hughes turned to go back to his car and had hardly taken a step or two when hearing a noise he turned and saw that the six Asians were attacking Sharp. Three of them appeared to be using weapons made out of the bottom half of a snooker cue. He saw Sharp being hit around the head and generally all over the body. The three who did not have weapons were punching and kicking Sharp. As he was being hit around the head, Sharp fell to his knees but the attackers carried on until he fell down completely and was lying still. The six attackers then ran off to their car. The attack had lasted, he thought, 30 seconds. He saw no attempt by Sharp to strike at the attackers or deliver any blows. His impression was that all six attackers were taking part in the violence but he could not say

which of them used weapons or which of them kicked or punched. Mr Tatham, who owned the launderette, also witnessed the attack. He had come from a shop about two doors away and noticed an argument with five or six young Asian males standing around a white man, who was swearing. The Asians then seemed calm and standing around. From just inside the launderette he saw them on the opposite side of the road and, out of the corner of his eye, he noticed a man to his left strike a blow at Sharp, who went down. As he went down all the others converged on him and as they did so he heard someone shout: 'Stab him!' He added:

'When Mr Sharp was in a crouching position they all converged. They were fighting to get one in. There was kicking and everything, hitting and kicking. When Sharp was lying down the group was hitting and kicking.'

He heard the words 'Stab him' as Sharp went down after the first hit had reduced him to a crouching position and before he was on the ground. All the young Asians were involved together but when they ran off some ran to the right and some to the left. He made a 999 call at 1752 hrs, in which he said that a man had been stabbed.

Another witness, Mr Harper, described how four or five Asians were arguing with Sharp:

'They were pulling things out of their sleeves and started to hit him. They looked like poles and bars. I think they all had a weapon like a chrome bar, looked like, and one looked like a wooden bar about two feet long ... They started hitting the man, pushing him to the floor and beating him. I could see all the blood. I thought about five were involved in the attack ... All of them started pushing him about, knocked him to the floor and kicked and beat him.'

He added that he did not see Sharp use any violence: 'He had no chance really. He tried to defend himself, but did not get much chance.'

There were several other witnesses to the attack, including a ten-year-old boy, Ian Smith, watching from the window of a flat overlooking the scene. One of the newcomers, he thought, took a big stick from his sleeve which looked like part of a snooker cue and he started hitting the white man (who was Sharp):

'He didn't make him go down and the white man turned and looked around. Then another Asian kicked him. He banged off the railings of the church and fell down. Then all of them just started hitting him, stamping on him and kicking him. All the men who came down the road had sticks as well. These sticks were all the same as the first stick that I just described. When the white man fell to the ground, the Asians with sticks hit him with their sticks. Others were stamping on him and kicking him. All of them were attacking him. No one was trying to stop what was happening.'

He thought he saw about five sticks.

After the attackers had departed, Mark Sharp was found to be seriously injured. He died three days later. Five of those who were said to have taken part in the attack were arrested and charged with the murder of Mark Sharp. They were: the appellant Rejan Uddin, Abdul Shahid, Forid Miah, Jomir Miah and Abdul Tahid. Abdul Abbadin could not be found. The five who were charged were tried in the Crown Court at Luton before Dyson J and a jury. On 11 July 1996 the appellant Rejan Uddin and Abdul Tahid were convicted of murder and sentenced to

a custody for life. Jomir Miah, Abdul Shahid and Forid Miah were acquitted of murder but convicted of manslaughter. Forid Miah and Abdul Shahid were sentenced to four years' imprisonment. Jomir Miah to four years' detention in a young offender institution.

b Mark Sharp died from injuries to his head. The most serious, and the cause of his death, was a stab wound delivered with moderate force near the base of the skull and which penetrated the brain but there were two other injuries to the head caused by a blow with a blunt instrument struck with mild to moderate force which might have been sufficient to cause unconsciousness and could not be ruled out as contributory causes of death but neither of the two doctors who gave evidence could state that they had actually done so.

c The blow with the knife was delivered by Abdul Tahid who apparently produced a flick-knife from his pocket as he joined in the attack. Apart from the shout of 'Stab him' heard by the witness Mr Tatham, there was no evidence that the other defendants knew that Abdul Tahid had a knife and all denied doing so. The three defendants convicted of manslaughter all gave evidence; the appellant did not. The defendants convicted of manslaughter were of good character and d apparently the appellant was not.

e One of the grounds of appeal advanced by Mr Amlot QC for Uddin was that the judge in giving the jury the appropriate direction on the significance of the evidence of the good character of the defendants who testified, did so in a manner which unnecessarily drew attention to the fact that he gave no such direction in the case of the appellant. It was said that the manner of his direction would have been likely to signal to the jury that the appellant was not of good character. In our view the criticism of the learned judge's summing-up in this respect is unjustified and we find it unnecessary to say more of this ground of appeal.

f Whilst the jury were deliberating on their verdicts, they reported to the judge that four of them had received telephone calls from a caller or callers who, when the telephone was answered, said nothing. It was submitted to the judge that he should discharge the jury. The judge's handling of the situation was faultless and he declined to do so. Again we find it unnecessary to deal in detail with the submission to us that the appellant's conviction was unsafe because the judge ought to have discharged the jury. It is sufficient to say that he gave the jury appropriate warnings and guidance and that no basis was shown on which we g could review the exercise of his discretion. Accordingly we reject this ground of appeal.

h We now come to the main grounds of appeal which were: (a) that the verdict in the appellant's case was inconsistent with the verdicts of manslaughter in the cases of the three co-defendants (Abdul Shahid, Jomir Miah, Forid Miah) who were acquitted of murder. The appellant was in no different position from those co-defendants. In each case there was no evidence that the defendant knew that a fourth defendant (Abdul Tahid) had a knife or would use it. A single stab wound to the head was the cause of death. (b) In dealing with joint enterprise the learned judge failed to direct the jury that as a secondary party to the killing, they j had to be sure that the appellant foresaw the use of a knife as a possibility if he was to be found guilty of murder: *R v Powell*, *R v English* [1997] 4 All ER 545, [1997] 3 WLR 959.

It will be appreciated that the decision of the House of Lords in that case was given more than 12 months after the judge summed up this case to the jury. As the law then stood Dyson J's directions to the jury could not be faulted. He had prepared for the jury a synopsis of his directions on murder, manslaughter and



common enterprise so that the jury could follow them as they were given. Before we come to his directions, we should state shortly the evidence of the three accused found guilty of manslaughter.

Abdul Shahid said that Sharp was shouting racial and other abuse towards the Asians. He saw no-one with weapons, though he said that Uddin and Abbadin had arrived on the scene. He saw Abbadin strike a blow with a bar once or twice and saw Sharp fall down but he saw no one with a knife, nor did he hear anyone say: 'Stab him.' Forid Miah also said Sharp shouted racial and other abuse. He himself had no weapon but he saw one of Abbadin's friends hit Sharp on the head with a wooden object and Sharp fell down hitting his car. He, Forid Miah, had not taken part in the assault on Sharp at all.

Jomir Miah also said that Sharp had made racial comments but they had not upset him. He saw no weapons but he saw Abbadin and Uddin arrive and one of them hit Sharp over the head. He did not recognise the person who struck the first blow but he said: 'They then hit him with wooden bars two of them dark in colour.'

He did not see where the wooden bars had come from but they had not been used by any of the occupants of the Nova car. It was the new arrivals who attacked Sharp. He did not see any knife, nor did he hear anyone say, 'Stab him'.

All the accused, including the appellant, had told lies when they were first interviewed. The appellant admitted this in his second interview and after describing how he had arrived on the scene he said that in the fight fists were used and someone 'had a bar or something'. He had tried to pull them away but he saw two pieces of wood. He said that there was punching and kicking in the fighting but he did not touch or see any other weapons or a knife. In a third interview he said:

'Suddenly there was a fight. Everyone was on top of everyone. Everyone was kicking and punching everywhere and all the punches and kicks were directed at the white man.'

He said that when the white man fell, everyone started running away and he ran off after the others.

### *The judge's directions*

After dealing with the essential elements of the crime of murder, including the necessary intent to kill or do really serious harm, the judge directed the jury that if they were sure that there had been a deliberate non-accidental killing that was unlawful but not sure that it was done with the intent to kill or do really serious harm but they did think that there may have been an intent merely to cause minor harm, for instance, then manslaughter was proved and it was not necessary to consider manslaughter any further. He explained to the jury how provocation could be considered by them as reducing murder to manslaughter if they were satisfied of the necessary ingredients of murder but considered that any of the accused had been caused to lose their self-control by things said or done by Sharp which would have been enough to make a reasonable young Asian male act—

'as the defendant whose case you are considering acted, or may it have done? If the answer is Yes then he is guilty of manslaughter by reason of provocation.'

a The judge emphasised that it was for the prosecution to prove that the accused were not provoked. He explained how an individual defendant could be guilty of murder on his own and said:

b 'For example, in the case of Abdul Tahid you will I expect be sure that his individual act of stabbing caused the death of Mark Sharp. If you are sure looking at the case of an individual defendant that he committed the offence of murder or manslaughter on his own then he is guilty of that offence regardless of whether there was a joint enterprise.'

The judge then defined joint enterprise saying:

c 'The prosecution case is that the defendants committed this offence together. Where a criminal offence is committed by two or more persons each of them may play a different part, but if they are acting together as part of a joint plan or agreement to commit it they are each guilty ... The essence of joint enterprise or joint responsibility for a criminal offence is that each defendant shared a common intention to commit the offence and played his part in it. If looking at the case of any defendant you are sure that he did an act or acts as part of a joint plan or agreement to commit it then he is guilty. Put simply, the question for you is were they in it together? Where two or more defendants embark on a joint criminal enterprise each is liable for the acts done in pursuance of it and that includes liability for unusual consequences if they arise from the execution of the joint enterprise, but if it goes beyond what has been agreed as part of the joint enterprise then subject to what I say below about common intention the others are not responsible for that unauthorised act and it is for you as the jury to decide whether what was done was part of the joint enterprise or went beyond it and was an act not authorised by the joint enterprise.'

f The judge went on to define what was meant by common intention. He said:

g 'In relation to murder it means either that the defendants each intended to kill or cause really serious harm or that the defendant whose case you are considering knew that there was a real possibility that one or more of his co-defendants might act with that particular intention whether he agreed to it or not and with that knowledge nevertheless went on to take part in the attack. But if death is caused by defendant (A) which goes beyond the agreed plan and you are not sure that the act is one that another defendant (B) knew was a real possibility the necessary common intention will not have been established as regards (B) and (B) is not guilty of murder. In relation to manslaughter, the common intention means either that the defendants each intended to cause some injury, but not to kill or cause really serious injury or that the defendant whose case you are considering knew that there was a real possibility that one or more of his co-defendants would cause some injury to the victim, but would not kill him or cause really serious injury and nevertheless joined (A) in the fight.'

j He went on:

'That sounds [as if] it may be rather complicated, but stripped down to its bare essentials the key question to ask of the defendant whose case you are considering is first, did he take part in the attack? Second, did he share a common intention with the other attackers to kill or do really serious harm

or if not then in taking part did he know that there was a real possibility that one or more of the attackers might attack Mark Sharp with the intention of killing him or doing really serious harm?' a

After reviewing all the evidence and reminding the jury that the doctors who had given evidence were agreed that the stab wound was the cause of death but that they could not rule out that the other injuries to the head contributed, the judge fairly summarised for the jury the case as put by the prosecution and as by counsel for each of the defendants. After they had deliberated for some time, the jury asked the judge to define what constituted really serious bodily harm adding: 'Can we presume that really serious bodily harm is layman's terms for grievous bodily harm?' b

They were told that that was so. Later they asked two more questions. The first: c

'If we agree that there was a joint enterprise are we allowed then to give differentiated verdicts, ie some of murder and some of manslaughter?'

The second question was: d

'If we think that a defendant joined in an attack in any way having seen someone else attack initially do we *have* to find this a joint enterprise or can we judge it on an individual basis knowing that joint enterprise can be formed within the spur of the moment.'

After discussing with counsel the questions and the way in which they should be answered, the judge in answer to the first question said Yes and to the second question said: e

'To that the answer is No. You can judge on an individual basis. I would just like to add two things. The first is that in the second question you use the word "If you think", I am sure that [think] there is no significance in the word "think" rather than "are sure" but you will remember what I said about the standard of proof. The second is that it is clear to me that you have been studying very carefully the written document that I provided you with and simply to remind you that the intent necessary for murder is an intent to kill or to do really serious bodily harm. If you find that you are not sure about those but you decide there was an intent to do some harm less than really serious bodily harm then the joint enterprise cannot be for murder but can be for manslaughter. I hope that sufficiently answers your questions.'

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The jury then retired and after further deliberation brought in their verdicts. h

We think it convenient to deal with the second ground of appeal before considering whether the verdicts were inconsistent. As Lord Hutton made clear in his speech in *R v English* [1997] 4 All ER 545, [1997] 3 WLR 959, if one party to a joint enterprise suddenly forms an intention to kill making use of a deadly weapon and, acting in a way which no party to the common design could suspect, kills using that deadly weapon the others taking part in the common enterprise are to be judged as secondary parties and are not guilty of murder unless the actions of the party causing death are of a type which they foresee but do not necessarily intend. But as he later explains ([1997] 4 All ER 545 at 566, [1997] 3 WLR 959 at 981), if the weapon used by the primary party is different from, but as dangerous as, the weapon which the secondary party contemplated he might use, the secondary party should not escape liability for murder because of the j



a difference in the weapon. For example, if he foresaw that the primary party might use a gun to kill and the latter used a knife to kill or vice versa. On the question of the degree of foresight required to impose liability, he agreed with the judgment of the Privy Council in *Chan Wing-siu v R* [1984] 3 All ER 877, [1985] AC 168 that if a secondary party contemplated the act causing death as a possible incident of the joint venture, he is liable unless the risk was so remote that the jury take the view that the secondary party genuinely dismissed it as altogether negligible.

b Such an analysis of the assessment of risk, whilst appropriate in the case of criminals who agree together in advance to commit an offence such as armed robbery, does not readily fit the spontaneous behaviour of a group of irrational individuals who jointly attack a common victim, each intending severally to inflict serious harm by any means at their disposal and giving no thought to the means by which the others will individually commit similar offences on the same person. In truth each in committing his individual offence assists and encourages the others in committing their individual offences. They are at the same time principals and secondary parties. Because it is often a matter of chance whether one or other of them inflicts a fatal injury, the law attributes responsibility for the acts done by one to all of them, unless one of the attackers completely departs from the concerted actions of the others and in so doing causes the victim's death. An example found in the observations of Lord Parker CJ in *R v Anderson and Morris* [1966] 2 All ER 644 at 648, [1966] 2 QB 110 at 120 is when one of the participants suddenly forms an intent to kill using a weapon in a way in which no other party could suspect.

e In this example the party departing from the common enterprise has not only formed a different intent but has acted in a way which no other party could suspect. In short he has not merely brought about the death of the victim with a different intent but has used a weapon which the others did not know or suspect he had with him. The essential ingredients of his offence are different and the actions of the others coincided with, but did not contribute to or assist, the commission of his offence. The difficulty in applying these principles to a case such as the present led to the expression in the speeches of Lord Mustill and Lord Steyn in *R v Powell* [1997] 4 All ER 545, [1997] 3 WLR 959 of the difficulties in the concepts of joint enterprise and accessory liability and their calls for urgent review of the law of homicide. Notwithstanding these difficulties, we think that the principles applicable to a case such as the present are as follows.

g (i) Where several persons join to attack a victim in circumstances which show that they intend to inflict serious harm and as a result of the attack the victim sustains fatal injury, they are jointly liable for murder; but if such injury inflicted with that intent is shown to have been caused solely by the actions of one participant of a type entirely different from actions which the others foresaw as part of the attack, only that participant is guilty of murder.

h (ii) In deciding whether the actions are of such a different type the use by that party of a weapon is a significant factor. If the character of the weapon, eg its propensity to cause death is different from any weapon used or contemplated by the others and if it is used with a specific intent to kill, the others are not responsible for the death unless it is proved that they knew or foresaw the likelihood of the use of such a weapon.

j (iii) If some or all of the others are using weapons which could be regarded as equally likely to inflict fatal injury, the mere fact that a different weapon was used is immaterial.

(iv) If the jury conclude that the death of the victim was caused by the actions of one participant which can be said to be of a completely different type to those contemplated by the others, they are not to be regarded as parties to the death whether it amounts to murder or manslaughter. They may nevertheless be guilty of offences of wounding or inflicting grievous bodily harm with intent which they individually commit. a

(v) If in the course of the concerted attack a weapon is produced by one of the participants and the others knowing that he has it in circumstances where he may use it in the course of the attack participate or continue to participate in the attack, they will be guilty of murder if the weapon is used to inflict a fatal wound. b

(vi) In a case in which after a concerted attack it is proved that the victim died as a result of a wound with a lethal weapon, eg a stab wound, but the evidence does not establish which of the participants used the weapon, then if its use was foreseen by the participants in the attack they will all be guilty of murder notwithstanding that the particular participant who administered the fatal blow cannot be identified (see *R v Powell*). If, however, the circumstances do not show that the participants foresaw the use of a weapon of this type, none of them will be guilty of murder though they may individually have committed offences in the course of the attack. c  
d

(vii) The mere fact that by attacking the victim together each of them had the intention to inflict serious harm on the victim is insufficient to make them responsible for the death of the victim caused by the use of a lethal weapon used by one of the participants with the same or shared intention. e

As we have said, in the present case there was no evidence upon which the jury could find that before the attack began the others involved knew that Abdul Tahid was carrying a flick-knife.

If the jury accepted the evidence of Mr Tatham who said that whilst in his laundrette on the opposite side of the road from the attack he heard the shout 'Stab him' as the attack began, they could as we have said have concluded that those of the defendants who then took part in the attack did so being aware, or at least foreseeing, that a knife might be used with intent to cause really serious harm. Whether those who having heard the shout attacked the deceased with shortened billiard cues as clubs themselves committed the offence of inflicting grievous bodily harm with intent or not, they would be guilty of murder as secondary parties. f  
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The judge's direction clearly left it to the jury to say whether one of the accused had gone beyond the common purpose of the concerted attack and he told them that if one of the defendants had done an act which went beyond the agreed plan and they were not sure that the act was one which another defendant knew was a real possibility, the necessary common intention would not have been established. It was suggested that the jury may from this direction have concluded that if a particular defendant had an intention to do really serious harm the existence of that intention was sufficient to make that defendant guilty of murder even though the action of the party who had caused the death went outside the common purpose of the attack. We do not think that the judge's direction was susceptible of this interpretation but we do think that since *R v English* it is necessary for the jury to have their attention directed particularly to the nature of a weapon used in a concerted or combined attack and to knowledge or foresight of the use of such a weapon. In the course of his speech in *R v English* [1997] 4 All ER 545 at 563–564, [1997] 3 WLR 959 at 978 Lord Hutton said: h  
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a 'In *R v Hyde* [1990] 3 All ER 892 at 896, [1991] 1 QB 134 at 139, as already  
set out, Lord Lane CJ stated: "If B realises (without agreeing to such conduct  
being used) that A may kill or intentionally inflict serious injury, but  
nevertheless continues to participate with A in the venture, that will amount  
b to a sufficient mental element for B to be guilty of murder if A, with the  
requisite intent, kills in the course of the venture." However in *R v Hyde* the  
attack on the victim took place without weapons and the Crown case was  
that the fatal blow to the victim's head was a heavy kick. The problem raised  
c by the second certified question is that, if a jury is directed in the terms stated  
in *R v Hyde*, without any qualification (as was the jury in English), there will  
be liability for murder on the part of the secondary party if he foresees the  
possibility that the other party in the criminal venture will cause really  
serious harm by kicking or striking a blow with a wooden post, but the other  
party suddenly produces a knife or a gun, which the secondary party did not  
know he was carrying, and kills the victim with it.'

d Lord Hutton continued ([1997] 4 All ER 545 at 565–566, [1997] 3 WLR 959 at  
980):

e 'Accordingly, in the appeal of English, I consider that the direction of the  
trial judge was defective (although this does not constitute a criticism of the  
judge, who charged the jury in conformity with the principle stated in *Hyde*'s  
case) because in accordance with the principle stated by Lord Parker CJ in *R*  
*v Anderson and Morris* [1966] 2 All ER 644 at 648, [1966] 2 QB 110 120, he did  
not qualify his direction on foresight of really serious injury by stating that if  
the jury considered that *the use of the knife* by Weddle was the use of a weapon  
and an action on Weddle's part which English did not foresee as a possibility,  
then English should not be convicted of murder. As the unforeseen use of  
f the knife would take the killing outside the scope of the joint venture the jury  
should also have been directed, as the Court of Appeal held in *R v Anderson*  
*and Morris*, that English should not be found guilty of manslaughter. On the  
evidence, the jury could have found that English did not know that Weddle  
had a knife. Therefore the judge's direction made the conviction of English  
unsafe and in my opinion his appeal should be allowed and the conviction for  
g murder quashed.' (Our emphasis.)

h Whilst the jury were, as we have said, carefully directed to consider whether  
the actions of any of the accused went so outside the common purpose that they  
were not foreseen by the others, the jury's attention was not specifically focused  
on the use of the knife by Abdul Tahid and whether on the evidence they were  
sure that the others were aware that he might use it. As we have said, there was  
evidence from which the jury could conclude that those of the accused who took  
part after the shout of 'Stab him' must have been aware that one of them had a  
knife and might use it with intent to do serious harm. Lord Hutton stressed the  
j lethal nature of a knife as a weapon; it was for the jury to say whether its use in  
this attack was so different from the concerted actions of hitting the deceased  
with clubs and kicking him with the shod foot that Tahid's actions went beyond  
the common purpose.

It was also for the jury to say in each case whether those taking part were  
aware, whether from the shout or otherwise, that one of their number might use  
a knife.



We are further troubled by the distinction apparently drawn by the jury between the parts played by the three accused convicted of manslaughter and the part played by the appellant. If the actions of Tahid did in fact go outside the common purpose of the attack then those who took part aware that a knife might be used were guilty of murder as secondary parties; if they were not aware that a knife might be used they were entitled to be acquitted. (See the observations of Lord Hutton in *R v English*). If, however, the use of the knife did not go outside the common purpose of the attack which from the actions of those taking part was plainly to cause Sharp really serious harm, it is difficult to discern the basis for the verdict of manslaughter or the basis on which the participation of those accused was found by the jury to be different from the participation of the appellant. It is true that each of those accused convicted of manslaughter gave evidence that they did not know that any of their number had a knife and therefore that it might be used with intent to do serious harm but equally there was no evidence that before the attack began and the shout of 'Stab him', the appellant knew that Tahid had a knife. In the circumstances of this case we think that it would be unsafe to allow the conviction of the appellant for murder to stand. We think, however, that as there was evidence from which the jury directed in accordance with *R v English* [1997] 4 All ER 545, [1997] 3 WLR 959 could have concluded that the appellant was guilty of murder that there should be a retrial. Equally however, as Tahid had used a lethal weapon, the jury could have concluded that his actions were so outside the common purpose of the attack in which the others joined that they could only be liable for murder if they were aware that Tahid was carrying a knife or could foresee his actions in using a knife in the course of the concerted attack. Accordingly, it could be argued that the defendants Abdul Shahid, Jomir Miah and Forid Miah may have been deprived of the chance of acquittal and we direct that this judgment should be drawn to the attention of Abdul Shahid and Jomir Miah and their solicitors for them to consider whether they wish to make a renewed application to the court for leave to appeal. We direct that any such renewed application should be made within 28 days of their receipt of the judgment.

On 3 October 1997 the Full Court over which I presided dismissed a renewed application for leave to appeal by Forid Miah. The point we have now identified as a possible ground of appeal was not argued on that application and the only way in which we could now consider it in his case is if his conviction were to be referred back to the court. This judgment should be drawn to his attention and the attention of his solicitors for him to consider whether he wishes to take steps for that to be done. In these circumstances we will consider any application which the Crown may make for an extension of time within which to prefer a fresh indictment.

*Appeal against conviction allowed.*

Kate O'Hanlon Barrister.

a **R v Lord Chancellor, ex parte Child Poverty  
Action Group**

**R v Director of Public Prosecutions, ex parte Bull  
and another**

b

QUEEN'S BENCH DIVISION (CROWN OFFICE LIST)

DYSON J

29, 30 JANUARY, 6 FEBRUARY 1998

c

*Judicial review – Costs of application – Pre-emptive order for costs – Public interest challenge – Applicants applying for order that no order for costs be made against them whatever outcome of application – Principles to be applied in exercise of court's discretion – Whether pre-emptive orders should be made – RSC Ord 62, r 3(3).*

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In the first case, the applicants were a registered charity whose objects included the promotion of action for the relief of poverty among children and families with children. They engaged in test case work by supporting cases before social security commissioners and courts and applied for judicial review of the decision by the Lord Chancellor not to exercise his power under s 14(2)<sup>a</sup> of the Legal Aid

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Act 1988 to extend legal aid to at least some cases before social security tribunals and commissioners. In the second case, the applicants were human rights organisations whose objects included the abolition of torture and the implementation of national and international law against torture. They applied for judicial review of the decision by the Director of Public Prosecutions not to prosecute two individuals for possession of an electro-shock baton without

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licence, contrary to s 5(1)(b) of the Firearms Act 1968. In each case, the applicants applied to the court for pre-emptive costs orders, so that no order for costs would be made against them in the proceedings, whatever their ultimate outcome. They contended that in public interest challenge cases where public law issues of general importance were raised but the applicant had no private interest in the outcome of the case, the court should be more willing to make no order as to

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costs against an unsuccessful applicant.

**Held** – In public interest challenge cases, the starting point as regards costs had to be the basic rule encapsulated in RSC Ord 62, r 3(3)<sup>b</sup> that costs followed the event, since the parties to such proceedings and the litigation were still adverse, and the rule ensured that the assets of the successful party were not depleted by having to go to court to meet a claim by an unsuccessful party. Although the court had jurisdiction under s 51<sup>c</sup> of the Supreme Court Act 1981 to make

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pre-emptive costs orders they should only be made in exceptional circumstances, since it would often not become clear whether an issue was of sufficient public

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importance to justify departure from the basic rule until the hearing of the substantive application, and it would rarely be possible to make a sufficient assessment of the merits of the claim at the interlocutory stage. The necessary

a Section 14(2) is set out at p 758 fg, post

b Rule 3(3) is set out at p 761 h, post

c Section 51, so far as material, is set out at p 761 e, post

conditions for doing so were that the court was satisfied that the issues raised were truly of general public importance, and that it had a sufficient appreciation of the merits of the claim that it could conclude that it was in the public interest to make the order. However, the court also had to have regard to the financial resources of the parties and the amount of costs likely to be in issue, and it would be more likely to make the order where the respondent clearly had a superior capacity to bear the costs of the proceedings than the applicant, and where it was satisfied that unless the order was made the applicant would probably discontinue the proceedings and would be acting reasonably in doing so. In the instant cases, neither of the necessary conditions for the making of the pre-emptive costs order were satisfied. Accordingly the applications would be dismissed (see p 761 *d* to *f*, p 762 *d*, p 764 *a* to *h*, p 765 *e* to p 766 *a* to *j*, p 767 *j* and p 768 *a* to *j*, post).

### Notes

For the discretion of the court to award costs, see 37 *Halsbury's Laws* (4th edn) paras 714–718, and for cases on the subject, see 37(3) *Digest* (Reissue) 240–244, 4350–4378.

For costs in judicial review proceedings, see 1(1) *Halsbury's Laws* (4th edn reissue) para 193.

For the Firearms Act 1968, s 5, see 12 *Halsbury's Statutes* (4th edn) (1997 reissue) 420.

For the Legal Aid Act 1988, s 14, see 24 *Halsbury's Statutes* (4th edn) (1989 reissue) 25.

For the Supreme Court Act 1981, s 51, see 11 *Halsbury's Statutes* (4th edn) (1991 reissue) 1019.

### Cases referred to in judgment

*Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira* [1986] 2 All ER 409, [1986] AC 965, [1986] 2 WLR 1051, HL.

*Davies (Joseph Owen) v Eli Lilly & Co* [1987] 3 All ER 94, [1987] 1 WLR 1136, CA.

*Hoffmann-La Roche (F) & Co AG v Secretary of State for Trade and Industry* [1974] 2 All ER 1128, [1975] AC 295, [1974] 3 WLR 104, HL.

*IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93, [1982] AC 617, [1981] 2 WLR 722, HL.

*McDonald v Horn* [1995] 1 All ER 961, CA.

*New Zealand Maori Council v A-G of New Zealand* [1994] 1 All ER 623, [1994] 1 AC 466, [1994] 2 WLR 254, PC.

### Cases also cited or referred to in skeleton arguments

*Alsop Wilkinson (a firm) v Neary* [1995] 1 All ER 431, [1996] 1 WLR 1220.

*Equal Opportunities Commission v Secretary of State for Employment* [1994] 1 All ER 910, [1995] 1 AC 1, HL.

*Liversidge v Anderson* [1941] 3 All ER 338, [1942] AC 206, HL.

*R v Inspectorate of Pollution, ex p Greenpeace Ltd (No 2)* [1994] 3 All ER 329.

*R v Metropolitan Police Comr, ex p Blackburn* (No 3) [1973] 1 All ER 324, [1973] QB 241, CA.

*R v Secretary of State for Foreign Affairs, ex p World Development Movement Ltd* [1995] 1 All ER 611, [1995] 1 WLR 386, DC.



- a *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants, R v Secretary of State for Social Security, ex p B* [1996] 4 All ER 385, [1997] 1 WLR 275, CA.
- R v Secretary of State for Social Services, ex p Child Poverty Action Group* [1989] 1 All ER 1047, [1990] 2 QB 540, CA.
- R v Secretary of State for the Environment, ex p Greenpeace Ltd* [1994] 4 All ER 352..
- b *Wallersteiner v Moir (No 2)* [1975] 1 All ER 849, [1975] QB 373, CA.

### Interlocutory applications

#### *R v Lord Chancellor, ex p Child Poverty Action Group*

- c The Child Poverty Action Group (CPAG), who applied for judicial review of a decision of the Lord Chancellor, applied for an order that no order as to costs should be made against them in the substantive proceedings whatever their ultimate outcome. The facts are set out in the judgment.

#### *R v DPP, ex p Bull and anor*

- d David Neill Bull, acting for and on behalf of Amnesty International UK (Amnesty), and The Redress Trust (Redress), who applied for judicial review of a decision of the Director of Public Prosecutions, applied for an order that no order as to costs should be made against them in the substantive proceedings whatever their ultimate outcome. The facts are set out in the judgment.

- e *Richard Drabble QC and Rabinder Singh* (instructed by *David Thomas of Child Poverty Action Group*) for CPAG.

*Philip Sales* (instructed by the *Treasury Solicitor*) for the Lord Chancellor's Department.

*Richard Drabble QC, Ben Emmerson and Philippa Kaufmann* (instructed by *Jean Gould, Public Law Project*) for Amnesty.

- f *Richard Drabble QC and Murray Hunt* (instructed by *Jean Gould, Public Law Project*) for Redress.

*Philip Havers QC and Philippa Whipple* (instructed by the *Treasury Solicitor*) for the DPP.

*Cur adv vult*

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6 February 1998. The following judgment was delivered.

- h **DYSON J.** There are before me interlocutory applications for orders that no order as to costs be made against the applicants in these proceedings, whatever their ultimate outcome. Mr Drabble QC describes the orders that he seeks as 'protective' costs orders. I think that the adjective 'pre-emptive' is more apt, but nothing turns on that. Leave to move for judicial review has been granted in both cases. Both respondents have refused to agree in advance not to seek an order for costs against the applicants if their applications for judicial review are dismissed.
- j It is conceded by both respondents that there is jurisdiction to make pre-emptive costs orders in these cases. There is, however, no agreement as to the principles which should guide the court in deciding whether a pre-emptive costs order should be made in judicial review cases which concern what the Law Commission has described as 'public interest challenges'. Nor is there agreement whether, applying the relevant principles to the facts of the two cases, pre-emptive costs orders should be made. The researches of counsel have not

discovered any case in which the court has been asked to decide whether or not to make a pre-emptive costs order in an application for judicial review. a

There is some authority as to the position that applies in ordinary private law litigation. In *McDonald v Horn* [1995] 1 All ER 961 at 969 Hoffmann LJ said that the general rule that costs follow the event, encapsulated in RSC Ord 62, r 3(3) was—

‘a formidable obstacle to any pre-emptive costs order as between adverse parties in ordinary litigation. It is difficult to imagine a case falling within the general principle in which it would be possible for a court properly to exercise its discretion in advance of the substantive decision.’ b

It is not disputed that, if these applications were made in private law actions, I would be bound to dismiss them. The main question of principle that arises in these applications is whether different considerations of public policy apply in cases which can aptly be characterised as ‘public interest challenges’. I shall explain later in this judgment what I understand to be meant by ‘public interest challenges’. Before I come to deal with the submissions that were made before me, I ought to describe in outline the nature of the applications in the two cases. c

#### *Child Poverty Action Group (CPAG)*

CPAG is a registered charity, which was founded in 1965. Its objects include the promotion of action for the relief of poverty among children and families with children. It is widely recognised as the leading anti-poverty organisation in the UK. It has a particular reputation in the field of welfare benefits law, and engages in test case work by supporting cases before social security commissioners and courts in this country. d

Section 14 of the Legal Aid Act 1988, so far as material, provides:

‘... (2) Subject to subsection (3) below, Schedule 2 may be varied by regulations so as to extend or restrict the categories of proceedings for the purposes of which representation is available under this Part, by reference to the court, tribunal or statutory inquiry, to the issues involved, to the capacity in which the person seeking representation is concerned or otherwise ... f

(4) Regulations under subsection (2) above which extend the categories of proceedings for the purposes of which representation is available under this Part shall not be made without the consent of the Treasury.’ g

Schedule 2 to the 1988 Act lists the types of proceedings for which legal aid is available. It includes some tribunals, such as the Employment Appeal Tribunal, but not social security tribunals or commissioners.

It is not in issue that hearings before social security tribunals and commissioners can be extremely complicated, especially if points of law are raised. On 4 November 1996 the solicitor acting for CPAG wrote to the Lord Chancellor, inviting him to exercise his power under s 14(2) of the 1988 Act to extend legal aid to at least some cases before social security tribunals and commissioners. On 22 November 1996 the Lord Chancellor refused to do so, at least for the time being. h

The application for leave to move for judicial review of that decision was refused by Laws J on the papers. It was renewed at an ex parte hearing before Popplewell J, who granted leave on the basis of what CPAG calls its ‘European arguments’. These arguments, which are novel and complex, and which Mr Sales describes as ‘speculative’, are set out at paras 22 to 24 of Form 86A. The points j

a are difficult. One or two of them were touched on lightly by counsel before me. It is obvious that I cannot begin to assess the likelihood of the European arguments succeeding, nor was I asked to do so.

The finance and administration sub-committee of CPAG resolved on 13 May 1997 that 'CPAG should not allow itself to be exposed to the risk of an adverse costs order and that the case should be withdrawn if adequate protection in one form or another cannot be obtained'. The sub-committee had delegated authority to make decisions on financial matters of that nature. Part of the background to that decision was the fact that CPAG had recently purchased the freehold of its office premises. This meant that, in the short term, there was an urgent need to raise several hundred thousand pounds to finance the purchase. Virtually all the organisation's fund-raising efforts had to be geared to this imperative. Accordingly, the view taken by CPAG was that, irrespective of the wisdom or otherwise of exposing CPAG to a large costs risk in 'normal' times, it would be irresponsible to do so at the present time.

d In his affidavit sworn on behalf of CPAG on 23 September 1997, Mr Thomas says that there is no reasonable possibility of an individual or another organisation agreeing to indemnify CPAG against any potential liability for costs to the Lord Chancellor. The reality is that, if a pre-emptive costs order is not made, the substantive application will 'in all probability' have to be withdrawn.

#### *Amnesty International UK and The Redress Trust*

e Both of these applicants are human rights organisations of international standing, whose objects include the abolition of torture and the implementation of national and international law against torture. They claim that they have an interest in ensuring the proper enforcement of laws relating to weapons of torture, including an interest in any particular case in which a decision is taken as to whether or not to prosecute for breach of such laws.

f Their substantive application is for judicial review of the decision made by the Director of Public Prosecutions (the DPP) not to prosecute a Mr Morris and a Mr Hall for possession of an electro-shock baton without licence, contrary to s 5(1)(b) of the Firearms Act 1968. That is a strict liability offence. The factual background to the commission of the offences is complex, and it is unnecessary to go into it for the purposes of this judgment.

g Section 3(2) of the Prosecution of Offenders Act 1985 sets out the duties of the DPP in relation to the institution and conduct of criminal proceedings. They include the duty—

h '(b) to institute and have the conduct of criminal proceedings in any case where it appears to him that—(i) the importance or difficulty of the case makes it appropriate that proceedings should be instituted by him; or (ii) it is otherwise appropriate for proceedings to be instituted by him ...'

j Paragraph 4.1 of the code of practice, issued by the DPP pursuant to s 10 of the 1985 Act, provides for two stages in the decision to prosecute. First, an evidential test has to be satisfied. The DPP was of the view in this case that the evidential test was satisfied in relation to both Mr Morris and Mr Hall. Secondly, as set out at para 4.2 of the code, there is a public interest test. A prosecution will only start or continue when the Crown Prosecutor is satisfied that the case passes both tests.

The public interest test is explained in para 6 of the code. So far as material, it provides:



‘6.2 ... In cases of any seriousness, a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour. Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed. a

6.3 Crown Prosecutors must balance factors for and against prosecution carefully and fairly. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence or the circumstances of the offender. Some factors may increase the need to prosecute but others may suggest that another course of action would be better ... b

Some common public interest factors in favour of prosecution c

6.4 ‘The more serious the offence, the more likely it is that a prosecution will be needed in the public interest. A prosecution is likely to be needed if [a number of factors are then set out].

Some common public interest factors against prosecution

6.5 A prosecution is less likely to be needed if: a the court is likely to impose a very small or nominal penalty; b the offence was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence) ...’ d

The DPP gave three reasons for her decision not to prosecute. They were (i) the way in which the incident was prompted; (ii) the impact of a genuine mistake or misunderstanding; and (iii) the circumstances that were particular to the potential defendants. In amplification of the second reason, the Chief Crown Prosecutor, writing on behalf of the DPP on 12 August 1997, said that both men mistakenly believed that they had lawful authority to possess the baton. A little later in his letter he said: e

‘Additionally, the circumstances pointed in our view to a technical breach of the Firearms Act. The unlawful possession of the articles for demonstration purposes in the mistaken belief that possession was lawful, and where there was no danger to the public, would not, we believe, be regarded as a serious offence and would be unlikely to be met with a significant penalty.’ f g

Form 86A identifies five grounds of challenge, one of which is particularly relied on by Mr Emmerson as justifying the making of a pre-emptive costs order, and it concerns the second of the three reasons given for the decision not to prosecute. Mr Emmerson submits that, when applying the public interest test in deciding whether or not to prosecute, the DPP was not entitled to have regard to the fact that the two men had made an honest mistake. The offences were serious, and the state of mind of the men afforded no defence. Mr Emmerson argues that the fact that the men were honestly mistaken, although relevant to sentence, was irrelevant to the decision whether or not to prosecute. The error is said to raise a public interest challenge. The extent of the discretion vested in the DPP, and in particular, the question whether she can take honest mistake (and, presumably, other matters of mitigation) into account, are matters which are of general public importance, being by no means limited to the facts of this case. h j

So much for the nature of the challenge. During argument, I expressed concern as to why this application is being made by two separate organisations.

a No satisfactory explanation was provided. I was told that all concerned are working pro bono publico (as indeed are those on the applicant's side in the CPAG case). Everyone should be grateful to all those who are giving their services free out of a sense of public duty, but that does not seem to me to be a sufficient reason for having two applicants (with separate representation) in the second case.

b Leave to move for judicial review was given by Forbes J on the papers. Neither Amnesty nor Redress has said that if the application for pre-emptive costs fails, it will withdraw the application, but on the evidence that is certainly a possible outcome. The affidavit of Mr Bull states that the board of Amnesty has become 'more anxious' about the extent of the cost risk as the case has developed, and that it will have 'great reservations' about proceeding to a substantive hearing if

c Amnesty remains potentially liable for the DPP's costs at the end of the day. On behalf of Redress, Mr Carmichael says in his affidavit that it will be 'difficult' for the trustees to agree to commit the funds of the charity if this application fails, and that he is 'very concerned' that Redress may have to discontinue proceedings in that event.

d *Jurisdiction*

As I have already said, it is common ground that there is jurisdiction to make the orders sought in these cases. It is based on s 51 of the Supreme Court Act 1981, which, so far as relevant, provides:

e '(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings ... shall be in the discretion of the court ...

(3) The court shall have full power to determine by whom and to what extent the costs shall be paid.'

f That the discretion conferred by that section is very wide was confirmed by the House of Lords in *Aiden Shipping Co Ltd v Interbulk Ltd*, *The Vimeira* [1986] 2 All ER 409 esp at 413, [1986] AC 965 esp at 975 per Lord Goff.

The relevant rules as to costs in the High Court are contained in RSC Ord 62. Order 62, r 2(4) provides, so far as relevant: 'The powers and discretion of the

g Court under section 51 of the Act ... shall be exercised subject to and in accordance with this Order.' The general rule is that costs follow the event, as stated in r 3(3), which provides:

h 'If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except where it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.'

As Hoffmann LJ said in *McDonald v Horn* [1995] 1 All ER 961 at 969, this rule reflects a basic rule of English civil procedure, that a successful litigant has a prima

j facie right to his costs. The Court of Appeal has held that, on its true construction, Ord 62 r 3(3) deals with the manner in which, as opposed to the time when, the court's discretion to order costs is to be exercised: see *Davies v Eli Lilly & Co* [1987] 3 All ER 94, [1987] 1 WLR 1136. In that case, the trial judge had ordered that any costs that were ordered or fell to be borne by any plaintiff in the lead actions should be borne proportionately by all plaintiffs. His order was appealed on the grounds that

making prospective orders as to costs was not within the jurisdiction of s 51 of the Supreme Court Act 1981 and Ord 62. The Court of Appeal held that there was jurisdiction to make anticipatory costs orders. Lloyd LJ said ([1987] 3 All ER 94 at 101, [1987] 1 WLR 1136 at 1144):

'In the normal way, of course, the discretion is exercised at the conclusion of the proceedings, whether final or interlocutory. But there is nothing in the language of Ord 62, r 3(3) to prohibit the exercise of the discretion at an earlier stage where the interests of justice so require.'

So jurisdiction is not in doubt. The issue that divides the parties is—in what circumstances will the discretion to make pre-emptive costs orders be exercised?

*Principles governing the exercise of discretion in cases involving public interest challenges*

I should start by explaining what I understand to be meant by a public interest challenge. The essential characteristics of a public law challenge are that it raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case. It is obvious that many, indeed most judicial review challenges, do not fall into the category of public interest challenges so defined. This is because, even if they do raise issues of general importance, they are cases in which the applicant is seeking to protect some private interest of his or her own.

The central submission advanced on behalf of the applicants is that, because of those essential characteristics, the court should be more willing to make no order as to costs against an unsuccessful applicant in public interest challenge cases than in other cases. It is submitted that public interest challenges are not 'ordinary litigation' between adverse parties of the kind that Hoffmann LJ was contemplating in *McDonald v Horn* [1995] 1 All ER 962.

It is argued that it is now recognised by the courts that the true nature of the court's role in public law cases is not to determine the rights of individual applicants, but to ensure that public bodies do not exceed or abuse their powers. It is a consequence of this recognition that procedural rules and practices that apply to the adjudication of the classic *lis inter partes* in private law cannot apply without modification to a public interest challenge to a decision of government. Hence, for example, the liberalisation of the law of standing. In *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93 at 107, [1982] AC 617 at 644 Lord Diplock said:

'It would, in my view, be a grave lacuna in our system of public law if a pressure group like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.'

Mr Drabble submits that if the courts did not make pre-emptive costs orders in public interest challenge cases, there would arguably be an even greater lacuna in our public law, since genuine public interest challenges could effectively be stifled, unless the executive agreed in advance not to seek its costs whatever the outcome of the proceedings. In fact, as he points out, there have been several cases in which, admittedly at the conclusion of the proceedings, courts have decided that costs should not be ordered against an unsuccessful party because of the general importance of and significant public interest in the resolution of the



a questions raised by the particular case. By way of example, I was referred to *New Zealand Maori Council v A-G of New Zealand* [1994] 1 All ER 623 at 638, [1994] 1 AC 466 at 485, where Lord Woolf, delivering the judgment of the Privy Council, said:

b 'There remains the question of costs. Although the appeal is to be dismissed, the applicants were not bringing the proceedings out of any motive of personal gain. They were pursuing proceedings in the interest of taonga which is an important part of the heritage of New Zealand. Because of the different views expressed by the members of the Court of Appeal on the issues raised on this appeal, an undesirable lack of clarity inevitably existed in an important area of the law which it was important that their Lordships examine and in the circumstances their Lordships regard it as just that there should be no order as to the costs on this appeal.'

c That case was concerned with the question whether certain legislation, which it was contended threatened the survival of the Maori language (taonga), was inconsistent with a treaty made between the Crown and Maori. It is clear that this was a good example of a public interest challenge.

d It is submitted by Mr Drabble that the same considerations that would lead a court to make no order for costs in such a case at the conclusion of the proceedings should also persuade a court to make a pre-emptive order for costs to like effect at the interlocutory stage. He says that the factors that the court takes into account when deciding whether to make no order for costs against the unsuccessful applicant at the end of the proceedings are familiar. These applications in essence ask the court to treat the costs question as if the substantive application has already failed, and simply bring forward the point at which the exercise of the costs discretion is carried out. It is obviously of benefit to an applicant to know where he stands in relation to costs; the uncertainty as to whether he will be liable to pay the respondent's costs if the application fails may deter an applicant from pursuing his application at all.

e The uncertainty of costs issue was considered by the Ontario Law Reform Commission in a report in 1989. It proposed that the applicant could ask for a decision on costs at any point in a public interest case, and that the court would be prevented from ordering costs against the applicant if the following conditions were met: (1) the case involves issues whose importance extends beyond the immediate interests of the parties involved; (2) the applicant has no personal, proprietary or pecuniary interest in the outcome of the case; and (3) the respondent has a clearly superior capacity to bear the costs of the proceedings.

f The applicants suggest the following as examples of the sorts of factors which may be relevant in determining when it is appropriate to make a pre-emptive costs order. (a) Is the substantive point (objectively) one of general public importance which ought to be litigated, eg because it concerns the legality of action by public authority which goes beyond the immediate interests of the parties concerned, or concerns issues of fundamental human rights? (b) Would the point of law probably not otherwise be litigated, eg because none of those affected has the resources to fund proceedings personally, or is able to secure legal aid, or has the capacity to bring proceedings? (c) Would legal aid probably have been given so that the point of law would have been brought to the attention of the court if the claim (being a money claim) had been for a greater sum? (d) Is the applicant the best representative of the interests directly affected by the challenged decision or measure, and/or is it well placed, because of its expertise in the area, to bring the issue before the court? (e) Is the respondent

able to, and should it, bear its own costs whatever the outcome of the case, since it is a public body and it is in the public interest that the issue of law was raised should be resolved? a

In my judgment, the discretion to make pre-emptive costs orders even in cases involving public interest challenges should be exercised only in the most exceptional circumstances. The starting point must be the basic rule encapsulated in Ord 62, r 3(3) that costs follow the event. It is true that the role of the court in all public law cases is to ensure that public bodies do not exceed or abuse their powers, but the parties to such proceedings are nevertheless adverse as is the litigation. As Lord Diplock said in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1974] 2 All ER 1128 at 1153, [1975] AC 295 at 365: b

‘ Under our legal system, however, the courts as the judicial arm of government do not act on their own initiative. Their jurisdiction to determine that a statutory instrument is ultra vires does not arise until its validity is challenged in proceedings inter partes, either brought by one party to enforce the law declared by the instrument against another party, or brought by a party whose interests are affected by the law so declared sufficiently directly to give him locus standi to initiate proceedings to challenge the validity of the instrument.’ c

I accept the submission of Mr Sales that what lies behind the general rule that costs follow the event is the principle that it is an important function of rules as to costs to encourage parties in a sensible approach to increasingly expensive litigation. Where any claim is brought in court, costs have to be incurred on either side against a background of greater or lesser degrees of risk as to the ultimate result. If it transpires that the respondent has acted unlawfully, it is generally right that it should pay the claimant’s costs of establishing that. If it transpires that the claimant’s claim is ill-founded, it is generally right that it should pay the respondent’s costs of having to respond. This general rule promotes discipline within the litigation system, compelling parties to assess carefully for themselves the strength of any claim. d

The basic rule that costs follow the event ensures that the assets of the successful party are not depleted by reason of having to go to court to meet a claim by an unsuccessful party. This is as desirable in public law cases as it is in private law cases. As Mr Sales points out, where an unsuccessful claim is brought against a public body, it imposes costs on that body which have to be met out of public funds diverted from the funds available to fulfil its primary public functions. e

I did not understand Mr Drabble to take serious issue with any of the foregoing. It is plainly right that in the normal run of the mill public law case, the unsuccessful party should pay the other side’s costs. To this Mr Drabble would respond by saying that typical judicial review proceedings involve adversarial litigation, in which the applicant is seeking to promote or protect his or her own private interest: it does not raise a public interest challenge as defined. Nevertheless, in considering whether, and in what circumstances, there should be a departure from the basic rule that costs follow the event in public interest challenge cases, in my view it is important to have in mind the rationale for that basic rule, and that it is for the applicants to show why, exceptionally, there should be a departure from it. f

a As I said earlier, Mr Drabble relies on those cases where, at the end of proceedings, the court made no order for costs against the unsuccessful applicant, on the ground that the issues raised were ones of general public importance. Mr Sales and Mr Havers QC submit that the court was able to take that exceptional course in those cases because it was seized of all the arguments, and could decide whether, in all the circumstances, it was truly in the public interest that the claim should have been brought. It cannot be right, they argue, that every claim for judicial review, however bad it proves to be, should attract the same favourable treatment. The critical point about such cases is that the court feels able, after full argument, to decide that public money should be spent (by denial of recoupment from the unsuccessful party) on the clarification of the point of law.

b Mr Drabble counters this by submitting that there is an important distinction between (1) the merits of the claim, and (2) the merits of bringing the claim. An assessment of the merits of the claim may be complex, and will not finally be determined until judgment is given on the substantive application. The merits of bringing the claim, however, although related to the merits of the claim, can be assessed at the interlocutory stage without a detailed examination of the merits of the claim itself. He submits that the court can, and should, make a pre-emptive costs order, where it is satisfied that the claim raises a point of general public importance, and that the applicant does not have any private interest in the outcome. He says that the court can be so satisfied at the interlocutory stage, without reaching any conclusion as to the merits of the claim itself, save on the question whether it is arguable. If leave to move for judicial review has been granted then, ex hypothesi, the claim is arguable.

e The reasons why, in my judgment, it is appropriate to make a pre-emptive costs order only in exceptional cases are as follows. First, it will often not become clear whether an issue is of sufficient public importance to justify departure from the basic rule that costs follow the event until the hearing of the substantive application. Let us take the challenge by CPAG as an example. CPAG do not contend that the Lord Chancellor should make legal aid available in all cases before the social security tribunals and commissioners, but only in a minority of cases. Certain criteria are proposed for determining which class of case should qualify for legal aid. These include (1) the complexity of the case; (2) its general importance; and (3) the vulnerability of the claimant. The Lord Chancellor opposes the application, inter alia, on the grounds that the existing procedures provide adequate safeguards to protect the interests of claimants. It seems to me that the court will be in a better position than I am now to judge whether the point is of sufficient general public importance to justify a departure from the basic rule that costs should follow the event, after it has seen all the material and heard all the arguments. I accept that there will be cases where it is possible to say at the interlocutory stage that the issue raised is of sufficient general public importance, but that will often not be the case.

h The second reason why, in my view, it will only be in an exceptional case that a pre-emptive costs order should be made is that it will rarely be possible to make a sufficient assessment of the merits of the claim at the interlocutory stage. I do not consider that the fact that leave to move to apply for judicial review is enough. Leave will often have been granted on the papers, or following an ex parte oral application. Even if the application is made at an inter partes hearing, the respondent may not at that stage place before the judge all the material or outline all the arguments that will eventually be considered by the court hearing the substantive application. It may ultimately transpire that the application is



hopeless. As Lord Scarman said in *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93 at 113, [1982] AC 617 at 653:

‘The curb represented by the need for an applicant to show, when he seeks leave to apply, that he has such a case is an essential protection against abuse of legal process. It enables the court to prevent abuse by busybodies, cranks, and other mischief makers. I do not see any further purpose served by the requirement for leave.’

*New Zealand Maori Council v A-G of New Zealand* [1994] 1 All ER 623, [1994] 1 AC 466 may (I emphasise ‘may’) be an example of one of those rare cases in which it would have been appropriate to make a pre-emptive costs order. First, it was obvious that the point raised was one of great public importance, since it potentially involved the very survival of the Maori language. Secondly, so far as the merits were concerned, it was clear, by the time the stage of an appeal to the Privy Council had been reached, that there was much to be said in favour of the point sought to be argued by the appellants. This was not least because Cooke P had dissented in the Court of Appeal.

Mr Drabble relies to some extent on the liberalisation of the law standing in support of his arguments for pre-emptive costs. But it is significant that, although the courts undoubtedly take a less strict view of the requirements for standing than previously, it has been decided that standing should not be treated as a preliminary issue, but must be taken in the legal and factual context of the whole case: see *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93 at 96, 107 and 113, [1982] AC 617 at 630, 645 and 653 per Lord Wilberforce, Lord Fraser and Lord Scarman respectively. It seems to me that, in so far as any assistance may be derived from the cases on standing, they support the proposition that the court should be extremely cautious about making pre-emptive orders for costs. What the court is being asked by the applicants to do is to say, in advance, that a public body should subsidise proceedings that have been brought against it, and to do so even at a time when the court has an incomplete appreciation of the merits of the claim, and when it may also be unable to assess properly the extent of the general public importance of the issues raised by the proceedings. I cannot accept that a departure from the basic rule that costs should follow the event is justified in such circumstances.

I conclude, therefore, that the necessary conditions for the making of a pre-emptive costs order in public interest challenge cases are that the court is satisfied that the issues raised are truly ones of general public importance, and that it has a sufficient appreciation of the merits of the claim that it can conclude that it is in the public interest to make the order. Unless the court can be so satisfied by short argument, it is unlikely to make the order in any event. Otherwise, there is a real risk that such applications would lead, in effect, to dress rehearsals of the substantive applications, which in my view would be undesirable. These necessary conditions are not, however, sufficient for the making of an order. The court must also have regard to the financial resources of the applicant and respondent, and the amount of costs likely to be in issue. It will be more likely to make an order where the respondent clearly has a superior capacity to bear the costs of the proceedings than the applicant, and where it is satisfied that, unless the order is made, the applicant will probably discontinue the proceedings, and will be acting reasonably in so doing.

a With that discussion of what I consider to be the correct approach to applications for pre-emptive costs, I turn to the particular applications that are before me.

CPAG

b I am not persuaded that I have enough material to be able to form a concluded view as to how considerable a point of public importance is raised by this application. At first sight, the question whether legal aid should be available for hearings before social security tribunals and commissioners, would appear to be a matter of great public importance. But as I said earlier, CPAG is contending that legal aid should be available only in a minority of cases. On the material before me, it is not possible to assess, even approximately, the number of cases which c would be likely to attract legal aid if the applicant's arguments were to succeed at the substantive hearing. It is not obvious at this stage that so many claimants would or might benefit from legal aid, if CPAG were to succeed, that I can say with any confidence that the issue raised is of such general public importance that I ought to make a pre-emptive costs order.

d Nor am I satisfied that I have a sufficient appreciation of the merits of the application to be able to conclude that it is in the public interest to make the order. CPAG seeks to advance difficult arguments of law. It contends that it is inconsistent with the obligations imposed by art 6 of Council Directive (EEC) 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and e working conditions and Council Directive (EEC) 79/7 on equal treatment in social security matters to fail to provide legal aid for cases involving those directives. Community law requires that there should be effective access to judicial remedies for the protection of rights which are directly effective under Community law. Reference is made to decisions of the European Court of f Justice.

CPAG also contends that the decision of the Lord Chancellor is in breach of art 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Human Rights Convention) (Rome, 4 November 1950; TS 71 (1953); Cmd 8969), which so far as material provides:

g 'In the determination of his civil rights ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

h Reliance is placed on a number of decisions of the European Court of Human Rights, and it is submitted that the refusal to make legal aid available in complicated social security cases amounts to a breach of art 6.1 of the European Convention on Human Rights.

j By these complex arguments, CPAG seek to break new ground. I am quite unable to form a view as to their merits at this stage. It is possible that, once the considerable relevant statutory and case law material has been examined, the arguments will be exposed as wholly lacking in substance. On the other hand, it may be that although the arguments are finally rejected at the substantive hearing, the court will decide that they were by no means without merit and that, in all the circumstances, CPAG should not be ordered to pay the Lord Chancellor's costs. At this stage, however, I am unable to assess the merits sufficiently to be able to conclude that it is in the public interest that a pre-emptive costs order should be made.

Accordingly, neither of the conditions that I have identified as being necessary for the making of a pre-emptive costs order is satisfied. If they had been satisfied, I would have been minded to make the order sought, because the Lord Chancellor clearly has a superior capacity to bear the costs of the proceedings than CPAG, and it seems that, unless the order is made, CPAG will probably discontinue the proceedings and, in my judgment, will be acting reasonably in so doing.

#### *Amnesty/Redress*

It is said by the applicants that this is an important test case which raises significant points of principle. In her affidavit, Jean Gould puts the point in this way:

‘A number of the grounds of review raise key questions that potentially have an impact on future prosecutorial decisions, notably the extent to which factors that go to evidential sufficiency can also be relevant public interest factors, the scope (if any) of the DPP’s discretion to give weight to *mens rea* in the context of offences of strict liability and the relevance of international obligations as public interest factors’.

I am not convinced that the court that decides the substantive application in this case will necessarily make any statements of general principle and application as to how the DPP should exercise her discretion whether or not to prosecute. The court might decide the case quite narrowly, in which event, the decision will be of limited general public importance. There is a significant factual content in this challenge to the decision of the DPP not to prosecute. It is this element of the case which compels me to conclude that the first necessary condition for a successful application for a pre-emptive costs order is not satisfied.

As regards the merits of the application, I am wholly unable to form a view as to the applicants’ prospects of success. The public interest test set out in para 6 of the code requires the DPP to carry out a balancing exercise, and it may well be difficult for the applicants’ challenge to succeed. But as in the CPAG challenge, I have heard very little argument indeed on the point. For the same reasons as I gave in relation to that case, I am unable to assess the merits sufficiently to be able to say whether it is in the public interest to make a pre-emptive costs order.

Even if I had been persuaded that the two necessary conditions that I have identified were satisfied, I doubt whether I would have made a pre-emptive costs order in this case in any event. I am prepared to assume that the DPP clearly has a superior capacity to bear the costs of the proceedings than the applicants. I am not, however, satisfied on the evidence that, if the order is not made, both applicants will discontinue the proceedings. The evidence is that each applicant would be concerned or anxious about continuing; neither says that discontinuance would be the probable result if a pre-emptive costs order were not made. It is perhaps of greater significance that their evidence does not address the obvious possibility that the application be continued in the name of one of the applicants only, and that the proceedings be financed by both of them.

#### *Conclusion*

For the reasons that I have given, both of these applications are dismissed.

*Orders accordingly. Leave to appeal granted.*



# **R v East Sussex County Council, ex parte Tandy**

HOUSE OF LORDS

LORD BROWNE-WILKINSON, LORD SLYNN OF HADLEY, LORD NOLAN AND LORD STEYN  
AND LORD HUTTON

13, 14 JANUARY, 20 MAY 1998

*Education – Local education authority – Statutory duty to make arrangements for provision of suitable education for children unable to attend school – Whether local education authority entitled to take account of available resources when deciding to reduce provision – Education Act 1993, s 298.*

The appellant, T, was born in February 1982 and was thus a child of compulsory school age until February 1998. She had suffered from myalgic encephalomyelitis (ME) since the age of seven, in consequence of which she found it very difficult and at times impossible to attend school. From May 1992 onwards her local education authority had provided five hours per week home tuition for her. Originally that tuition had been provided pursuant to a statement of special needs as T was mildly dyslexic, but from July 1995 onwards it had been provided under s 298<sup>a</sup> of the Education Act 1993 (now re-enacted in s 19 of the Education Act 1996). Under s 298 each local education authority was required to make arrangements for the provision of suitable full-time or part-time education at school or otherwise than at school for those children of compulsory school age who, by reason of, inter alia, illness, might not otherwise receive suitable education. In October 1996 the education authority advised T's parents that, for financial reasons, the maximum number of hours of home tuition provided under s 298 would be reduced from five hours per week to three hours per week. Thereafter, T, acting by her mother and next friend, applied for judicial review of that decision. The judge allowed the application, holding that the education authority had taken into account an irrelevant factor, ie the shortage of resources, when deciding to reduce the number of hours of home tuition, that the decision was made in pursuit of an ulterior purpose, namely the reduction of expenditure and that it was irrational. The Court of Appeal, however, reversed his decision by a majority on the ground that it was legitimate for the education authority to take into account the shortage of resources. T appealed.

**Held** – On a true construction of s 298 of the Education Act 1993, the question of what was 'suitable education' was to be determined purely with reference to educational considerations, ie that the education had to be 'efficient' and 'suitable to [the child's] age, ability and aptitude' and also suitable 'to any special educational needs he may have', and there was nothing in the section to indicate that the resources available were relevant to that determination. Moreover, the fact that there were other provisions in the Act which referred expressly to the efficient use of resources supported that construction in the sense that if Parliament had meant such resources to be relevant for the consideration of what constituted 'suitable education' it would have made that point expressly. Accordingly, there was no reason to treat the resources of a local education authority as a relevant factor in determining what constituted 'suitable

<sup>a</sup> Section 298, so far as material, is set out at p 770 j to p 771 b, post

education' for the purposes of s 298. However, if there was more than one way of providing 'suitable education', the education authority would be entitled to have regard to its resources in choosing between different ways of making such provision. It followed, in the instant case, that the decision of the education authority to reduce the hours of home tuition provided to T for financial reasons was unlawful. The appeal would therefore be allowed and the judge's order would be restored (see p 774 h to p 775 d, and p 777 f to j, post).

*R v Gloucestershire CC, ex p Barry* [1997] 2 All ER 1 distinguished.

### Notes

For duties of a local education authority, see 15 *Halsbury's Laws* (4th edn reissue) para 22.

As from 1 November 1996 s 298 of the Education Act 1993 was replaced by s 19 of the Education Act 1996. For s 19 of the 1996 Act, see 15 *Halsbury's Statutes* (4th edn) (1997 reissue) 474.

### Cases referred to in opinions

*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223, CA.

*R v Cambridge Health Authority, ex p B* [1995] 2 All ER 129, [1995] 1 WLR 898, CA.

*R v Gloucestershire CC, ex p Barry* [1997] 2 All ER 1, [1997] AC 584, [1997] 2 WLR 459, HL.

### Appeal

T, an infant acting by her mother and next friend, appealed from the decision of the Court of Appeal (Ward and Mummery LJ; Staughton LJ dissenting) ([1997] 3 WLR 884) made on 31 July 1997 allowing an appeal by the local education authority from the decision of Keene J dated 23 April 1997 whereby he allowed T's application for judicial review and quashed the education authority's decision to reduce the number of hours of home tuition provided to T from five hours to three hours per week. The facts are set out in the opinion of Lord Browne-Wilkinson.

Michael Beloff QC, Tim Kerr and Andrew Sharland (instructed by Bates Wells & Braithwaite) for T.

Nigel Pleming QC and Rabinder Singh (instructed by Sharpe Pritchard, agents for Paul O'Sullivan, Lewes) for the education authority.

Their Lordships took time for consideration.

20 May 1998. The following opinions were delivered.

**LORD BROWNE-WILKINSON.** My Lords, at all material times the East Sussex County Council, as the local education authority (the LEA), was subject to a statutory duty under s 298 of the Education Act 1993 (now re-enacted in s 19 of the Education Act 1996) to provide education for those children in its area who by reason of illness would not otherwise have received it. So far as relevant, s 298 provided as follows:

'(1) Each local education authority shall make arrangements for the provision of suitable full-time or part-time education at school or otherwise

a than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them ...

(7) In this section "suitable education", in relation to a child or young person, means efficient education suitable to his age, ability and aptitude and to any special educational needs he may have ...'

b The appellant, Beth Tandy, was born on 8 February 1982 and was a child of compulsory school age until 8 February 1998. She has suffered from myalgic encephalomyelitis (ME) since she was seven in consequence of which she has found it very difficult and at times impossible to attend school. From May 1992 onwards, the LEA provided five hours per week home tuition for her. Originally  
c this home tuition was provided pursuant to a statement of special needs: Beth was mildly dyslexic. However that statement of special needs was withdrawn in July 1995 and from then onwards home tuition has been continued under s 298. Beth's progress has been kept under constant review and every effort made to reintegrate her into her school environment. But her medical condition meant that she only attended school on a handful of occasions. Her prime source of  
d education was home tuition.

In July 1996 Dr Bacon, the manager of pupil services for the LEA wrote to Beth's parents telling them of a general review of the LEA's home tuition services and warning them that 'the level of tuition may reduce from the previous standard of five hours per week as part of a package of measures which aims to  
e facilitate a pupil's early return to full time education'. There was a report in the press that the LEA's home tuition budget had been cut from £100,000 a year to £25,000 a year but in July 1996 Beth's parents were told—as will appear rather surprisingly—that the LEA had not yet concluded its policy on home tuition. At that time Beth's ability to attend school had not improved. At a meeting held on  
f 10 September 1996 the LEA's casework officer told Beth's parents that the maximum number of hours of home tuition would be cut from five hours per week to three hours per week, a decision which, the case worker said, was dictated purely by financial considerations and not by Beth's illness or educational needs.

Beth's parents protested vigorously to the LEA against this cut in the hours of  
g home tuition. On 25 October 1996 the chairman of the education committee, wrote to them as follows:

'I understand your concern that your daughter Beth should receive sufficient education to meet her needs. The County Council had to make some very difficult decisions last March regarding the level of budget for  
h education and I regret that it was considered necessary to reduce expenditure on home tuition. It is not considered that the County Council is failing in its statutory duty to provide education other than at school for pupils such as Beth. It is important that all pupils who require this service do receive some tuition and the reduction from five to three hours per week has been  
j necessary to ensure equal access to this provision for those pupils who need it.'

It was in those circumstances that these proceedings for judicial review were launched on 30 November 1996 attacking the LEA's decision to reduce the number of hours of home tuition provided for Beth from five to three hours per week. The decision has been attacked on three separate grounds: (1) that the



local authority in reaching its decision to cut the number of hours took into account an irrelevant consideration, namely its financial resources; (2) that the decision was reached in pursuance of an improper purpose, viz to save money; (3) that the decision was irrational. For reasons which will appear, it is only necessary for me to consider the first of those grounds. But for that purpose it is necessary to consider the reasons for the decision of the LEA to reduce the number of hours of home tuition provided for Beth.

Like all other local authorities, the respondent county council is in an unenviable position. It is now prevented from obtaining either from central government or from local taxation the financial resources necessary to discharge its functions as it would like to do. In a period when the aim of central government, of whatever political colour, has been to achieve a reduction in public spending, local authorities have not been relieved of statutory duties imposed upon them by Parliament in times past when different attitudes prevailed. Thus, in preparing its budget the respondent county council had to find ways of saving expenditure.

The evidence discloses how such considerations bore on the decision challenged in the present case. The respondent council was to set its budget for the year 1996/97 at its meeting on 20 February 1996. One of the major items in that budget was the requirement of the education committee, which committee fixed its budget on 5 January 1996. The education committee faced a requirement for an additional expenditure of £8.499m on account of pay and price increases and other commitments. Under the system whereby central government seeks to control local authority expenditure, central government's calculation of the allowable expenditure on education (the SSA) provided for an increase of only £7.264m. On the assumption that the whole of this SSA increase of £7.264m was allotted to the education committee by the council, the education committee still had to find savings of £1.235m (ie £8.499m less £7.264m). Further there had been an overspend of £1.85m in the year 1995/96 which the education committee had to seek to recoup. Therefore in fixing its budget, the education committee was faced with the task of making savings of £3.085m by reducing expenditure. Amongst other economies, they resolved to cut the expenditure on home tuition from £100,000 to £25,000 per annum. This decision was based on a recommendation by a strategic forum set up by the education committee to consider and assess all areas of its services for possible budget reductions.

This 75% cut in provision for home tuition then had to be translated into practical decisions for individual children. This was achieved by adopting a policy, which is described in a letter dated 25 October 1996 from the county education officer as follows:

'Subject to a full revision of the home tuition policy, it was agreed that the existing criteria for the provision of home tuition would remain in place. However, in order to meet existing commitments it was determined that provision for existing students would be decreased from five to three hours per week, and that an allocation of two hours per week would be made in cases agreed from the spring term 1996. Existing commitments on this reduced basis will lead to a significant overspend against the allocated budget for the current financial year, and contingency moneys have been identified to enable commitments to be met.'

That change of policy was known to and understood by the chairman of the education committee, who, in her affidavit, described it as follows:

a 'I knew that, as one of the means of achieving the savings of £130,000 I have referred to, the County Education Officer had decided to alter one of the criteria related to the provision of home tuition. The previous policy or practice on the provision of home tuition was normally to limit it to 5 hours per week in term time; that normal allocation was now to be reduced to 3 hours per week for existing cases and 2 hours for new cases.'

b In these circumstances it is not surprising that the agreed statement of facts placed before your Lordships included the following paragraph:

c 'In September 1996, the LEA decided to reduce Beth's home tuition from five hours per week to three hours per week. The LEA applied a policy that the normal number of hours home tuition for children would be three hours per week. In formulating that policy and applying it to Beth's case the LEA had regard to financial considerations. Its decision in relation to Beth was made in the context of a previous decision, on the ground of financial stringency, to reduce the overall annual home tuition budget for the year 1996/7 from £100,000 per annum to £25,000 per annum.'

d There is therefore no doubt that in deciding what constituted suitable education for Beth the LEA did take into account the financial resources available to it. The question is whether that was lawful.

e In an affidavit, Dr Bacon deposed that, in dealing with Beth's case, she did not simply apply the new policy in reducing the number of hours of home tuition from five to three per week but considered Beth's case individually. She reached the conclusion that three hours' home tuition constituted 'a suitable educational arrangement for Beth in terms of Section 298'. There are a number of features of Dr Bacon's evidence which are difficult to reconcile with the contemporary documents. However she was not cross-examined nor was her good faith f challenged. It must therefore be accepted that Beth's case was considered by her individually. However there can be no doubt that her conclusion in relation to Beth did take into account the new policy as to the number of hours of home tuition which were normally to be allowed. She said:

g 'Therefore, as a general rule, the allocation was reduced from a normal level of five hours per week per case to three hours for existing cases, and two hours for new cases agreed after the start of the financial year, although it was accepted that each case would need individual consideration.'

h The application for judicial review came before Keene J, who quashed the decision of the LEA on the grounds, first that the council had taken into account an irrelevant factor (ie the shortage of resources) when deciding to reduce the number of hours of home tuition; secondly, on the ground that the decision was made in pursuit of an ulterior purpose, namely the reduction of expenditure; and, thirdly, on the ground that it was irrational. On appeal ([1997] 3 WLR 884), the majority of the Court of Appeal (Ward and Mummery LJ, Staughton LJ j dissenting) reversed the judge's decision. They held that it was legitimate for the council to take into account the shortage of resources and held that the decision was not irrational. The majority view was largely based on the premise that the duty under s 298 was owed by the LEA, not to each child individually, but to a class of children, viz all children of school age in their area who, for statutory reasons, might not receive suitable education unless arrangements were made for them (see at 898 and 904–905 per Ward and Mummery LJ). On the appeal to

your Lordships' House, Mr Pleming QC, for the LEA, did not seek to maintain that view. He accepted, in my view, correctly that the council owed an individual duty to each child in its area who answered the description in s 298(1) to provide education which was suitable to that individual child: see sub-s (7). a

Although Beth was due to attain the age of 16 (and therefore cease to be eligible for further education under s 298) on 8 February 1998, your Lordships agreed to entertain the appeal: there was at least one other younger child in a similar position to Beth whose case was awaiting the outcome of this appeal. b

Before your Lordships, Mr Beloff QC, for Beth, adopted the reasoning of Keene J. The local authority had adopted a policy which required the number of hours of home tuition to be reduced from five to three hours and had applied that policy to Beth. In so doing they had had regard to irrelevant circumstances, namely the shortage of resources available to the local education authority. Therefore the decision was unlawful. On the other side, the LEA accepted that there was a statutory duty imposed upon them to provide 'suitable' and 'efficient' education for Beth. But they contended, to my mind rightly, that the decision as to what constitutes 'suitable' or 'efficient' education for the purposes of s 298 is committed by Parliament to the local education authority and is one of opinion and degree. The LEA then contended that one of the factors that it could take into account in making that decision was the availability of resources. Thus, it was argued, that in adopting a policy which reduced the normal ration of home tuition from five to three hours per week the fact that such reduction was made with a view to reducing expenditure was not unlawful. The evidence showed that such policy was lawfully applied in that individual attention was given to Beth's case to see if it was appropriate to depart from it. c  
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My Lords, I can accept much of the argument of the LEA. In particular, as was much stressed, the LEA was entitled to adopt a policy by reference to which it carried out its duties under s 298. But, like Staughton LJ, I do not understand why it makes any difference whether the LEA decided what was suitable education for each child ad hoc or decided the question in part by reference to a policy which it had adopted. In either case, the question is the same: was it lawful to decide the case or to adopt a policy which took into account the resources available to the LEA? Or is the question 'what constitutes suitable education?' to be determined by reference to educational criteria divorced from the resources available to provide such education. f  
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There is a recent decision of your Lordships which obviously bears on this question: *R v Gloucestershire CC, ex p Barry* [1997] 2 All ER 1, [1997] AC 584. But I will consider the construction of the Education Act 1993 before considering the impact of that decision. There is nothing in the 1993 Act to suggest that resource considerations are relevant to the question of what is 'suitable education'. On their face those words connote a standard to be determined purely by educational considerations. This view is much strengthened by the definition of 'suitable education' in s 298(7), which spells out expressly the factors which are relevant to the determination of suitability, viz the education must be 'efficient' and 'suitable to his age, ability and aptitude' and also suitable 'to any special educational needs he may have'. All these express factors relate to educational considerations and nothing else. There is nothing to indicate that the resources available are relevant. Moreover, there are other provisions in the Act which do refer expressly to the efficient use of resources: see ss 160, 161(4) and Sch 10, para 3. The draftsman has shown that he was alive to the issue of available resources; if he meant such resources to be relevant for the consideration of what constitutes h  
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a suitable education he would surely have said so. Again, the words in s 298(7) 'efficient education suitable to his age, ability and aptitude and to any special educational needs he may have' echo the words in s 37 of the Education Act 1944 (now s 7 of the 1996 Act), which uses those words to spell out the duty of a parent to provide education for his child. The content of the parental duty to educate cannot vary according to the resources of the parent.

b It was suggested in argument that it made a difference that the statutory duty was to 'make arrangements for the provision' of suitable education rather than just to provide suitable education. This view commended itself to the majority of the Court of Appeal. But once it is conceded, as it is, that the LEA owes the statutory duty to each sick child individually and not to sick children as a class, I can see no force in the argument. The duty is to make arrangements for what constitutes suitable education for each child. That duty will not be fulfilled unless the arrangements do in fact provide suitable education for each child.

c For these reasons as a matter of pure construction I can see no reason to treat the resources of the LEA as a relevant factor in determining what constitutes 'suitable education'. But I should make it clear, as did Keene J and Staughton LJ  
d in their judgments, that if there is more than one way of providing 'suitable education', the LEA would be entitled to have regard to its resources in choosing between different ways of providing suitable education.

e Does the decision in *R v Gloucestershire CC, ex p Barry* [1997] 2 All ER 1, [1997] AC 584 lead to a different conclusion? That case concerns s 2(1) of the Chronically Sick and Disabled Persons Act 1970, which, so far as relevant, provides as follows:

*'Provision of welfare services.—(1) Where a local authority having functions under section 29 of the National Assistance Act 1948 are satisfied in the case of any person to whom that section applies who is ordinarily resident in their area that it is necessary in order to meet the needs of that person for that authority to make arrangements for all or any of the following matters, namely [(a) to (h)] then ... it shall be the duty of that authority to make those arrangements in exercise of their functions under the said section 29.'*

The matters referred to paras (a) to (h) of s 2(1) were as follows:

g '(a) the provision of practical assistance for that person in his home; (b) the provision for that person of, or assistance to that person in obtaining, wireless, television, library or similar recreational facilities; (c) the provision for that person of lectures, games, outings or other recreational facilities ...  
h (d) the provision for that person of facilities for, or assistance in, travelling to and from his home for the purpose of ... (e) the provision of assistance for that person in arranging for the carrying out of any works of adaptation in his home or the provision of any additional facilities designed to secure his greater safety, comfort or convenience; (f) facilitating the taking of holidays by that person ... (g) the provision of meals for that person whether in his home or elsewhere; (h) the provision for that person of, or assistance to that person in obtaining, a telephone ...'

The applicant was disabled and had been in receipt under s 2(1) of home care for shopping, pension, laundry, cleaning and meals on wheels. He was then informed that the provision of cleaning and laundry would be withdrawn because the local authority had insufficient resources. It was held by the majority of your Lordships' House, Lord Nicholls of Birkenhead, Lord Hoffmann and

Lord Clyde (Lord Lloyd of Berwick and Lord Steyn dissenting) that it was lawful for the local authority in deciding what was necessary to meet the needs of the applicant to take into account the scarcity of the resources available to it. a

Although both that case and the one now before your Lordships are concerned with the extent to which a local authority can take account of its lack of resources in carrying out a statutory duty, that is the limit of the similarity between the two cases. The question in *Ex p Barry* related to the questions what were the 'needs' of the disabled person and whether it was 'necessary in order to meet' those needs to make arrangements for the indicated benefits. It was held by Lord Nicholls that, in assessing the needs of the disabled person, the local authority had to have regard to the cost of what was to be provided and once regard was had to cost they must also have regard to the resources available to meet such cost. Depending on the authority's financial position the authority could be more or less stringent in the criteria it set as constituting need. Lord Clyde adopted a rather different approach. He apparently accepted that the local authority's resources were not relevant to deciding what were the needs of the applicant but held that they were relevant to the decision whether it was 'necessary' to make arrangements to meet those needs: he accepted that there might be in one sense 'unmet needs' if the local authority decided, in the light of its financial circumstances, that there was no necessity to meet those needs (see [1997] 2 All ER 1 at 16, 17, [1997] AC 584 at 610, 611). Whichever approach was adopted, the statutory provision there under consideration was a strange one. The statutory duty was to arrange certain benefits to meet the 'needs' of the disabled persons but the lack of certain of the benefits enumerated in the section could not possibly give rise to 'need' in any stringent sense of the word. Thus it is difficult to talk about the lack of a radio or a holiday or a recreational activity as giving rise to a need: they may be desirable but they are not in any ordinary sense necessities. Yet, according to the section the disabled person's needs were to be capable of being met by the provision of such benefits. The statute provided no guidance as to what were the criteria by which a need of that unusual kind was to be assessed. There was no definition of need beyond the instances of the possible benefits. In those circumstances, it is perhaps not surprising that the majority of your Lordships looked for some other more stringent criteria enabling the local authority to determine what was to be treated as a need by reference to the resources available to it. b  
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The position in the present case is quite different. Under s 298 the LEA is not required to make any prior determination of Beth's need for education nor of the necessity for making provision for such education. The statute imposes an immediate obligation to make arrangements to provide suitable education. Moreover it then expressly defines what is meant by 'suitable education' by reference to wholly objective educational criteria. For these reasons, in my judgment the decision in *Ex p Barry* does not affect the present case. h

There remains the suggestion that, given the control which central government now exercises over local authority spending, the court cannot, or at least should not, require performance of a statutory duty by a local authority which it is unable to afford. In the present case, the LEA does not contend that lack of resources is any defence to a failure to perform the statutory duty if it has arisen. But lack of resources is relied upon to preclude any statutory duty arising. My Lords, I believe your Lordships should resist this approach to statutory duties. j

First, the county council has as a matter of strict legality the resources necessary to perform its statutory duty under s 298. Very understandably it does

a not wish to bleed its other functions of resources so as to enable it to perform the statutory duty under s 298. But it can, if it wishes, divert money from other educational, or other, applications which are merely discretionary so as to apply such diverted moneys to discharge the statutory duty laid down by s 298. The argument is not one of insufficient resources to discharge the duty but of a preference for using the money for other purposes. To permit a local authority to avoid performing a statutory duty on the grounds that it prefers to spend the money in other ways is to downgrade a statutory duty to a discretionary power. A similar argument was put forward in *Ex p Barry* but dismissed by Lord Nicholls (see [1997] 2 All ER 1 at 12, [1997] AC 584 at 605) apparently on the ground that the complainant could control the failure of a local authority to carry out its statutory duty by showing that it was acting in a way which was *Wednesbury* unreasonable (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223) in failing to allocate the necessary resources. But with respect this is a very doubtful form of protection. Once the reasonableness of the actions of a local authority depends upon its decision how to apply scarce financial resources, the local authority's decision becomes extremely difficult to review. The court cannot second-guess the local authority in the way in which it spends its limited resources: see also *R v Cambridge Health Authority, ex p B* [1995] 2 All ER 129 esp at 137, [1995] 1 WLR 898 esp at 906. Parliament has chosen to impose a statutory duty, as opposed to a power, requiring the local authority to do certain things. In my judgment the courts should be slow to downgrade such duties into what are, in effect, mere discretions over which the court would have very little real control. If Parliament wishes to reduce public expenditure on meeting the needs of sick children then it is up to Parliament so to provide. It is not for the courts to adjust the order of priorities as between statutory duties and statutory discretions.

For these reasons I would allow the appeal and restore the order of Keene J.

f **LORD SLYNN OF HADLEY.** My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Browne-Wilkinson. For the reasons he gives I too would allow the appeal and restore the order of Keene J.

g **LORD NOLAN.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Browne-Wilkinson. For the reasons which he gives I too would allow the appeal and restore the order of Keene J.

h **LORD STEYN.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Browne-Wilkinson. For the reasons contained in his speech I would also allow the appeal and restore the order of Keene J.

j **LORD HUTTON.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Browne-Wilkinson. For the reasons he gives I would allow this appeal and restore the order of Keene J.

*Appeal allowed.*



## Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd and another

HOUSE OF LORDS

LORD GOFF OF CHIEVELEY, LORD LLOYD OF BERWICK, LORD NOLAN, LORD HOFFMANN  
AND LORD HOPE OF CRAIGHEAD

25 FEBRUARY, 20 MAY 1998

*Arbitration – Stay of court proceedings – Grant of stay – Building contract – Employer claiming damages against contractor and architects for breach of contract and negligence – Building contract providing for disputes to be referred to arbitration – Arbitrator having power to open up, review and revise architects' certificates and opinions – Whether court having similar power – Whether court proceedings should be stayed to enable dispute between employer and contractor to be settled by arbitration.*

The appellant employer entered into a contract dated 3 May 1994 with the contractor for the construction of a nine-storey office block in Belfast. The contract was in the standard JCT form. By a separate contract it employed a firm of architects. By art 5 of the JCT agreement, the parties agreed to refer any disputes arising thereunder or in connection therewith to arbitration and by cl 41 any such arbitrator was expressly empowered to open up, review and revise the architects' certificates. Litigation commenced in Northern Ireland on 31 August 1995 when the contractor issued a writ, claiming about £230,000 and interest due under six architects' certificates. In December 1995 the employer issued a writ against both the contractor and the architects, claiming damages for negligence and breach of contract. Thereafter, the contractor applied to the court for an order staying the employer's action pursuant to s 4 of the Arbitration Act (Northern Ireland) Act 1937. The master granted the stay. On appeal, his decision was affirmed by the judge who held that he was bound by authority to hold that an arbitrator would have the power to 'open up, review and revise' certificates or opinions of the architect which the court did not possess and that, if a stay was refused, the contractor would be at a grave disadvantage in that it would be faced with architect's certificates which the court would not be able to review. The Court of Appeal in Northern Ireland upheld the judge's decision and the employer appealed.

**Held** – The court had not been deprived, by the power which the parties had given to their arbitrator to open up, review and revise certificates, opinions and decisions of the architect, of its ordinary power to determine the rights and obligations of the parties and to provide them with the usual remedies. In the circumstances, there would be no injustice to the contractor in refusing a stay. Indeed, to grant a stay would be to risk conflicting decisions in the separate proceedings which would be needed to determine the respective responsibilities to the employer of the contractor and of the architect. Accordingly, the appeal would be allowed (see p 779 j to p 780 a, p 781 e to j, p 782 b to d f, p 787 g h, p 790 c d f to j, p 791 d, p 792 e, p 796 f, p 797 d f j to p 798 b e to g, p 799 c and p 800 a to d f to h, post).

*Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] 2 All ER 175 overruled.

**Notes**

- a** For stay of court proceedings, see 2 *Halsbury's Laws* (4th edn reissue) paras 616–640.

**Cases referred to in opinions**

- Balfour Beatty Civil Engineering Ltd v Docklands Light Rly Ltd* (1996) 49 ConLR 1, CA.
- b** *Benstrete Construction Ltd v Hill* (1987) 38 BLR 115, CA.
- Brodie v Cardiff Corp* [1919] AC 337, HL.
- Dawnays Ltd v F G Minter Ltd* [1971] 2 All ER 1389, [1971] 1 WLR 1205, CA.
- East Ham BC v Bernard Sunley & Sons Ltd* [1965] 3 All ER 619, [1966] AC 406, [1965] 3 WLR 1096, HL.
- Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195, [1974] AC 689, [1973] 3 WLR 421, HL; *rvsg* (1973) 71 LGR 162, CA.
- c** *Kaye (P & M) Ltd v Hosier & Dickinson Ltd* [1972] 1 All ER 121, [1972] 1 WLR 146, HL.
- Minster Trust Ltd v Traps Tractors Ltd* [1954] 3 All ER 136.
- Mondel v Steel* (1841) 8 M & W 858, [1835–42] All ER Rep 511, 151 ER 1288.
- d** *National Coal Board v Wm Neill & Son (St Helens) Ltd* [1984] 1 All ER 555, [1985] QB 300, [1984] 3 WLR 1135.
- Neale v Richardson* [1938] 1 All ER 753, CA.
- Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] 2 All ER 175, [1984] QB 644, [1984] 2 WLR 676, CA.
- Robins v Goddard* [1905] 1 KB 294, CA.
- e** *Taunton-Collins v Cromie* [1964] 2 All ER 332, [1964] 1 WLR 633, CA.

**Appeal**

- Beaufort Developments (NI) Ltd (the employer) appealed with leave from the decision of the Court of Appeal in Northern Ireland (Hutton LCJ, Carswell and Nicholson LJ) ([1997] NI 142) on 21 April 1997 dismissing its appeal from the order of Pringle J on 24 May 1996 dismissing its appeal from the decision of Master Wilson on 18 April 1996 whereby he ordered that the proceedings commenced by the employer against Gilbert-Ash NI Ltd (the contractor) and Parker & Scott (a firm) (the architects) for damages for breach of contract be stayed pursuant to s 4 of the Arbitration Act (Northern Ireland) 1937. The facts
- f** are set out in the opinion of Lord Hoffmann.
- g**

*Declan Morgan QC* and *Gavin Bonnar* (both of the Northern Ireland Bar) (instructed by *Crawford & Lockhart*, Belfast) for the employer.

- Donnell Deeny QC* and *T Mark Horner QC* (both of the Northern Ireland Bar) (instructed by *L'Estrange & Brett*, Belfast) for the contractor.
- h** *John Thompson QC* and *Desmond Marrinan* (both of the Northern Ireland Bar) (instructed by *McCloskey & Co*, Belfast) for the architects.

Their Lordships took time for consideration.

- j** 20 May 1998. The following opinions were delivered.

**LORD GOFF OF CHIEVELEY.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Hoffmann. I find myself to be in complete agreement with his reasoning and his conclusion; and I too am satisfied that, with all respect to the distinguished members of the Court of Appeal who decided the case, *Northern Regional Health Authority v Derek*

*Crouch Construction Co Ltd* [1984] 2 All ER 175, [1984] QB 644 was wrongly decided and must be overruled. I too would therefore allow the appeal—a conclusion which, I have no doubt, will be welcomed by the courts in Northern Ireland who would, if they had been free to do so, have wished to follow the same course. Like Lord Hoffmann, I gladly acknowledge my debt to the writings of Mr I N Duncan Wallace QC on the subject. a

**LORD LLOYD OF BERWICK.** My Lords, standard forms of building contract have often been criticised by the courts for being unnecessarily obscure and verbose. But in fairness one should add that it is sometimes the courts themselves who have added to the difficulty by treating building contracts as if they were subject to special rules of their own. b

Two recent examples illustrate the point. In *Dawnays Ltd v F G Minter Ltd* [1971] 2 All ER 1389, [1971] 1 WLR 1205 the Court of Appeal held that when a sum is certified by an architect as due under a building contract (in that case the RIBA form) the employer has no right of set-off. The justification for this decision was said to be that cash flow is the life blood of the building trade: see *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* (1973) 71 LGR 162 at 167 per Lord Denning MR. The decision came as something of a surprise in the official referees' corridor. It was overruled a few years later when the *Modern Engineering* case reached the House ([1973] 3 All ER 195, [1974] AC 689). Lord Diplock said: c

'It is not to be supposed that so an elementary an economic proposition as the need for cash flow in business enterprises escaped the attention of judges throughout the 130 years which had lapsed between *Mondel v Steel* (1841) 8 M & W 858, [1835–42] All ER Rep 511 and *Dawnay's* case in 1971 ...' (See [1973] 3 All ER 195 at 216, [1974] AC 689 at 718.) e

And so the House held, restoring the decision of Judge Edgar Fay QC, that the ordinary common law right of set-off, whereby a breach of warranty may be set up in diminution of the price, applies as much to building contracts as to contracts for the sale of goods. f

In the meantime the *Dawnays* case had been followed in five other cases in the Court of Appeal. This is not surprising when one considers the pressure of litigation in this field. One erroneous decision of the Court of Appeal is bound to lead to others. g

The same applies to the second example, although the intervening period has been somewhat longer. The arbitration clause in *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] 2 All ER 175, [1984] QB 644 gave the arbitrator the power to 'open up review and revise any certificate' of the architect, as does the arbitration clause in the present case. The Court of Appeal held that this special power was confined to the arbitrator, on whom it had been conferred by the arbitration clause. It could not be exercised by the courts. Since it would have been unjust to the contractors to deprive them of the opportunity of challenging the architect's certificates in that case, the Court of Appeal held that the arbitrations (there were two of them) should go ahead. h

As in the *Dawnays* case, it appears that the decision in the *Crouch* case came as a surprise. Official referees had been opening up and revising certificates as a matter of course for many years without any objection from the parties. j

It is clear from Pringle J's judgment in the present case that, but for the decision in the *Crouch* case, he would not have granted the defendant a stay of the plaintiffs' action under s 4 of the Arbitration Act (Northern Ireland) 1937, and the



a Court of Appeal ([1997] NI 142) would have upheld his decision. In my view they would have been right. So the question is whether the *Crouch* case was correctly decided.

b In the present case we are concerned with cl 30.9, 30.10 and 41.4. Clause 30.9 provides that the *final* certificate is to be conclusive evidence of the matter certified in accordance with the elaborate provisions set out in that clause. Clause 41.4, the arbitration clause, provides, as one would expect, that the arbitrator's powers to open up and revise certificates are subject to cl 30.9. So the arbitrator has no power to open up and revise the final certificate, save as provided by cl 30.9, and in particular by cl 30.9.3. But we are not here concerned with the final certificate. It has not yet been issued.

c Nothing in cl 30.9 affects any certificate other than the final certificate. Indeed cl 30.10 specifically provides:

'Save as aforesaid no certificate of the Architect shall of itself be conclusive evidence that any works, materials or goods to which it relates are in accordance with this Contract.'

d Interim certificates granted by the architect in the course of a building contract are an important part of the contractual machinery. But there is nothing in the present contract to make interim certificates conclusive; nor was there in the *Crouch* case. So there is no need for the contract to confer on the courts the power to open up and revise interim certificates. The power already exists, as part of the court's ordinary power to enforce the contract in accordance with its terms.

e Then can it be said that the jurisdiction of the courts to open up and revise interim certificates is impliedly excluded by the terms of the arbitration clause? I do not pause to consider whether such an ouster of the court's powers would be effective in law; on any view it would require the clearest of language. I can find no such language in cl 41.4. Since an arbitrator's powers, unlike the powers of the court, are derived ultimately from the contract under which he is appointed, it is f by no means unusual to find his powers spelt out in longhand. Thus under the old law (until changed by s 30 of the Arbitration Act 1996) an arbitrator had no power to rule on his own jurisdiction. Since he could not pull himself up by his own boot straps, he could not decide whether a valid arbitration agreement had ever come into existence. But the High Court can rule on its own jurisdiction.

g Similarly an arbitrator could not rule on a question whether the contract ought to be rectified. So it is not surprising to find the parties conferring on the arbitrator an express power to rectify the contract. But it would be hopeless to argue that because the parties had by cl 41.4 conferred on the arbitrator an express power to rectify the contract, they had by implication curtailed the power h of the court to rectify the contract. By the same token, the court's power to open up and revise interim certificates is not excluded by the express power to open up and revise certificates conferred on the arbitrator.

j For these reasons, and those given by my noble and learned friends Lord Hoffmann and Lord Hope, with which I agree, I would hold that the *Crouch* case was wrongly decided, and, like them, would allow the appeal.

**LORD NOLAN.** My Lords, I confess to much sympathy with the very distinguished and experienced judges who have expressed or assented to the view that a clause such as cl 41.4 of the building contract giving the arbitrator power to 'open up, review and revise any certificate, opinion, decision ... requirement or notice ...' confers upon him a discretion wider than that available to a court. The language used is not that of *The Supreme Court Practice*. It seems to suggest

an informal and constructive approach to the resolution of problems occurring in the course of the building work, an approach appropriate to the work of an arbitrator who is chosen because he is an architect rather than a judge. a

I am, however, persuaded by the arguments of Mr Declan Morgan QC, and by the opinions of your Lordships whose speeches I have had the opportunity of reading in draft, that the Court of Appeal in *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] 2 All ER 175, [1984] QB 644 placed a weight on cl 41.4 greater than it will bear. I am persuaded in particular that cl 41.4, read in the context of the contract as a whole, cannot properly be construed as giving an interim certificate (as distinct from a final certificate) any conclusive effect in litigation between the parties. Further, I am satisfied that the clause cannot be regarded as conferring upon the arbitrator the power to modify the contract. I find it difficult to conceive of a contract properly so called which conferred upon a third party the power to modify its terms. b  
c

The decision in the *Crouch* case has stood unchallenged, although not uncriticised, for 14 years. It has now been virtually superseded by s 9(4) of the Arbitration Act 1996, unless and until (if ever) s 86 of that Act is brought into operation. Yet on the view of the law which has prevailed in your Lordships' House the relevant dicta in the *Crouch* case must clearly be overruled, in justice to the appellants. Pringle J and the Court of Appeal in *Northern Ireland* ([1997] NI 142) would plainly have refused a stay to the respondents, on the compelling ground that to grant it would lead to duplication of proceedings, had it not been for their reluctant acceptance of what was said in the *Crouch* case. The same objection to a stay did not, as it happens, arise in the *Crouch* case itself because all three of the parties concerned submitted to arbitration by the same arbitrator. Mr Donnell Deeny QC, for the first-named respondent, persuasively invited your Lordships to assume that the same consequence would follow if the stay were upheld in the present case, but the assumption was not one which Mr Morgan was prepared to support. d  
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I, too, would therefore allow the appeal.

**LORD HOFFMANN.** My Lords, the question before your Lordships is whether an arbitrator appointed to decide a dispute arising under a building contract in the JCT standard form has a power to review decisions and certificates of the architect which is not available to a court. The English Court of Appeal so held in *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] 2 All ER 175, [1984] QB 644, but your Lordships are invited to say that they were wrong. g

The clause which is said to give the arbitrator these exceptional powers is 41.4, of which the relevant parts are as follows: h

'... the Arbitrator shall, without prejudice to the generality of his powers, have power to rectify the contract so that it accurately reflects the true agreement made by the Employer and the Contractor, to direct such measurements and/or valuations as may in his opinion be desirable in order to determine the rights of the parties and to ascertain and award any sum which ought to have been the subject of or included in any certificate and to open up, review and revise any certificate, opinion, decision ... requirement or notice and to determine all matters in dispute which shall be submitted to him in the same manner as if no such certificate, opinion, decision, requirement or notice had been given.'

j

a The words particularly relied upon are those which confer a power to 'to open up, review and revise any certificate, opinion, decision ... requirement or notice' and determine matters in dispute as if they had not been given. The Court of Appeal in the *Crouch* case said that these were special powers conferred exclusively upon the arbitrator. Browne-Wilkinson LJ ([1984] 2 All ER 175 at 186–187, [1984] QB 644 at 667) said that in an action 'questioning the validity of an architect's certificate or opinion', the jurisdiction of the court would be limited to deciding whether or not the certificate or opinion was invalid for bad faith or excess of power. It could not revise the certificate on the ground that the court thought it was wrong. A clause such as 41.4, on the other hand, gave the arbitrator 'power not only to enforce the contractual obligations but to modify them'. Donaldson MR also said that the arbitrator could vary the certificates to create new rights and obligations which would not otherwise arise from the contract. Dunn LJ said that one could not imply a term that if the dispute was litigated instead of arbitrated, the court should have a similar power.

d My Lords, I have no doubt that it is open to the parties to enter into an agreement of the kind described by the Court of Appeal in the *Crouch* case. I put aside the purely theoretical question of whether it is right to speak of the architect or arbitrator having power to modify the contractual obligations of the parties. I find this a strange concept. The powers of the architect or arbitrator, whatever they may be, are conferred by the contract. It seems to me more accurate to say that the parties have agreed that their contractual obligations are to be whatever the architect or arbitrator interprets them to be. In such a case, the opinion of the court or anyone else as to what the contract requires is simply irrelevant. To enforce such an interpretation of the contract would be something different from what the parties had agreed. Provisions of this kind are common in contracts for the sale of property at a valuation or goods which comply with a specified description. The contract may say that the value of the property or the question of whether the goods comply with the description shall be determined by a named person as an expert. In such a case, the agreement is to sell at what the expert considers to be the value or to buy goods which the expert considers to be in accordance with the description. The court's view on these questions is irrelevant.

g It is less usual, though certainly theoretically possible, to add a second tier to arrangements of this kind, and to provide that a party who is dissatisfied with the view of one expert shall be entitled to call for the opinion of another, which shall then be final and binding. From the point of view of the court, the final outcome is no different from that in the case of a single expert. The contractual obligations of the parties depend upon the opinion of the one expert or the other and not upon its own view of the matter.

j It is this two-tier arrangement which the Court of Appeal in the *Crouch* case considered that the JCT contract had created; what Donaldson MR afterwards called, cryptically but vividly, an 'internal arbitration' (see *Benstrete Construction Ltd v Hill* (1987) 38 BLR 115 at 118). It is internal in the sense that it does not adjudicate upon the rights and duties of the parties but is part of the machinery for determining what they are. The court appears to have considered that in the absence of a second-tier power of the arbitrator to open up, review and revise the architect's certificates, they would (if given in good faith and within the ambit of the relevant contractual provisions) be binding upon the parties. So the critical question is whether, upon the true construction of the contract, such certificates are binding. Unless they are, there is no need for any special second-tier



arrangement. They will be open to review by any tribunal called upon to determine the rights of the parties, whether arbitral or judicial. a

The judgments of the Court of Appeal contain no very detailed analysis of the provisions of the contract which are said to confer upon the architect this power to issue binding certificates. Although none of the judges say so expressly, there is an implied suggestion that one can infer such a power from the very fact that the arbitrator is given a power to 'open up, review and revise'. This is the argument from redundancy; the parties are presumed not to say anything unnecessarily and unless the decisions of the architect were binding, there would be no need to confer upon the arbitrator an express power open up, review and revise them. The later judgment of Donaldson MR in *Benstrete Construction Ltd v Hill* (1987) 38 BLR 115, in which he distinguished *Crouch* on the ground that the contract in the latter case did not have a similar arbitration clause, tends to support the view that he had adopted this form of reasoning. b  
c

I think, my Lords, that the argument from redundancy is seldom an entirely secure one. The fact is that even in legal documents (or, some might say, especially in legal documents) people often use superfluous words. Sometimes the draftsmanship is clumsy; more often the cause is a lawyer's desire to be certain that every conceivable point has been covered. One has only to read the covenants in a traditional lease to realise that draftsmen lack inhibition about using too many words. I have no wish to add to the anthology of adverse comments on the drafting of the JCT standard form contract. In the case of a contract which has been periodically renegotiated, amended and added to over many years, it is unreasonable to expect that there will be no redundancies or loose ends. It is therefore necessary to make a careful examination of the contract as a whole in order to discover whether upon its true construction it does confer binding power upon the decisions of the architect or whether there is some other explanation for the 'open up, review and revise' power in cl 41.4. It is also important to have regard to the course of earlier judicial authority and practice on the construction of similar contracts. The evolution of standard forms is often the result of interaction between the draftsmen and the courts and the efforts of the draftsman cannot be properly understood without reference to the meaning which the judges have given to the language used by his predecessors. d  
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The substantive provisions of the agreement state the principal obligations of the parties in clear and objective terms. The contractor is obliged by cl 2.1 of the conditions to 'carry out and complete the Works in accordance with the Contract Documents, using materials and workmanship of the quality and standards therein specified ...' In this particular contract, the preliminary articles defined the 'Works' as the construction of a nine-storey office block as described in the contract documents. Clause 8.1.3 provides that all work is to be carried out in a proper and workmanlike manner and by cl 23.1.1 the contractor is to proceed 'regularly and diligently' with the works and complete them on or before the completion date. The contract specified 14 January 1995 as the completion date and said that the contract price was to be £1,700,000. g  
h

This framework of carefully defined contractual obligation is not easily reconcilable with a broad discretion, said to be conferred in the first instance upon the architect and subject to review by an arbitrator, to vary or modify the rights of the parties or to have them conclusively determined by the judgment of one or the other. The parties have agreed that a particular building is to be constructed out of specified materials in a workmanlike manner and that the work should proceed regularly and diligently to completion by a specified date. i

a No doubt within this framework there is room for judgment about what amounts to proper workmanship and diligent progress. But one would not ordinarily describe the exercise of such judgment as a power to modify the contractual rights. These are questions which require the application of objective standards and with which the courts are routinely familiar.

b The contract provides for the issue by the architect of certificates or statements in writing as to his opinion on various matters. For present purposes, these documents may be treated as similar. As Devlin J said in *Minster Trust Ltd v Traps Tractors Ltd* [1954] 3 All ER 136 at 145: 'The mere use of the word "certificate" is not decisive.' In the absence of express words, the parties are highly unlikely to have intended that some of these statements of opinion should be binding and others not. I shall give a few examples. Clause 30 provides for the issue of interim  
c certificates of the value of the work for which the contractor is from time to time entitled to payment. Clause 30.1.1 provides that the contractor is entitled to payment within 14 days after the issue of the certificate. Clause 25, which deals with extension of time, lists a number of 'relevant events' such as force majeure or failure to provide instructions or information which the parties accept as  
d capable of delaying completion beyond the completion date without breach of the contractor's primary obligation to proceed diligently with the works. By cl 25.3, if the architect is of opinion that a relevant event is likely to delay completion beyond the completion date, he must give the contractor an appropriate extension of time by a written notice fixing a new completion date. Clause 26 deals with claims for loss and expense caused by deferment of giving  
e possession of the site or various matters such as provision of information for which the employer or architect is responsible. Here again, the architect is required to state his opinion that loss or expense has been caused, or is likely to be caused, by one of the specified matters, whereupon the amount is ascertained by the quantity surveyor and added to the contract price. Finally, cl 30.8 provides  
f for the issue of a final certificate stating the balance due from employer to contractor or vice versa.

Clause 30.9 expressly makes the final certificate conclusive evidence as to various matters. But there is no other express provision which says that any certificate or expression of opinion is to be binding upon the parties in the same way as the determination of an expert. Clause 30.10, immediately after the  
g provisions dealing with the final certificate, says:

'Save as aforesaid no certificate of the Architect shall of itself be conclusive evidence that any works, materials or goods to which it relates are in accordance with this Contract.'

h This clause has itself been the subject of refined arguments of the *inclusio unius, exclusio alterius* variety. The clause refers to certificates, therefore it must have been intended that other statements of opinion by the architect should be conclusive. The clause refers only to works, materials and goods being in accordance with the contract, therefore it must have been intended that certificates as to other matters such as extensions of time should be conclusive.

j In a contract such as this, such arguments are just as dangerous as the argument from redundancy, of which they are in truth merely a variety. If arguments of this kind are to be pursued, what seems to me much more compelling is that the contract contains express and elaborate terms which provide for conclusiveness as to various matters for one certificate and one only, namely the final certificate.

If the certificates are not conclusive, what purpose do they serve? If one considers the practicalities of the construction of a building or other works, it

seems to me that parties could reasonably have intended that they should have what might be called a provisional validity. Construction contracts may involve substantial work and expenditure over a lengthy period. It is important to have machinery by which the rights and duties of the parties at any given moment can be at least provisionally determined with some precision. This machinery is provided by architect's certificates. If they are not challenged as inconsistent with the contractual terms which the parties have agreed, they will determine such matters as when interim payments are due or completion must take place. This is something which the parties need to know. No doubt in most cases there will be no challenge.

On the other hand, to make the certificate conclusive could easily cause injustice. It may have been given when the knowledge of the architect about the state of the work or the effect of external causes was incomplete. Furthermore, the architect is the agent of the employer. He is a professional man but can hardly be called independent. One would not readily assume that the contractor would submit himself to be bound by his decisions, subject only to a challenge on the grounds of bad faith or excess of power. It must be said that there are instances in the nineteenth century and the early part of this one in which contracts were construed as doing precisely this. There are also contracts which provided that in case of dispute, the architect was to be arbitrator. But the notion of what amounted to a conflict of interest was not then as well understood as it is now. And of course the inclusion of such clauses is a matter for negotiation between the parties or, in a standard form, the two sides of the industry, so that what is acceptable will to some extent depend upon the bargaining strength of one side or the other. At all events, I think that today one should require very clear words before construing a contract as giving an architect such powers.

The language and practical background of the JCT contract does not therefore suggest that any certificates other than the final certificate were intended to have conclusive effect. I return, therefore, to cl 41.4, from which the Court of Appeal in the *Crouch* case drew the opposite conclusion. It is worth noticing in passing that, in addition to the power to 'open up, review and revise', it also confers express powers to rectify the contract and to direct measurements and valuations. It seems plain that the reason for the inclusion of these powers in cl 41.4 is to confer upon the arbitrator the plenitude of power to 'determine the rights of the parties' which would be possessed by a court. If the power to 'open up, review and revise' was intended to be peculiar to the arbitrator, it would at any rate be different in its purpose from the other powers.

At this stage, however, I wish to refer to an important authority on a clause in similar language which may be taken to have formed part of the background to the inclusion of cl 41.4 in the JCT Standard Form Contract (1980 edn) which was used in this case. It is *Robins v Goddard* [1905] 1 KB 294. This concerned an RIBA form of contract, of which cl 17 dealt with defects 'arising in the opinion of the architect from materials or workmanship not in accordance with the drawings or specification'. It provided that the contractor should make good such defects at his own cost 'unless the architect should decide that the contractor ought to be paid for the same'. The contract also included an arbitration clause which conferred power to 'open up, review and revise' any certificate, opinion etc of the architect. The contractor sued upon unpaid architect's certificates and the employer counterclaimed on the ground that the work done and materials supplied were not in accordance with the terms of the contract. Farwell J held that the fact that the architect had not expressed an opinion in accordance with



a cl 17 that the work and materials were not in accordance with the contract was conclusive and that the court therefore had no jurisdiction to entertain the counterclaim.

b Mr Duke KC (at 299–300) argued for the contractor that the contract meant that ‘the certificate of the architect is to be final unless and until it is appealed under the arbitration clause’. He mentioned one express exception in the contract but said that in ‘all other cases the certificates are final so long as the only mode of reviewing them by means of the arbitration clause is not adopted’. In other words, he was contending for precisely the two-tier system of conclusive determination which the Court of Appeal adopted in the *Crouch* case.

c The Court of Appeal unanimously rejected this argument. In fact, they stood it on its head. Collins MR said that the arbitrator’s power to open up review and revise showed that the architect’s certificates were not intended to be conclusive at all. And if they were not conclusive, they were no more conclusive in litigation than in arbitration. The power to open up and review, said Collins MR (at 301), ‘negatives the contention that the defendant is debarred by the certificates of the architect from setting up bad workmanship on the building and the introduction of improper materials’. It followed that he could challenge them in an arbitration or, if there was no arbitration, before the court. Stirling LJ (at 303–304) said that, rather as I have suggested to your Lordships is the case with the JCT contract in this case, the language of the rest of the RIBA contract did not support the view that certificates were intended to be conclusive. But, he added: ‘When we come to the arbitration clause the matter is free from doubt.’ The effect of the power to open up and revise was that:

f ‘These certificates, therefore, were not intended to be absolutely binding and conclusive. No doubt on an application made at the proper time the dispute might have been referred to arbitration; but it has not been referred, and the matter remained open for decision under the ordinary jurisdiction of the Courts, and the defendant was entitled to his ordinary legal remedies and to have his case heard.’

g I have said, my Lords, that *Robins v Goddard* [1905] KB 294 is an important case. This is not because it lays down any proposition of law but because it tells us what the Court of Appeal, nearly a century ago, when the ‘open up, review and revise’ formula seems to have been relatively new, thought that it was intended to do. Not, as the Court of Appeal said in the *Crouch* case, to enable certificates otherwise conclusive to be revised by an arbitrator and no one else, but to make it clear that such certificates were not conclusive at all. The court clearly took the view that the draftsman had seen no need to confer an express power on the court in the same terms as the arbitration clause. The court’s jurisdiction was unlimited. It was the arbitrator’s powers which need to be spelled out. On this view, the power to open up, review and revise falls into place alongside the other powers conferred by cl 41.4 as a power which a court would in any event possess.

h During the 80 years between *Robins v Goddard* and the *Crouch* case, I can find no authority in which a construction inconsistent with the earlier case was adopted. In *Neale v Richardson* [1938] 1 All ER 753 similar reasoning was used in a case in which the question was whether the contractor could sue without a certificate which the architect had refused to issue. The arbitration clause empowered the arbitrator to decide all disputes, which, on the authority of *Brodie v Cardiff Corp* [1919] AC 337, the court construed to include disputes as to whether or not a certificate should have been issued. There had been no arbitration because the arbitrator (who was also the architect) refused to act, but the court

decided in general terms that the non-issue of the certificate was not conclusive and therefore if the arbitrator had power to decide that the money was owing, the court must have it also. Scott LJ said ([1938] 1 All ER 753 at 758):

‘If ... the parties did not choose to enforce the domestic tribunal, or were prevented by the action of the agreed tribunal from doing so, the King’s courts regained their full jurisdiction, and then the county court judge was entitled to decide the issue as to the certificate which the architect would have decided as arbitrator, had he acted as such.’

It is true that *Robins v Goddard* seems to have been a cause of perplexity to some members of your Lordships’ House in *East Ham BC v Bernard Sunley & Sons Ltd* [1965] 3 All ER 619, [1966] AC 406. Lord Upjohn in particular said that he found it a ‘rather difficult case’ and that while not doubting the actual decision, he did not find it easy to follow some of the observations in the judgments. Lord Pearson also said that the effect of the case was not clear (see [1965] 3 All ER 619 at 635, 638, [1966] AC 406 at 441, 447). I venture to suggest that the problem lay not so much in what *Robins v Goddard* decided but the extraordinary proposition for which counsel was seeking to rely upon it in the *East Ham* case. He appears to have submitted that even if the contract expressly made a certificate conclusive (as did the contract in the *East Ham* case) but conferred upon an arbitrator a special power to revise it, the court would automatically acquire a similar power if the matter was litigated. In other words, a two-tier structure of conclusive certificates could not be created even by express language. Viscount Dilhorne dealt with the matter accurately and concisely when he said ([1965] 3 All ER 619 at 623–624, [1966] AC 406 at 424):

‘... it appears to be thought in some quarters that, if special powers are given to an arbitrator, they devolve on the court should there be litigation. I do not regard the decision in *Robins v. Goddard* as establishing or, indeed, supporting such a proposition. In that case, as I understand it, the Court of Appeal held that the arbitration clause, which gave power to an arbitrator to open up, review and revise a certificate, showed beyond doubt that the certificates in that case were not conclusive and, the certificates not being conclusive, the court was not obliged to treat them as if they were.’

*P & M Kaye Ltd v Hosier & Dickinson Ltd* [1972] 1 All ER 121, [1972] 1 WLR 146, another decision of this House, also concerned a final certificate expressly declared by the contract to be conclusive. The arbitration clause (cl 35) gave the arbitrator power to decide any dispute including ‘any matter or thing left by this Contract to the discretion of the Architect’ but there had been no request for arbitration. The House held that a final certificate was conclusive not only in relation to any later litigation but also in relation to litigation already commenced. Your Lordships are not concerned with this aspect of the decision, but Lord Wilberforce ([1972] 1 All ER 121 at 132, [1972] 1 WLR 146 at 158) said near the end of his speech:

‘Had the matter gone to arbitration the position would no doubt have been different; this is because cl 35 of the contract confers very wide powers on arbitrators to open up and review certificates which a court would not have.’

I understand Lord Wilberforce to have meant that the contract in question, which expressly declared final certificates to be conclusive but gave an arbitrator a special power to revise them, had successfully created a two-tier structure of

a binding certificates. There is nothing to support the view that certificates which are not said to be conclusive or binding can be assumed to have such effect merely because the arbitrator is given an express power to open up and revise them.

b In *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195, [1974] AC 689 the issue was whether a contractor, sued by a sub-contractor on interim certificates, could set off an unliquidated claim for damages for late and defective work. The Court of Appeal had held in a number of decisions that there was a strong presumption (amounting, as Lord Diplock said virtually to a rule of law) that the contract excluded the right of set-off. The House overruled these cases, Lord Diplock saying that so far from there being a presumption that set-off was excluded—

c ‘one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption.’ (See [1973] 3 All ER 195 at 215, [1974] AC 689 at 717.)

d It was submitted to your Lordships that this presumption supports an argument that the contract should be construed so as to preserve the common law remedies of the parties for breach of contract rather than making their rights subject to the binding decision of the architect. But I think that such an argument may be circular: if the decision of the architect is as conclusive as that of an expert, subject only to second-tier revision by an arbitrator, then the rights of the parties are defined by reference to the opinions of the architect or arbitrator and there is no question of any independent breach of contract. More to the point, however, is a later passage in Lord Diplock’s speech, in which he referred to the power of an arbitrator to open up, review and revise any certificate and went on to say ([1973] 3 All ER 195 at 217, [1974] AC 689 at 717 at 720):

f ‘Counsel for the respondent felt compelled to concede, in my view rightly, that the employer if sued in an action for the amount stated as due in an interim certificate, would be entitled to challenge the certificate on the ground that the work included in the calculation of that amount was not properly executed; though counsel contended that in order to resist payment on this ground the employer would have to have already submitted to arbitration the dispute as to whether or not the certificate was in accordance with the conditions of the contract and then to apply for a stay of action under s 4 of the Arbitration Act 1950. The arbitration clause, however, does not make an award a condition precedent to a right of action, let alone a condition precedent to a right of defence; and I see no grounds in law to prevent the employer from defending the action by setting up the contractor’s breach of warranty in doing defective work even though this involves challenging the architect’s certificate that that work had been properly executed.’

j This passage seems to me a clear and explicit statement that in the case of a certificate expressly stated (by the equivalent of cl 30.10 of the JCT contract) not to be conclusive, the court has exactly the same right to interpret the contractual obligations of the parties as an arbitrator would have had.

This was the state of the authorities at the time when the *Crouch* case came before the Court of Appeal. Dunn LJ ([1984] 2 All ER 175 at 184, [1984] QB 644 at 663) introduced his discussion of this question by saying: ‘Perhaps surprisingly



there is no direct authority on the point which is binding on us.' He made no reference to *Robins v Goddard* [1905] KB 294 and appears to have regarded the issue as being, not whether the certificates were conclusive in the first place, but whether (assuming them to be conclusive) one could imply into the contract a term that the court was to have the same power to revise them as the arbitrator. Not surprisingly, he rejected the implication of such a term. Browne-Wilkinson LJ also made no reference to *Robins v Goddard*, agreed that there was no authority directly in point and said that his view was supported by the 'weight of judicial dicta' (see [1984] 2 All ER 175 at 187, [1984] QB 644 at 668). Donaldson MR did refer to *Robins v Goddard*, but only in relation to the comments upon that case in *East Ham BC v Bernard Sunley & Sons Ltd* [1965] 3 All ER 619, [1966] AC 406. He mentioned the comment of Viscount Dilhorne as to the proposition which *Robins v Goddard* did not support but made no reference to his summary of what the case actually decided. It was the latter which was, in my opinion, binding upon the Court of Appeal in the *Crouch* case and should have been determinative on the question before them. None of the judges made reference to what Lord Diplock had said in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195, [1974] AC 689, although it appears from the report that counsel drew attention to the passage and submitted (in my view rightly) that it supported the proposition that—

'where a dispute as to the quality of work is litigated as opposed to arbitrated the court would be entitled to consider the matter on the basis of the evidence adduced and so would not be bound by the architect's certificate.' (See [1984] QB 644 at 649.)

In my opinion, therefore, the dicta on this point in *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] 2 All ER 175, [1984] QB 644 were both obiter and wrong. Since then, however, 14 years have passed and the building industry has lived with the *Crouch* construction of the standard building contracts. There have also been legislative changes. Section 43A of the Supreme Court Act 1981, inserted by s 100 of the Courts and Legal Services Act 1990, provides that if all parties agree, the High Court may exercise any specific powers which the contract confers upon an arbitrator. The discretion of the court to refuse a stay on the grounds of an arbitration clause has been abolished by s 9(4) of the Arbitration Act 1996, which provides that a stay must be granted 'unless ... the arbitration agreement is null and void, inoperative, or incapable of being performed'. This provision is subject to s 86, which excludes its operation in domestic operations and retains the court's discretion. Section 86 has not however been brought into force and it is not clear whether it will be. For the moment, the mandatory stay required by s 9(4) appears to be of general application. So the possibility of litigating contracts containing an arbitration clause except by the consent of all parties has been much reduced.

Nevertheless, it seems to me that cases since *Crouch* show that the decision has caused such uncertainty and even injustice that its dicta should be disapproved. I refer in particular to the recent decision of the Court of Appeal in *Balfour Beatty Civil Engineering Ltd v Docklands Light Rly Ltd* (1996) 49 ConLR 1. It was a claim for extension of time and loss and expense under the ICE Conditions of Contract, which had been amended, first, by substituting the employer's representative for the engineer and, secondly, by deleting the arbitration clause. The contract provided for the employer to certify extensions of time and loss and expense claims. But there was no provision that they were to be binding or conclusive.

a Nevertheless, the court held that there was no power to 'open up, review and revise' them such as an arbitrator might have had if there was an arbitration clause in the usual form and that, as a matter of construction, 'the contractor's entitlement was to depend on the employer's judgment': see 49 ConLR 1 at 10 per Bingham MR. Your Lordships will remember that in *Benstrete Construction Ltd v Hill* (1987) 38 BLR 115 at 118 Donaldson MR appeared to be saying that the  
b *Crouch* construction of the certification clauses as conclusive in litigation was based upon the fact that the contract created an 'internal arbitration'. But in the *Balfour Beatty* case the contractors were held, even in the absence of an arbitration clause or any express language as to the certificates being conclusive, to have subjected themselves to the judgment of the employer. It is true, as Bingham MR remarked (at 57): 'It is not for the court to decide whether the Contractor made  
c a good bargain or a bad one; it can only give fair effect to what the parties agreed.' On the other hand, in deciding exactly what the parties did agree, it seems to me that in the absence of express language, one should not assume so uncommercial a bargain. I do not think that the *Balfour Beatty* case would have been decided as it was if not for the shadow of the *Crouch* decision that certificates, even if not  
d declared to be conclusive, can be questioned only for bad faith or excess of power. I do not think that anyone in the industry can be said to have acted in reliance on the *Crouch* case and I would therefore overrule it. I must acknowledge the assistance which I have had in reaching this conclusion from the writings of Mr I N Duncan Wallace QC

The significance of doing so in the present case can be briefly stated. Beaufort  
e Developments (NI) Ltd (the employer) entered into a contract dated 3 May 1994 with Gilbert-Ash NI Ltd (the contractor) for the construction of a nine-storey office block in Belfast. The contract was in the standard JCT form (1980 edn) Private Without Quantities. By a separate contract it employed the firm of Parker & Scott (the architects) as architects. The works were not completed on  
f time; an outcome for which the contractor blamed the architects and the employer blamed them both. For example, some work had to be done over again and there are disputes over whether this was on account of the contractor's bad workmanship or use of wrong materials or the architects' failure to provide adequate drawings and information. There is also a dispute over whether this and other matters actually caused the delay in completion. The contractor  
g claimed that it was entitled to payment from the employer, both under certificates issued by the architects for work done under the contract and by way of payment for extra work. The employer claimed that it was entitled to damages against contractor and architects for breach of contract.

Litigation commenced on 31 August 1995, when the contractor issued a writ  
h claiming about £230,000 and interest due under six architects' certificates. On 9 October 1995 the employer served an unilluminating defence, denying liability and alleging that it was entitled to set off a cross-claim in a larger amount. On 15 November 1995 the contractor served a notice to refer and concur in the appointment of an arbitrator pursuant to the arbitration clause in the contract. It referred in general terms to the areas of dispute such as the responsibility for  
i delay and the contractor's claims to payment for extra work. On 5 December 1995 the employer issued a writ which named both the contractor and the architects as defendants. It claimed damages for negligence and breach of contract. On 7 February 1996 the contractor issued a summons for a stay of the employer's action pursuant to s 4 of the Arbitration Act (Northern Ireland) 1937. The agreement between the employer and the architects also contained an arbitration clause but the architects did not make a similar application.

Master Wilson granted the stay and on appeal his decision was affirmed by Pringle J. He did so with reluctance because he said that the architects could not be required to take part in the arbitration between the employer and the contractor and there was a very real risk of conflicting decisions in the arbitration and the litigation against the architects. But he considered that he was bound by the *Crouch* case to hold that an arbitrator would have the power to 'open up, review and revise' certificates or opinions of the architect which the court did not possess. If a stay was refused, the contractor would therefore be at a 'grave disadvantage in that it will be faced with architect's certificates which the court will not be able to review'. In the Court of Appeal ([1997] NI 142 at 145), Carswell LCJ prefaced his judgment by saying:

'On the hearing of this appeal counsel for the contractor did not seek to challenge the correctness of the judge's view that, if it were not for the effect of the *Crouch* decision, a stay should not be granted in the present case. Nor did counsel for the employer or counsel for the architects challenge his conclusion that if the *Crouch* decision is to be followed in this jurisdiction it would be unjust to the contractor to refuse a stay. The argument before us turned on the correctness of the *Crouch* decision and whether this court should follow it.'

As in my opinion the *Crouch* case was wrongly decided, I think that the discretion should have been exercised as Pringle J would have done if he felt free to do so. I would therefore allow the appeal.

**LORD HOPE OF CRAIGHEAD.** My Lords, the application by Gilbert-Ash NI Ltd (the contractor) for a stay of the action by Beaufort Developments (NI) Ltd (the employer) was made under s 4 of the Arbitration Act (Northern Ireland) 1937. The grant of a stay under that section is discretionary. It is plain from the reasons which Pringle J gave for affirming the master's decision to grant the stay that he would have refused the application had it not been for the decision of the Court of Appeal in *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] 2 All ER 175, [1984] QB 644. As he pointed out, the circumstances in the present case are very similar to those in *Taunton-Collins v Cromie* [1964] 2 All ER 332, [1964] 1 WLR 633.

In that case, as here, the contract between the employer and the contractor contained an arbitration clause. The architect, in response to the employer's claim against him, put part of the blame for the unsatisfactory building on the contractor. The employer then joined the contractor as a defendant to his action against the architect. The contractor's application for a stay in reliance on the arbitration clause was refused by the official referee, and an appeal from his decision was dismissed. This was because to grant a stay would have resulted in two sets of proceedings. There would have been an arbitration as against the contractor and an action as against the architect. There would have been a substantial risk of different decisions on the same question and on the same facts. Pearson LJ ([1964] 2 All ER 332 at 334-335, [1964] 1 WLR 633 at 638) said that there were very strong reasons based on the principle of avoiding a multiplicity of proceedings for permitting the action to continue as an action by the employer against both defendants.

Pringle J noted that there were many issues of fact to be determined in the present case. They included the reasons for the delay which had occurred in the completion of the works by the contractor, the standard of workmanship and



a materials and the question whether acceleration of the works had given rise to additional costs. He said that he could foresee very considerable difficulties in  
b dealing with these issues, and that in his opinion the risk of conflicting decisions was a very real one. Nevertheless he felt obliged to uphold the stay in view of the consequences to the contractor of the decision in the *Crouch* case if the dispute between it and the employer were not to be dealt with by an arbitrator. The  
c Court of Appeal ([1997] NI 142) decided, with some hesitation, to follow the decision in the *Crouch* case. But Carswell LCJ made it clear in the course of his judgment that the court had considerable reservations about the soundness of that decision. He said that, if the matter were *res integra*, he would have been attracted to an interpretation of the contract which would have avoided the need to go to arbitration to avoid injustice to the contractor.

d The situation in this case has therefore brought out into the open difficulties created by the decision of the Court of Appeal in the *Crouch* case which have been lying not far below the surface since it was made. The fundamental question is whether the court has been deprived, by the power which the parties have given to their arbitrator to open up, review and revise certificates, opinions and  
e decisions of the architect, of its ordinary power to determine the rights and obligations of the parties and to provide them with the usual remedies. In the *Crouch* case [1984] 2 All ER 175 at 186, [1984] QB 644 at 667 Browne-Wilkinson LJ said:

‘In no circumstances would the court have power to revise such certificate or opinion solely on the ground that the court would have reached a different conclusion, since so to do would be to interfere with the agreement of the parties.’

f I shall return to this passage later when I come to examine that case in more detail. For the time being it is sufficient to notice that the basis for this view is the difference which was said to exist between the powers of the court and those conferred by the agreement of the parties on the arbitrator. The power of the court, it was said, was to enforce the contract, while the arbitrator had been given the power, which the court does not possess, to modify it. This proposition has come to be applied generally to all cases where the arbitrator has been given power to open up, review and revise certificates.

g The contract in the present case was entered into under the JCT Standard Form of Building Contract (1980 edn) (Private without Quantities). It incorporated amendments nos 1 to 12 together with the Adaptation Schedule for Northern Ireland and the Contractor’s Designed Portion Supplement. By art 5 of the articles of agreement the parties agreed to refer their disputes to arbitration  
h in accordance with cl 41 of the conditions. Clause 41.4 of the conditions, so far as relevant to this case, provides:

‘... the Arbitrator shall, without prejudice to the generality of his powers, have power to rectify the contract so that it accurately reflects the true agreement made by the Employer and the Contractor, to direct such  
j measurements and/or valuations as may in his opinion be desirable in order to determine the rights of the parties and to ascertain and award any sum which ought to have been the subject of or included in any certificate and to open up, review and revise any certificate, opinion, decision ... requirement or notice and to determine all matters in dispute which shall be submitted to him in the same manner as if no such certificate, opinion, decision, requirement or notice had been given.’

Clause 41.5 provides that, subject to cl 41.6, which enables either party to appeal to the High Court on any question of law, the award of such arbitrator shall be final and binding on the parties. Clause 30 deals with certificates and payments to the contractor. Clause 30.9 makes provision as to the effect of the final certificate, while cl 30.10 makes provision as to the effect of certificates other than the final certificate. Clause 30.9 provides that, except in certain circumstances, the final certificate shall be conclusive evidence 'in any proceedings arising out of or in connection with this Contract (whether by arbitration under article 5 or otherwise)' as to various matters about which decisions have had to be made by the architect under the contract. Clause 30.10 provides:

'Save as aforesaid no certificate of the Architect shall of itself be conclusive evidence that any works, materials or goods to which it relates are in accordance with this Contract.'

Had it not been for the weight of contrary authority I would not have found much difficulty in reaching the following conclusions about the effect of these provisions relating to the powers of the arbitrator and the finality to be given to certificates. In the first place, the function of cl 41.4 is to define the powers which are to be given to the arbitrator. An arbitrator has no jurisdiction except that which the parties choose to confer upon him by their agreement to refer their disputes to an arbitrator. The whole question as to the extent of his powers rests upon contract. So it is necessary that the agreement should set out all the powers which he is to have in order that he may determine all the matters which are in dispute. But it is not to be thought that by conferring powers on the arbitrator the parties are limiting the ordinary powers of the court to determine their rights and obligations under the contract. In the present case, for example, cl 41.4 gives power to the arbitrator to rectify the contract. The court already has that power, but it might well have been in doubt as to whether the power of the court could be exercised by the arbitrator. There is nothing in c 41.4 to suggest that, by conferring this power on the arbitrator, the parties intended to remove this power from the court.

Then there are the provisions about the certificates. In the present case the contractor seeks payment of the sums certified as due for payment under six interim certificates. It appears that it will also seek to maintain a claim against the employer for additional costs which are not the subject of any certificate by the architect. The employer for its part claims, by way of set-off against any sums due to the contractor, amounts in respect of delay in completion of the construction and fitting out works and damages for breach of its obligation to provide materials and workmanship to the standard which the contract required. These are matters about which the contract provides for decisions to be taken or opinions to be given by the architect. But there is no express contractual provision to which one can point which has the effect of giving finality to the various decisions and opinions which he has made. We are not concerned in this case with any question as to the conclusive effect of the final certificate because, although a certificate of practical completion was issued in June 1996, the final certificate has not yet been issued. It is made quite clear by cl 30.10 that the interim certificates which the architect has issued are not of themselves to be conclusive evidence.

On this approach, if there is no stay, the court will be able to exercise all its ordinary powers to decide the issues of fact and law which may be brought before

a it and to give effect to the rights and obligations of the parties in the usual way. It will have all the powers which it needs to determine the extent to which, if at all, either party was in breach of the contract and to determine what sums, if any, are due to be paid by one party to the other whether by way of set-off or in addition to those sums which have been certified by the architect. It will not be necessary for it to exercise the powers which the parties have conferred upon the architect in order to provide the machinery for working out their contract. Nor will it be necessary for it to exercise the power which cl 41.4 confers on the arbitrator to revise certificates. This is because the court does not need to make use of the machinery under the contract to provide the parties with the appropriate remedies. The ordinary powers of the court in regard to the examination of the facts and the awarding of sums found due to or by either party are all that is required. There would be no risk of any injustice to the contractor.

b In *Taunton-Collins v Cromie* [1964] 2 All ER 332 at 334, [1964] 1 WLR 633 at 637 Pearson LJ said that in that case there was a conflict between two well-established principles. One was that parties should normally be held to their contractual agreements. Where the parties have agreed that any dispute or difference c by its decision what the parties have already said by their contract. The other principle was that a multiplicity of proceedings was highly undesirable. In that case it was the principle of avoiding a multiplicity of proceedings which prevailed. The effect of the decision of the Court of Appeal in the *Crouch* case has been to reverse the result of balancing these two principles. But that case also, it may be said, involved the application of two well-established principles. The first is that which was expressed by Browne-Wilkinson LJ ([1984] 2 All ER 175 at 186, [1984] QB 644 at 667) in these terms:

f 'In principle, in an action based on contract the court can only enforce the agreement between the parties: it has no power to modify that agreement in any way.'

The second, which was not referred to at all in the judgments in that case, is that which was described by Lord Diplock in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195 at 216, [1974] AC 689 at 718:

g 'So when one is concerned with a building contract one starts with the presumption that each party is to be entitled to all those remedies for its breach as would arise by operation of law, including the remedy of setting up a breach of warranty in diminution or extinction of the price of material supplied or work executed under the contract. To rebut that presumption h one must be able to find in the contract clear unequivocal words in which the parties have expressed their agreement that this remedy shall not be available in respect of breaches of that particular contract.'

i The facts in the *Crouch* case can be stated quite shortly. There had been delays in the completion of the work under the main contract and by a nominated sub-contractor. An arbitrator had been appointed on a reference under the main contract between the contractor and the authority. The same arbitrator had been appointed in a reference under the sub-contract in which the nominated sub-contractor was proceeding in the contractor's name in its arbitration with the authority. The arbitrator was empowered under cl 35(3) of the conditions under the main contract to open up, review and revise the architect's certificates, opinions, decisions, requirements or notices. There had been no final certificate.



The question was whether the arbitration proceedings should be stayed. One of the issues raised in the case—although it was not necessary to decide this issue in order to dispose of the appeal—was whether the official referee in the High Court had the power to open up, review and revise the certificates, opinions, decisions, requirements or notices of the architect which had been given to the arbitrator by cl 35(3) of the main contract. a

Dunn LJ ([1984] 2 All ER 175 at 184, [1984] QB 644 at 663) said that the court had been told that it was common practice for the official referee to open up and review certificates and other decisions of the architect and he observed that there were decisions of high authority either way as to whether this was competent. In his summary of the competing arguments he said that the authority had relied on obiter dicta of Lord Wilberforce in *P & M Kaye Ltd v Hosier & Dickinson Ltd* [1972] 1 All ER 121 at 132, [1972] 1 WLR 146 at 158 and of Viscount Dilhorne and Lord Cohen in *East Ham BC v Bernard Sunley & Sons Ltd* [1965] 3 All ER 619 at 623–624 and 628, [1966] AC 406 at 424 and 432. The other side had contended that in order to give business efficacy to the contract there must be an implied term that if the parties were to litigate rather than arbitrate the court was to have the same powers as the arbitrator. He went on ([1984] 2 All ER 175 at 184, [1984] QB 644 at 664): b  
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‘In my judgment it is not necessary to imply the term suggested in cl 35. The contract gives the architect wide discretionary powers as to the supervision, evaluation and progress of the works. The parties have agreed that disputes as to anything left to the discretion of the architect should be referred to arbitration, and cl 35 gives wide powers to the arbitrator to review the exercise of the architect’s discretion and to substitute his own views for those of the architect. Where parties have agreed on machinery of that kind for the resolution of disputes, it is not for the court to intervene and replace its own process for the contractual machinery agreed by the parties.’ e  
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Browne-Wilkinson LJ ([1984] 2 All ER 175 at 186, [1984] QB 644 at 667) began his discussion of this point with the statement of principle that the court had power only to enforce the contract, not to modify it in any way. He went on to say that, if the parties have agreed on a specified machinery for establishing their obligations, the court cannot substitute a different machinery. He then distinguished the powers of the court from those of the arbitrator. The parties had agreed that certain rights were to be determined by the certificate or opinion of the architect. In no circumstances would the court have power to revise such certificate or opinion solely on the ground that it would have reached a different conclusion, as to do so would be to interfere with that agreement. But the powers conferred on the arbitrator were different. He had been given power to modify the contractual rights by varying the architect’s certificates and opinions if he disagreed with them and to substitute his own discretion for that of the architect. He summed the matter up with these words: g  
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‘Therefore as a matter of principle I reach the conclusion that if this matter were to be litigated in the High Court (whether before the official referee or a judge) the court would not have power to open up, review and revise certificates or opinions as it thought fit since so to do would be to modify the contractual obligations of the parties. The limit of the court’s jurisdiction would be to declare inoperative any certificate or opinion given by the architect if the architect had no power to give such certificate or opinion or had otherwise erred in law in giving it. The court could not (as an arbitrator j

a could) substitute its discretion for that of the architect.' (See [1984] 2 All ER 175 at 187, [1984] QB 644 at 667–668.)

b Donaldson MR ([1984] 2 All ER 175 at 189–191, [1984] QB 644 at 671–673) also drew a distinction between the power of the court and those which had been conferred on the arbitrator. He said that the powers conferred on the arbitrator  
c was quite different from the function of the court. He described the court's function as being to determine facts and to enforce the contractual rights of the parties. The arbitrator had that function also, but he also had the right and duty which the court did not possess to review the architect's decisions and, if appropriate, to substitute his own. He also found support for his opinion that the court would not be able to exercise the power to open up and review which cl 35 of the JCT contract had given to the arbitrator in the dicta to which Dunn LJ had referred in the *East Ham* case and in what Lord Wilberforce had said in the *Hosier & Dickinson* case [1972] 1 All ER 121 at 132, [1972] 1 WLR 146 at 158.

d The statement of principle with which Browne-Wilkinson LJ began his discussion of this point seems to me, with respect, to be both relevant and accurate. I do not think that it can be doubted that in a case which has been based on contract the court's function is to enforce the agreement of the parties, not to modify their agreement in any way. But I have the impression that in the discussion which follows, and in the remarks which were made by the other judges, two other important points were overlooked and that the description of  
e the arbitrator's powers as including a power to modify the contract, for what it is worth, is less than accurate.

f The first point is that there is a difference between an agreement that machinery is to be used to implement or to give effect to the contract and an agreement that the parties' rights are to be determined solely by means of that machinery. An agreement which falls into the first category will be needed in almost every building or engineering contract. Some method has to be laid down for dealing with such matters as variations to the contract works and the making of interim payments to the contractor as the work proceeds. But an agreement of that kind does not imply any limitation on the ordinary powers of the court. Nor does it confer any powers on the architect or engineer, or in his turn on the  
g arbitrator, which restrict the power of the court, in the event of litigation, to conduct its own inquiry into the facts. Its purpose is simply to enable the contract to be worked out upon the agreed terms to achieve the result to which it was directed. The purpose of an agreement which falls into the second category, on the other hand, is to exclude the point at issue from being determined by the  
h court. If the parties have agreed that a dispute between them is to be determined conclusively by the architect or engineer, or in the event of dispute by an arbitrator, the sole function of the court is to give effect to the agreement which they have made. Its jurisdiction is to enforce the contract. Its duty is to ensure that the decision of the architect or the engineer or, in his turn, of the arbitrator is given the conclusive effect which has been agreed. But none of the judges in  
i the *Crouch* case addressed the question whether the certificates or opinions of the architect which the arbitrator had power to open up, review and revise were agreed by the parties to the contract to have effect as conclusive evidence.

The second point is this. The powers which the court ordinarily has to determine and give effect to the rights and obligations of the parties to a contract differ from the additional powers which, in the typical building or engineering contract, are given to the architect or the engineer and, in the event of any dispute

about their exercise, to the arbitrator. The purpose of these additional powers is not to deprive the court of its ordinary powers to determine their rights and obligations under the contract. Their purpose is to enable the architect or engineer, and in the event of a dispute about their exercise the arbitrator, to do things in the course of the execution of the contract which the court could not do. This point was well expressed by Piers Ashworth QC, sitting as a deputy judge of the High Court, in *National Coal Board v Wm Neill & Son (St Helens) Ltd* [1984] 1 All ER 555 at 561, [1985] QB 300 at 309, where he said:

‘I have heard much argument on the effect of arbitration clauses. I cannot help feeling that a certain unjustified mystique has been attributed to them. In general an arbitration clause does no more than provide an alternative method of resolving disputes. It is hoped that it is simpler, quicker and cheaper than resorting to a court of law. In building contracts an arbitrator is frequently given additional powers which would not otherwise be open to him and are not open to a judge to exercise. For example, by cl 15 of this contract the contractor is required to proceed with the work in accordance with the instructions of the engineer. By para (b) he is entitled to dispute any such instruction and to refer to arbitration. Were it not for this paragraph, clearly the contractor would have no right to dispute or litigate about any such instruction and, even with para (b), he cannot dispute such an instruction before a court. In this respect, it is right to say the arbitrator has additional powers to a court. But in general, as I have said, arbitration is simply an alternative way of resolving disputes.’

So there is this difference between the provision of an agreed machinery for giving effect to the contract and the taking of decisions or the expressions of opinion which may be necessary from time to time to its exercise. Where the parties have conferred additional powers on the architect, the engineer or the arbitrator, the function of the court is to give effect to the agreement of the parties as to the use of that machinery. The court cannot give the instructions or issue the certificates. But the fact that decisions are taken or opinions are expressed in the course of the working out of that machinery does not, of itself, affect the ordinary powers of the court if litigation becomes necessary. That would only be so if the parties had agreed that those decisions or opinions were to receive effect as conclusive evidence.

Then there is the question whether it was accurate for the court in the *Crouch* case to describe the power which was given by the conditions in the JCT contract to the arbitrator to open up, review and revise certificates and opinions of the architect as a power to modify the contract. It was primarily on this ground that the distinction was drawn between the powers of the arbitrator and those of the court. In my opinion the correct analysis is that the power which is given to the arbitrator in the event of a dispute about the exercise of his powers by the architect is a power to give effect to the contract, not to modify it.

In *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195 at 215, [1974] AC 689 at 717 Lord Diplock said that a building contract is an entire contract for the sale of goods and work and labour for a lump sum price payable by instalments as the goods are delivered and the work is done. Decisions have to be taken from time to time about such essential matters as the making of variation orders, the expenditure of provisional and prime cost sums and the extension of time for carrying out the works under the contract. Decisions also have to be taken from time to time as to the adjustments which may have to be



a made to the contract sum on account of these matters and on the amounts to be paid to the contractor by way of instalments towards a final settlement of the sums to which he is entitled under the contract. But in taking their decisions on all these matters the duty of the architect or the arbitrator is to give effect to the contract, not to alter or modify it. Variations can only be made to the contract within the limits which the parties themselves have agreed. From time to time b in order to exercise these functions the architect or the arbitrator must apply the provisions of the contract to the facts. But in this regard their position in the resolution of disputes between the parties is no different from that enjoyed in the exercise of its ordinary powers by the court.

For these reasons I consider that the Court of Appeal in the *Crouch* case, having started from the correct principle, fell into error in its application to the facts. c Unlike both *East Ham BC v Bernard Sunley & Sons Ltd* and *P & M Kaye Ltd v Hosier & Dickinson Ltd* it was not a case in which there had been a final certificate. There was no issue between the parties as to whether any of the certificates which had been issued had been agreed to be conclusive evidence of the facts stated in them. In the *East Ham* case it was held that the effect of the relevant provisions of the d building contract was that the final certificate was conclusive evidence and that it could not be reopened even by the arbitrator. In the *Hosier & Dickinson* case [1972] 1 All ER 121 at 128, [1972] 1 WLR 146 at 153 Lord Morris of Borth-y-Gest explained that the fact that the parties had agreed to the conclusiveness of a certificate as a matter of evidence did not involve any ouster of the jurisdiction of the court. Lord Wilberforce ([1972] 1 All ER 121 at 131–132, [1972] 1 WLR 146 e at 157) said that to describe it as doing so would be to misdescribe the effect attributed to it by the contract. There was no discussion of any of these points in the *Crouch* case. But the effect of the decision was to confer a similar status on the certificates and opinions of the architect, subject only to their review by an arbitrator, without having identified any provision in the contract which f removed these matters from the ordinary jurisdiction of the court.

In the *Crouch* case [1984] 2 All ER 175 at 184 and 191, [1984] QB 644 at 663 and 673 both Dunn LJ and Donaldson MR relied on the dictum of Lord Wilberforce in *P & M Kaye Ltd v Hosier & Dickinson Ltd* [1972] 1 All ER 121 at 132, [1972] 1 WLR 146 at 158, where he said:

g 'Had the matter gone to arbitration the position would no doubt have been different; this is because cl 35 of the contract confers very wide powers on arbitrators to open up and review certificates which a court would not have.'

I agree that, at first sight, this dictum may be taken to suggest that the court can h never open up and review certificates where such wide powers in that regard are given to the arbitrator. But I think that to read the dictum in this way would be to take it out of its context. The context is to be found in what Lord Wilberforce ([1972] 1 All ER 121 at 132, [1972] 1 WLR 146 at 157) said about the provisions of the contract which dealt with the effect of the final certificate. He said that the court proceedings had raised the question whether the work done and the j materials used were such as should have been done and used under the contract, and that an essential question was what standard was to be set for this. It was in that context that he examined the provisions about the final certificate. He concluded that there could be no objection to a clause which provided that it was the architect's standard which was to be relevant and that his final certificate was to be conclusive evidence. The only circumstances in which, by cl 30(7) of the conditions in that contract, the final certificate was not to be conclusive evidence

were where there had been a written request by either party, within certain time limits, to concur in the appointment of an arbitrator. a

It seems to me that the discussion in the *Hosier & Dickinson* case put the matter on the correct basis. On the one hand there is the principle which was expressed by Lord Diplock in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd*, by which clear unequivocal words must be used to deprive a party to a contract of recourse to the court for the ordinary exercise of its powers and the granting of the ordinary remedies. On the other there is the principle that the court must give effect to the contract which the parties have made for themselves. If the contract provides that the sole means of establishing the facts is the expression of opinion in an architect's certificate, that provision must be given effect to by the court. But in all other respects, where a party comes to the court in the search of an ordinary remedy under the contract or for a remedy in respect of an alleged breach of it, the court is entitled to examine the facts and to form its own opinion upon them in the light of the evidence. The fact that the architect has formed an opinion on the matter will be part of the evidence. But, as it will not be conclusive evidence, the court can disregard his opinion if it does not agree with it. b  
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For these reasons I agree with my noble and learned friend Lord Hoffmann that the *Crouch* case was wrongly decided and should be overruled. I also consider that the answers which the Court of Appeal gave to the questions which were before it in *Balfour Beatty Civil Engineering Ltd v Docklands Light Rly Ltd* (1996) 49 ConLR 1 were the wrong answers. That was a case in which there was no arbitration clause, but there was no provision in the contract agreeing that the opinion of the employer's representative was to be conclusive evidence in the event of a dispute. The fact that the contract did not provide an agreed means of challenging the judgment of the employer's representative did not affect the power of the court to examine the issue and to form its own judgment in the light of the evidence. e  
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I can return now to the facts of this case. There has been no final certificate. No certificates or opinion have been issued or given which the parties have agreed shall be taken to provide conclusive evidence as to the matters which are in dispute. The court is thus in no different position in regard to such expressions of opinion as have been given as would be an arbitrator. It does not have the additional power which an arbitrator has under this contract to issue fresh certificates in place of those already issued by the architect. But it does not need that power in order to resolve the disputes which have arisen in this case. In these circumstances there would be no injustice to the contractor in refusing a stay. To grant a stay would be to risk conflicting decisions in the separate proceedings which would be needed to determine the respective responsibilities to the employer of the contractor and of the architect. I would therefore allow the appeal and refuse a stay of the proceedings in the High Court. g  
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*Appeal allowed.*

Celia Fox Barrister. j

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## Re W and another (minors) (social worker: disclosure)

COURT OF APPEAL, CIVIL DIVISION

BUTLER-SLOSS, JUDGE AND MUMMERY LJ

b

18, 19 FEBRUARY, 26 MARCH 1998

c

*Family proceedings – Confidential information in care proceedings – Disclosure of confidential documents in care proceedings – Disclosure to police – Social work assessment report containing admission by mother that she had shaken child – Police seeking leave of court for disclosure of report and associated documents – Whether judge right in refusing leave – Whether leave required for disclosure of notes and drafts of report – Whether leave required for disclosure of interview notes and notes of social workers' meeting – Administration of Justice Act 1960, s 12 – Family Proceedings Rules 1991, r 4.23.*

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During the course of a social work assessment of the parents of two children, the mother admitted to a social worker that she had shaken the elder child, who was the subject of an interim care order. Subsequently both parents were arrested and interviewed by the police, but they were not charged. When the social work assessment was concluded, the assessment report, including the mother's admission, was filed with the court and the local authority wrote to the police informing them of that fact. The police thereupon, on being made a party to the proceedings, applied to the court for leave to see the assessment report and associated documents under r 4.23<sup>a</sup> of the Family Proceedings Rules 1991, which otherwise prohibited the disclosure of any 'document ... held by the court ... relating to proceedings'. The district judge refused the police leave to see the assessment report and held also that the preparatory documents for the report (ie notes and drafts) and any other records held by the social workers were not to be made available to them. The police appealed to the judge, who held that, apart from the assessment report, only the notes of the interviews and the meeting of the social workers were covered by r 4.23, and refused leave for the disclosure of those documents to the police. The mother appealed, contending (i) that r 4.23 also covered the preparatory documents, and (ii) that documents not so covered were covered and protected from disclosure to the police by s 12<sup>b</sup> of the Administration of Justice Act 1960. The police cross-appealed, contending (i) that the judge had been wrong to extend the ambit of r 4.23 to include the notes of the interviews and of the meeting of the social workers which had not been filed with the court, and (ii) that the judge had erred in the exercise of his discretion in refusing to allow the police to see the assessment report.

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**Held** – (1) Under r 4.23 of the 1991 rules, leave to disclose was only required in respect of documents actually filed with and held by the court. Furthermore, s 12

<sup>a</sup> Rule 4.23, so far as material, is set out at p 805 f, post

<sup>b</sup> Section 12, so far as material, provides: '(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say—(a) where the proceedings—(i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors; (ii) are brought under the Children Act 1989; or (iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor ...'



of the 1960 Act, which was designed to protect information from publication in child family cases heard in private, only covered the proceedings, principally the actual hearing before the court, and was not intended to cover documents held by social workers which had not been filed with the court nor used in the proceedings heard by the court in private. In the instant case, the notes and drafts had not been filed with the court and were not, therefore, covered by those provisions. Nor had the notes of the interviews and of the meeting of the social workers, and so the police were entitled to ask the local authority for an opportunity to see them without reference to the court. However, since the assessment report had been filed with and was held by the court it was covered by r 4.23 (see p 805 g to p 806 d h j, p 809 d and p 811 g, post); *Re G (a minor) (social worker: disclosure)* [1996] 2 All ER 65 applied.

(2) When considering whether to grant leave under r 4.23 for the disclosure of a document to the police, it was not for the family judge to exercise the discretion of the police and the Crown Prosecution Service as to whether or not a parent should face a criminal trial. In the instant case, however, the judge had considered that the seriousness of the offence and the possibility of the mother receiving a prison sentence were reasons not to disclose to the police rather than to give the police the information contained in the assessment report. Moreover, he had failed to give any weight to the public interest in the administration of justice and the prosecution of crime and to the desirability of co-operation between the various agencies concerned with the welfare of children. It followed that the judge's approach to the exercise of his discretion was flawed and could not stand, and exercising the discretion afresh, leave would be given for the disclosure of the assessment report to the police. Accordingly, the appeal would be dismissed and the cross-appeal allowed (see p 810 b to p 811 b f g, post); *Re EC (disclosure of material)* [1996] 2 FLR 725 applied.

## Notes

For confidentiality of welfare reports, see 5(2) *Halsbury's Laws* (4th edn reissue) para 819.

For the Administration of Justice Act 1960, s 12, see 11 *Halsbury's Statutes* (4th edn) (1991 reissue) 179.

For the Family Proceedings Rules 1991, r 4.23, see 12 *Halsbury's Statutory Instruments* (1995 reissue) 93.

## Cases referred to in judgments

*A (criminal proceedings: disclosure)*, *Re* [1996] 1 FLR 221, CA.

*D (minors) (wardship: disclosure)*, *Re* [1994] 1 FLR 346, CA.

*EC (disclosure of material)*, *Re* [1996] 2 FLR 725, CA.

*F (minors) (wardship: police investigation)*, *Re* [1989] Fam 18, [1988] 3 WLR 818, CA.

*G (a minor) (social worker: disclosure)*, *Re* [1996] 2 All ER 65, [1996] 1 WLR 1407, CA.

*L (a minor) (police investigation: privilege)*, *Re* [1996] 2 All ER 78, [1997] AC 16, [1996] 2 WLR 395, HL; *affg* [1995] 1 FLR 999, CA.

*M (a minor) (disclosure of material)*, *Re* [1990] 2 FLR 36, CA.

*S and ors (minors) (wardship: police investigation)*, *Re* [1987] 3 All ER 1076, [1987] Fam 199, [1987] 3 WLR 847.

*X and ors (minors) v Bedfordshire CC*, *M (a minor) v Newham London BC*, *E (a minor) v Dorset CC* [1995] 3 All ER 353, [1995] 2 AC 633, [1995] 3 WLR 152, HL.

**Case also cited or referred to in skeleton arguments**

- a *C (a minor) (care proceedings: disclosure)*, *Re* [1997] Fam 76, CA.

**Appeal and cross-appeal**

The mother of two children appealed with leave from the decision of Judge Barry on 7 November 1997 whereby he allowed in part the appeal of the Chief Constable of West Yorkshire Police, from the decision of District Judge Giles on 22 May 1997 dismissing the chief constable's application under r 4.23 of the Family Proceedings Rules 1991, SI 1991/1247, for leave to see an assessment report and associated documents prepared by the local authority in relation to the parents of the children. The chief constable cross-appealed. The facts are set out in the judgment of Butler-Sloss LJ.

- c *Jill M Black QC* and *John P Godfrey* (instructed by *Switalski's*, Wakefield) for the mother.  
*R M Harrison QC* and *Paul Wilson* (instructed by *A K Hussain*, Wakefield) for the chief constable.
- d *Elizabeth Auckland* (instructed by *James Holt*, Wakefield) for the local authority.

*Cur adv vult*

26 March 1998. The following judgments were delivered.

**BUTLER-SLOSS LJ.**

1. This appeal and cross-appeal arise from the decision of Judge Barry on 7 November 1997 allowing in part an appeal from District Judge Giles on 22 May 1997. The appellant is the mother of two children, D born on 27 October 1995 and C born on 18 September 1996. The Chief Constable of West Yorkshire Police has filed a respondent's notice by way of cross-appeal. The local authority attended the appeal but its stance is neutral and Miss Auckland on its behalf indicated that, if not restrained by a court order, it will provide the police with the relevant documents. The guardian ad litem did not attend the appeal but provided a written report about the children in which he indicated that to provide the information to the police would not be in the interests of the children.

2. One difficulty in this case is that the police do not at this moment have all the information which was before the judge and is before this court since their application to be provided with it has not yet been granted. Consequently it is necessary in this judgment to be careful to give only a brief background to the case on facts known to all the parties. The mother took the elder child to hospital on 4 July 1996 and he was admitted for reasons unconnected with the police investigation. Whilst there the doctors were concerned about the size of his head circumference and he was found to have two subdural haematomas, which raised the suspicion of non-accidental injury. On his discharge from hospital the local authority obtained an interim care order and he was placed with foster parents. After his birth the younger child also was the subject of an interim care order and placed with foster parents. Since April 1997 the two children have lived with their paternal grandparents. The local authority obtained a care order by consent on 2 June 1997 and the current plan is for the children to remain with the grandparents with supervised contact to the parents.

3. In September 1996 the social workers began an assessment of the parents. On 8 October the police arrested both parents and interviewed them but to date

have not charged either of them. During the assessment interviews the mother admitted to the social worker that she had shaken D. In February 1997 the social work assessment was concluded. The local authority, on the advice of its legal department, sought a direction from the district judge on 20 February whether it required the leave of the court to inform the police of the admission by the mother. The district judge held that no leave was required to inform the police of the general nature of the admission made by the mother to the social worker. The local authority then wrote to the police. The letter also informed the police that the assessment report including the admission was filed with the court and that leave would be required for the police to see the report. The police applied to be made a party to the proceedings for the purpose of seeing the assessment report and associated documents and for permission to interview the social worker. On 2 May 1997 the chief constable was joined as a party.

4. At the hearing on 22 May the district judge refused leave to the police to see the assessment report under r 4.23 of the Family Proceedings Rules 1991, SI 1991/1247. He also held that the preparatory documents for the assessment report and any other records held by the social workers were not to be made available to the police and the social workers were not to divulge to the police the substance of the admissions made by the mother. The police appealed to the county court judge, who allowed the appeal in part. He held that no leave was necessary for the social worker to pass on the information to the police and to give a statement to the police for the purpose of criminal proceedings.

He also held that—

‘to give the rule the effect that has been desired by Parliament and the author of the rules (its proper effect) it is necessary to read the rule in a very broad sense so that the expression “no document, other than a record of an order” should be read as to mean, “no information which has been enshrined in such a document shall be disclosed other than to the listed parties without leave of a judge or district judge.” I am prepared to say that I cannot see how the rule could have effect without extending the protection it gives to copies of the documents referred to in the rule, or to drafts of such documents, or preliminary notes to the construction of such a document. Each of those things, of course, would be documents themselves and are so closely related to the documents covered by the rule that I accept the argument of Mr Godfrey that it would be absurd not to give the protection to those as well, but it is such a stretch of inference, it seems to me, to say therefore to give full value to the rule the information itself has to be protected so as to prevent the witness divulging it to anyone else.’

He ruled that the notes of the interviews and the meeting of the social workers were covered by r 4.23 and decided, for reasons to which I shall refer later, to refuse leave to provide the documents to the police and gave leave to appeal to this court.

5. The main issues before this court are: (a) the scope of r 4.23, (b) the status of the documents not covered by r 4.23, and (c) the exercise of discretion by the court on the application for leave to disclose documents under r 4.23.

6. Mrs Black QC for the mother submitted that the documents were covered by s 12 of the Administration of Justice Act 1960. This section protected from publication proceedings which related to the inherent jurisdiction of the High Court with respect to minors and proceedings brought under the Children Act 1989. Those proceedings were exceptions to the general rule under s 12 that the



a publication of information relating to proceedings before any court sitting in private shall not of itself be a contempt of court. She also submitted that r 4.23 covered preparatory documents, in this case the 'working papers' from which the report was written. Not to do so, submitted Mrs Black, would destroy the protection inherent in the rule and the effectiveness of the court control, since, as a matter of common sense, information contained in documents filed with the court is likely to be available in note form or draft form in the files of the social workers. The leave requirement could then be circumvented by calling for the notes or drafts which did not require the leave of the court. Most of the information contained in those documents would also be held in other documents and the use of r 4.23 would be ineffective.

7. Mr Harrison QC, upon behalf of the chief constable, asked us to take into account the duties of the police to investigate as well as to prosecute, and submitted that the police, in conjunction with the Crown Prosecution Service, exercised their own discretion whether to prosecute based upon the Code for Crown Prosecutors, which included the public interest test and factors for and against prosecution. These factors included the seriousness of the offence, the likelihood of it recurring, whether the offence was committed as a result of a genuine mistake or misunderstanding and significantly in this case, the state of health, mental or physical, of the offender at the time of the offence. He argued that the judge was wrong to extend the ambit of r 4.23 to include the notes of interviews and notes of the meeting which had not been filed with the court. He further submitted that the judge erred in the exercise of his discretion in refusing to allow the police to see the assessment report.

8. Rule 4.23

Rule 4.23 states:

*'Confidentiality of documents'*

(1) Notwithstanding any rule of court to the contrary, no document, other than a record of an order, held by the court and relating to proceedings to which this Part applies shall be disclosed, other than to—(a) a party, (b) the legal representative of a party, (c) the guardian ad litem, (d) the Legal Aid Board, or (e) a welfare officer, without leave of the judge or district judge ...'

For this rule to apply, the requirements are: (i) a document (ii) held by the court and (iii) relating to proceedings.

In *Re G (a minor) (social worker: disclosure)* [1996] 2 All ER 65 at 77, [1996] 1 WLR 1407 at 1419 Sir Roger Parker said:

'The wording of r 4.23 of the Family Proceedings Rules 1991, SI 1991/1247, appears to me to be plain. Leave to disclose is only required in respect of documents and only in respect of documents held by the court. The rule thus follows established wardship practice as can be seen from the judgments of this court in *Re D (minors) (wardship: disclosure)* [1994] 1 FLR 346. I can see neither need nor justification for extending the scope of the clear words so as to require leave for the disclosure of information imparted to a social worker and recorded in case notes or a report which for one reason or another has never reached the court. To do so would, in my view, not be construction but a complete rewriting of the rule and thus legislation, which is neither the function nor within the powers of the court.' (Sir Roger Parker's emphasis.)

I said ([1996] 2 All ER 65 at 69, [1996] 1 WLR 1407 at 1411):

'The narrow view is that documents created for the purpose of court proceedings do not attract control under r 4.23 until actually filed with the court. The alternative view is to include identifiable documents destined for the court within the control of the court.'

9. It was not necessary for the decision in *Re G* to decide how far r 4.23 extended but I inclined to the narrower approach that it was limited to documents actually filed with the court. The issue on this appeal is one stage further on from the facts in *Re G* since the admission has been made and written down both in notes which have not been filed with the court and in the assessment report which has been filed with the court. The passage from the judgment of Sir Roger applies, in my view, with equal force to the present documents created by the social worker by way of notes and drafts which were not filed with the court as in the case of *Re G*. Interpreting the rule narrowly, the only relevant document which I have identified above which has been filed with the court and is held by the court is the assessment report. The 'working papers' which are not held by the court do not come within the ambit of the rule, unless its meaning is considerably extended. The decision of this court in *Re D* [1994] 1 FLR 346, a wardship case, draws a helpful distinction between the documents for which leave has to be given and those which fall outside the control of the court. The father and grandfather were charged with offences of indecency against children. In order to assist their defences at the trial, they sought disclosure of affidavits and transcripts of evidence used in the wardship hearing, and social work files relating to the wards. In his judgment Sir Stephen Brown P drew a distinction between the wardship documents which were part of the wardship file in the custody and control of the court, in respect of which there was no doubt that leave was required and documents held by the local authority. Sir Stephen Brown P said (at 352):

'So far as the local authority documents (the case records, as I have termed them) are concerned, they were not adduced in evidence in the wardship proceedings. They have never been in the custody or control of the court and they do not form part of the wardship, save in so far as they may be the basis of the report which was annexed to the social worker's affidavit.'

Rule 4.23 provides a protection similar to that invoked in wardship to Children Act cases. For my part, however, I am satisfied that it is not designed to provide cover which is wider than that exercised in wardship, as demonstrated in *Re D*, that is to say the material actually provided for the court proceedings.

10. Mrs Black has relied principally on the provisions of s 12 in order to support her argument that documents not filed with the court are none the less protected from disclosure to the police. Section 12 is designed to protect information from publication in child family cases heard in private. The protection covers the proceedings, principally the actual hearing before the court and those proceedings cannot be, for instance, reported in the press. This section was not intended to cover documents held by social workers which have not been filed with the court nor used in the proceedings heard by the court in private. It does not seem to me that the control by the court either under the umbrella of r 4.23 or of s 12 extends to documents outside the court proceedings. The argument of Mrs Black supporting the judge's approach is, none the less, at first sight, very attractive since, if the purpose of r 4.23 is to protect the information contained in the documents, there seems little point in having a rule

a which protects only the pieces of paper and not the contents. It is not, however, necessary for the court to give r 4.23 the extended meaning suggested. The appropriate protection of information, notes and other papers from disclosure can be achieved by another route which does not do violence to the clear words of r 4.23.

b 11. *Local authority files*

c What, therefore, is the status of the working papers and similar papers held by the social workers and what protection, if any, is afforded to those papers? In my judgment, all the documents with which we are concerned, created or obtained by and held by the social services department of the local authority in the course of its statutory duty, come under the protection of confidentiality. This part of  
d this appeal has nothing to do with publication of information contrary to s 12 or r 4.23 but is concerned with the limits of confidentiality and public interest immunity. The issue is whether one agency, the police, working in co-operation with another agency, social services, is entitled to share information which is subject to confidentiality in the hands of each agency and protected from general  
e publication by the doctrine of public interest immunity. In *Re M (a minor) (disclosure of material)* [1990] 2 FLR 36, again a wardship case, this court explained the special category of immunity enjoyed by local authority records; see also *Re D* [1994] 1 FLR 346 at 352. Access to confidential information, in furtherance of the best interests of children, by agencies with separate statutory duties is the subject of comprehensive guidance from government departments.

12. *Working Together*

f As a consequence of the passing of the Children Act, in 1991 four government departments jointly published a guide to arrangements for inter-agency co-operation for the protection of children from abuse, *Working Together under the Children Act 1989*. The government departments were the Home Office, Department of Health, Department of Education and Science and the Welsh Office. The Local Authority Social Services Act 1970 requires, by s 7(1):

g 'Local authorities shall, in the exercise of their social services functions, including the exercise of any discretion conferred by any relevant enactment, act under the general guidance of the Secretary of State.'

The 1970 Act was amended by s 50 of the National Health Service and Community Care Act 1990 to include s 7A, which provides :

h 'Without prejudice to section 7 of this Act, every local authority shall exercise their social services functions in accordance with such directions as may be given to them under this section by the Secretary of State.'

i Absent an order of the court, the local authority has, therefore, to comply with the guidance given in *Working Together* and that requirement is set out in the preface. *Working Together* sets out in detail the procedures for the close working relationship between social services departments, the police service, medical practitioners, community health workers, schools, voluntary agencies and others. As Lord Browne-Wilkinson pointed out in *X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC* [1995] 3 All ER 353 at 381, [1995] 2 AC 633 at 750:



'This procedure by way of joint action takes place, not merely because it is good practice, but because it is required by guidance having statutory force binding on the local authority.'

Under the heading 'Legal Framework' (para 1.11) the guidance points out that the other agencies need to understand that they are not only carrying out their own agency's functions but are also making, individually and collectively, a vital contribution to advising and assisting the local authority in the discharge of its child protection and child care duties. It states (para 1.11) that:

'... it is essential that Area Child Protection Committee procedures provide a mechanism whereby, wherever one agency becomes concerned that a child may be at risk, it shares its information with other agencies'

13. Inter-disciplinary and inter-agency work is an essential process in the task of attempting to protect children from abuse. There has therefore to be the free exchange of information between the agencies in order to facilitate that work and the protection of children. This partnership, as it is called in para 3.10, requires the sharing and exchange of relevant information, in particular, between the social workers and the police. At para 3.10 it states:

'Those in receipt of information from professional colleagues in this context must treat it as having been given in confidence. They must not disclose such information for any other purpose without consulting the person who provided it.'

At para 3.11 it states:

'Ethical and statutory codes concerned with confidentiality and data protection are not intended to prevent the exchange of information between different professional staff who have a responsibility for ensuring the protection of children.'

At para 3.15 it is recognised that confidentiality may not be maintained if the withholding of the information will prejudice the welfare of a child. The involvement of the police in investigation is set out in paras 4.11ff including the bases for a decision whether or not to initiate criminal proceedings. At para 4.14 it is pointed out that, irrespective of their decision whether or not to institute criminal proceedings, the information they hold should, where appropriate, be shared with other agencies. It is essential that methods of joint working between police and social workers are established over and above the joint interviewing of child victims (see para 4.17). In the present case the police attended the case conference held in October. The crucial picture presented by the guidance is of co-operation between the relevant agencies and free and frank exchange of information for the better protection of children. If the arguments of Mrs Black are correct the information available to social workers cannot be communicated to the police. That would drive a coach and four straight through the carefully considered guidance of the four government departments for joint working between police and social workers from the moment that any important information is contained in a document lodged with the court, unless or until a judge or district judge gives permission. Since child abuse allegations, especially physical abuse, may surface at a moment's notice and an emergency protection order or interim care order may be obtained quickly, no information thereafter could be shared immediately or freely by the two main agencies bearing the

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brunt of the child abuse investigations. Mrs Black recognised the difficulties such an approach would create. An extreme example might be the effect of filing of police witness statements in the care proceedings in that they might not thereafter be used by the police in criminal proceedings without an application to and obtaining leave from the district judge or judge in family proceedings.

14. In *Re G* [1996] 2 All ER 65 at 69, [1996] 1 WLR 1407 at 1410 I expressed myself on this issue and nothing I have heard on the present appeal leads me to change my mind that this result is as absurd as the failure to protect information was said by the judge to be if the umbrella of r 4.23 is not extended to cover information as well as documents. The effect of disclosure to the police by social services is for two agencies, each bound at that stage by confidentiality, to share information and disclose documents to each other in the spirit of *Working Together*. The information and documents remain confidential vis-à-vis the public unless or until it is disclosed with leave in the family proceedings if it ever becomes part of those proceedings, or it is necessary under the separate statutory duties of the police to disclose it for the purpose of criminal proceedings. The confidentiality by which both the agencies are bound is the appropriate and sufficient protection of the information with which this appeal is concerned. The notes of the two interviews with the mother and the notes of the social workers' meeting are not documents held by the court relating to proceedings nor are they covered by the provisions of s 12. The police are entitled to ask the local authority for an opportunity to see them without reference to the court. It is important to make clear that, on this appeal, we are concerned solely with documents held by and information known to social workers and the decision has no application to the wholly different position of a guardian ad litem or indeed a court welfare officer appointed for the purpose of court proceedings.

15. *Exercise of discretion under r 4.23*

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I turn now to the assessment report which was filed with the court and clearly requires leave of the court for it to be disclosed to the police. That leave was refused both by the district judge and by the judge. Booth J in *Re S and others (minors) (wardship: police investigation)* [1987] 3 All ER 1076, [1987] Fam 199 considered the likely outcome and effect upon a ward of granting the police application to disclose the information. She said ([1987] 3 All ER 1076 at 1080, [1987] Fam 199 at 204):

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‘... when balanced against the competing public interest which requires the court to protect society from the perpetration of crime it could only be in exceptional circumstances that the interests of the individual ward should prevail.’

Her judgment was approved in *Re F (minors) (wardship: police investigation)* [1989] Fam 18. Sir Stephen Brown P in *Re D* [1994] 1 FLR 346 at 351 said that the principle is quite clear that the judge—

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‘has to balance the importance of confidentiality in wardship proceedings and the frankness which it engenders in those who give evidence to the wardship court against the public interest in seeing that the ends of justice are properly served.’

16. The factors to be taken into account in the balancing exercise were again considered by Bingham MR in *Re L (a minor) (police investigation: privilege)* [1995]

1 FLR 999. Lord Jauncey of Tullichettle on the appeal to the House of Lords said in his speech ([1996] 2 All ER 78 at 88, [1997] AC 16 at 30):

‘Indeed, in proceedings of this nature it would be most unsatisfactory if the court, having information that the mother might have committed a serious offence against the children whose welfare it was seeking to protect, should be disabled from disclosing such information to the appropriate investigating authority.’

In *Re A (criminal proceedings: disclosure)* [1996] 1 FLR 231 this court gave further similar guidance. These decisions were reviewed by this court in *Re EC (disclosure of material)* [1996] 2 FLR 725. In that case the information sought by the police was principally the medical reports and transcripts of oral evidence given by the medical witnesses in the care proceedings heard by Wall J. Rule 4.23 applied to the reports. Section 98(2) of the Children Act and s 12 of the 1960 Act governed the oral evidence at the hearing. Swinton Thomas LJ (at 733) in his judgment set out a list of ten factors to take into account which, he said, were not exhaustive and were not placed in any order of importance since the importance of the various factors will inevitably vary very much from case to case.

17. In the present appeal we are concerned with the stage before the oral evidence, but the guidelines set out by Swinton Thomas LJ are equally applicable to this point of the proceedings. Judge Barry recognised that he had to take into account a number of factors in the exercise of his discretion. He was right to consider the welfare of the two children, the absence of danger to them or to other children from the mother, the importance of the maintenance of confidentiality and of encouraging frankness in children cases. But in assessing the risks and benefits of permitting or inhibiting a prosecution, in my judgment, he fell into error in a number of ways. His reliance upon the importance of contact between the children and their mother is a factor likely to arise in most cases, even where a prosecution is inevitable, and cannot therefore carry much weight. He does not appear to have given any weight to some of the factors set out by Swinton Thomas LJ, in particular, (5):

‘... the public interest in the administration of justice. Barriers should not be erected between one branch of the judiciary and another because this may be inimical to the overall interests of justice.’

and (6):

‘The public interest in the prosecution of serious crime and the punishment of offenders, including the public interest in convicting those who have been found guilty of violent or sexual offences against children. There is a strong public interest in making available material to the police which is relevant to a criminal trial. In many cases, this is likely to be a very important factor.’

and (8):

‘The desirability of co-operation between various agencies concerned with the welfare of children, including the social services departments, the police service, medical practitioners, health visitors, schools etc. This is particularly important in cases concerning children.’

18. Both he and the district judge considered, somewhat surprisingly as Mr Harrison pointed out, that the seriousness of the offence and the possibility of the



a mother receiving a prison sentence were reasons not to disclose to the police rather than to give the police the information. In this case the alleged offence is serious although there appears to be evidence, particularly psychiatric evidence, which may give a very different slant to the reasons why the child was injured. At the stage of considering leave it is not for the family judge to exercise the discretion of the police and the Crown Prosecution Service whether or not the mother should face a trial. I am satisfied that the judge's approach to the exercise of his discretion under r 4.23 was flawed and cannot stand.

b 19. It falls therefore to this court to exercise its discretion on the police application to see the assessment report. In reality, in this case, it does not much matter whether they get leave or not. The thrust of the police case has been to obtain the notes of the social worker and the assessment report may not add very much. The effect of that situation gives, in my judgment, considerable weight in the balancing exercise in favour of the police application. Material disclosure will in any event take place when the local authority give the police the notes of the interviews. The disclosure in this case will not adversely affect the children. I would however go further. In a case such as this where the police and the social workers are working together, a family judge should hesitate before refusing to provide relevant and significant information to the police. There will be cases where the evidence is peripheral and the harm of giving leave will outweigh the value of the information. But the police investigations require them to put together a jigsaw of information in order to carry out their important public duty. The family judges ought not to frustrate the investigation of potential crimes (which includes the dissipation of unfounded suspicions against the innocent) without good reason, even more so when the police are working alongside the social workers on the same case. The arguments put forward by Mrs Black of stress on the mother, the grandparents and consequently the children should not in a case like the present prevail over the strong public interest in making the information available to the police. I would exercise the discretion of this court to give leave to disclose the assessment report to the police. When the information is made available to the police, I would urge them to take it together with our judgments as soon as possible to the Crown Prosecution Service so that a decision whether to prosecute can be made quickly in this unusually sad case.

I would dismiss the appeal and allow the cross-appeal.

g JUDGE LJ. I agree.

MUMMERY LJ. I also agree.

h Appeal dismissed. Cross-appeal allowed.

Dilys Tausz Barrister.

## R v Crown Court at Stafford, ex parte Chief Constable of the Staffordshire Police

QUEEN'S BENCH DIVISION (CROWN OFFICE LIST)

LAWS J

20 NOVEMBER, 3 DECEMBER 1997

*Licensing – Permitted hours – Special hours certificate – Whether possible in law for two or more special hours certificates to co-exist in respect of same premises – Licensing Act 1964, ss 76(7), 77, 81(3).*

The respondent was the licensee of a public house in respect of which he held a full justices' on-licence. In December 1995 he applied for a special hours certificate (SHC) under s 77<sup>a</sup> of the Licensing Act 1964 for Thursday, Friday and Saturday with the permitted hours lasting from 11 am until midnight. The licensing justices granted the certificate but at the invitation of the police limited it in time to operate only between 7 pm and midnight. The respondent appealed to the Crown Court, contending that the licensing justices had no power under s 78A<sup>b</sup> of the 1964 Act to impose any limitation on the commencement time of the SHC but the court rejected that submission and dismissed his appeal. The respondent thereupon applied to the licensing justices for a second SHC, which they granted but again imposed a 7 pm start time. The respondent appealed to the Crown Court, which allowed his appeal, holding that the 7 pm start time should be revoked, so that the second SHC would be effective with the statutory start time of 11 am. The chief constable applied for judicial review of the Crown Court's decision, contending that the scheme of the 1964 Act did not contemplate the co-existence of two or more SHCs in respect of the same premises. The respondent contended that while two or more SHCs could not have effect in relation to the same premises at the same time, since a SHC had no effect until the licensee gave notice under s 76(7)<sup>c</sup> of the Act, there was no objection to them being in force at the same time, provided that only one governed the permitted hours at the premises.

**Held** – Although there was no express provision in the 1964 Act which forbade an application being made for a second SHC while a first was already in force, two or more SHCs could not co-exist in relation to the same premises since the statutory scheme would be unworkable, as it would be impossible to know which one actually governed the permitted hours. Moreover, the Act by implication contradicted that possibility, since while it would be possible to draft a notice for the purposes of s 76(7) which referred to a particular SHC, such a notice would be beyond, and qualitatively different from, what the subsection provided; furthermore, s 81(3)<sup>d</sup> assumed that at the time when a SHC was revoked thereunder, no other SHC was in force. The application would therefore be granted (see p 816 h to p 817 a e and p 820 b to e j, post).

a Section 77, so far as material, is set out at p 814 d, post

b Section 78A, so far as material, is set out at p 814 e to g, post

c Section 76(7) is set out at p 814 c, post

d Section 81(3) is set out at p 814 j to p 815 a, post

**Notes**

- a For special hours certificates, see Supplement to 26 *Halsbury's Laws* (4th edn) para 322.

For the Licensing Act 1964, ss 76, 77, 78A, 81, see 24 *Halsbury's Statutes* (4th edn) (1989 reissue) 380, 381, 382, 384.

b **Cases referred to in judgment**

*Brown v Drew* [1953] 2 All ER 689, [1953] 2 QB 257, [1953] 3 WLR 472, DC.

*Chief Constable of West Midlands Police v Marsden* (1995) 159 JP 405.

*Drury v Scunthorpe Licensing Justices* (1992) 12 Licensing Review 13, DC.

*Lacey v E Lacon & Co Ltd* [1899] AC 222, [1895–9] All ER Rep 223, HL.

*R v City of London Licensing Justices, ex p Davys of London Wine Merchants Ltd* (1985)

- c Times, 28 June.

**Case also cited or referred to in skeleton arguments**

*R v Godalming Licensing Committee, ex p Knighton* [1955] 2 All ER 328, [1955] 1 WLR 600, DC.

d **Application for judicial review**

The Chief Constable of the Staffordshire Police applied with leave of Popplewell J given on 30 June 1997 for judicial review by way of an order of certiorari to quash the decision of the Crown Court at Stafford (Mr Recorder Coates and justices) on 24 March 1997 allowing the appeal of the respondent, Steven John Shipley, against the imposition by the Cannock licensing justices of an opening limitation of 7 pm on a second special hours certificate granted to him under the provisions of s 77 of the Licensing Act 1964. The facts are set out in the judgment.

*James Quirke* (instructed by *Clive Alcock*, Stafford) for the applicant.

- f *John Saunders QC* and *Richard Moat* (instructed by *Jeffrey Green Russell*) for the respondent.

*Cur adv vult*

3 December 1997. The following judgment was delivered.

- g **LAWS J.** By these judicial review proceedings, for which Popplewell J gave leave on 30 June 1997, the applicant Chief Constable of the Staffordshire Police seeks to challenge a decision of the Crown Court at Stafford made on 24 March 1997. On that occasion the court held that it possessed the jurisdiction (and the licensing justices below had possessed the jurisdiction) to grant a second special hours certificate (SHC) to the respondent, there being in force an earlier SHC in relation to the respondent's public house in Cannock. I am required to decide whether in principle there may lawfully co-exist two or more SHCs in respect of the same premises. In order to explain how the question arises I must describe something of the history, but it is convenient first to set out the relevant provisions of the
- j Licensing Act 1964 as amended.

Section 76 provides:

*'Permitted hours where special hours certificate in force.—*(1) This section applies to licensed premises or premises in respect to which a club is registered, or part of any such premises, during the time that—(a) there is in force for the premises or part a special hours certificate granted under the following provisions of this Part of this Act; and (b) the section is applied,



under subsection (7) of this section, to the premises or part, by the holder of the licence or, as the case may be, the secretary of the club. a

(2) Subject to the following provisions of this section, the permitted hours on weekdays in any premises or part of premises to which this section applies shall extend until two o'clock in the morning following, except that ... (c) in any premises or part for which a certificate is in force subject to a limitation imposed in pursuance of section 78A or section 81A of this Act, the permitted hours on any day to which the limitation relates shall not extend beyond the time specified in the certificate ...' b

I should say that, by force of provisions in the licensing regime which I need not trace, the standard permitted hours under s 76(2) commence on any day at 11 am. Subsection (7) provides: c

'The holder of the licence or, as the case may be, the secretary of the club, may apply this section, or terminate its application, from such day as he may fix by notice in writing to the chief officer of police served not less than 14 days before that day.'

Section 77 empowers the licensing justices to grant a SHC with respect to licensed premises 'with or without limitations' if they are satisfied that a music and dancing licence is in force and that the premises are adapted and used or to be used for 'music and dancing and substantial refreshments to which the sale of intoxicating liquor is ancillary'. d

Section 78A provides in part as follows: e

'(1) On an application for a special hours certificate the licensing justices ... may grant a certificate under section 77 ... of this Act limited in any of the following respects.

(2) The limitations referred to are limitations—(a) to particular times of the day; (b) to particular days of the week; (c) to particular periods of the year ... f

(4) Where a special hours certificate is subject to limitations under this section the licensing justices ... may, on the application of the licensee or the club, vary any limitation to which it is so subject.'

Section 81 deals with revocation: g

'(1) If at any time while a special hours certificate is in force no music and dancing licence ... is in force for the premises to which ... the special hours certificate relates that certificate shall thereby be revoked.

(2) At any time while a special hours certificate for any premises or part of premises is in force, the chief officer of police may apply to the licensing justices ... for the revocation of the certificate on the ground that, while the certificate has been in force ... [Then grounds are set out: (a) that the premises have not been used as required by s 77; (b) that there has been a conviction under s 59 of the Act, viz selling liquor outside permitted hours; and (c) that customers have gone to the premises for the predominant purpose of obtaining drink.] h

(3) Where a special hours certificate is revoked under subsection (2) of this section in consequence of a contravention of section 59 of this Act, no special hours certificate shall be valid in relation to the premises or part in question, if it is issued on an application made earlier than 2 months after the date of the revocation or made earlier than such later time, if any (not being more j

a than twelve months after that date) as may be specified in the order revoking the certificate'.

Section 81B provides in part as follows:

b 'Special hours certificates: appeals.—(1) Subject to subsection (2) of this section, any person aggrieved by a decision of licensing justices ... (a) not to grant a special hours certificate under section 77 ... (aa) to revoke or not revoke a special hours certificate on an application under subsection (2) or (4) of section 81 of this Act, (b) to attach or not to attach limitations under section 78A of this Act ... may appeal to the Crown Court against that decision.

c (2) Only the chief officer of police may appeal against a decision not to revoke a certificate as mentioned in paragraph (aa) of subsection (1) of this section or not to attach a limitation under section 81A(3) of this Act; and a person may appeal against a decision not to attach a limitation under section 81A(2) of this Act only if he has appeared before the licensing justices ... and made representations that the limitations be attached.'

d These are the relevant provisions contained in the 1964 Act. I may turn to the history. As I have said, the respondent is the licensee of a public house in Cannock, in respect of which he held a full justices' on-licence. On 4 December 1995 he applied for a SHC for his premises for Thursday, Friday and Saturday of each week. The licensing justices granted the certificate but at the invitation of the police imposed a limitation upon the permitted hours, so that they should start at 7 pm and end at midnight. The respondent had asked for a certificate limited only so as to end at midnight. He appealed to the Crown Court, contending that neither the licensing committee nor the Crown Court possessed the power under s 78A to impose any limitation on the commencement time of the hours permitted by the SHC. There was however earlier authority of the High Court to the effect that the court had the jurisdiction so to limit the certificate: *Chief Constable of West Midlands Police v Marsden* (1995) 159 JP 405. The respondent, and I apprehend more particularly the brewery standing behind him, were anxious to have the decision in *Marsden's* case revisited. At the hearing of the respondent's appeal in the Crown Court at Stafford on 30 May 1996, I am told that Judge Chapman indicated his provisional view on the particular merits of the case that the 7 pm start time imposed by way of limitation by the justices might properly be revoked, so that the SHC would have effect from 11 am. That was of course a view favourable to the respondent; however the court was asked in terms not to make any such ruling, but to deal with the question of principle whether the justices or the Crown Court on appeal had the power to impose any start time at all. It is quite plain what was the thinking of the respondent, or rather those behind him: if the Crown Court ruled in his favour on the merits, while accepting the jurisdiction to set a start time, they would be disabled (or at least in all likelihood disabled) from seeking to challenge the jurisdiction point in the High Court because, of course, they would have won on the facts. As a result the Crown Court's decision on 30 May 1996 was limited to the jurisdiction issue. As regards that the Crown Court held, unsurprisingly, that they were bound by *Marsden's* case.

So it was that the respondent sought a judicial review of the Crown Court's decision, and before Keene J in November 1996 submitted that *Marsden's* case had been wrongly decided. Keene J gave judgment upon that judicial review

application on 13 December 1996 and dismissed it, following *Marsden's* case. His decision was in turn appealed to the Court of Appeal. The appeal was heard in July 1997, and judgment is awaited<sup>e</sup>.

Meantime, however, on 3 June 1996 on counsel's advice the respondent had applied to the licensing justices for a second SHC: again seeking a start time of 11 am. The justices granted the second SHC but, as had been done on the first application in December 1995, decided to impose a limitation by way of a start time at 7 pm. The respondent launched an appeal against that decision pursuant to s 81B, contending that the permitted hours should run from 11 am. The appeal came before the Crown Court at Stafford on 24 March 1997 (Mr Recorder Coates sitting with justices). It was urged for the police—the applicant before me—that the justices below lacked all jurisdiction to grant a second SHC, and that accordingly the Crown Court had no business to allow the appeal on the merits of the licensee's complaint regarding the start time; since such a course necessarily contemplated an acceptance of the court's jurisdiction, there and below, to confer or validate the grant of a second concurrent SHC in respect of the same premises. It was put, as it has been put before me, that the justices and the Crown Court were *functi officio*. I may say that, whatever the merits of the applicant's substantive case in these proceedings, I do not consider that the concept of *functus officio* enters into the matter at all. That is an expression apt to describe the position where a court or tribunal revisits a dispute which it has already finally decided. Here, the question is simply whether there was any power to grant a second SHC. It is not a case of a court having second thoughts about something it had already done, or anything of the kind. However the use of this expression has not obscured the real arguments on the issue I must decide, which have been presented with admirable clarity.

Paragraph 8 of the applicant's Form 86A records counsel's note of the recorder's ruling in the Crown Court on 24 March, or at any rate the critical part of it. There is no transcript, but I do not understand counsel's note to be disputed:

'Mr Quirke [for the police] submitted that this court is *functus officio*. He further submits that when Chapman J on 30 May 1995 dealt with the matter this court could go no further. That on 3 June 1996 the licensing justices had no jurisdiction to hear another application for a supper hour certificate [*sic*]. There was one already in force. The purported order is a nullity. There is no reason in principle why, if two licences are in force, there could not be surrender as in other areas of licensing.'

(The recorder proceeded to consider the evidence in the case and held on the merits that the 7 pm start time should be revoked, so that the second SHC would be effective with the statutory start time of 11 am.)

Hence these judicial review proceedings, in which the chief constable renews his submission that the statutory scheme does not contemplate the co-existence of two (or more) SHCs in respect of the same premises. I am not of course concerned with the factual merits of the decision to revoke the 7 pm limitation.

There is no express provision in the Licensing Act 1964 which forbids an application being made for a second SHC while a first is already in force, or requires a court faced with such an application to decline it. But it is clear that the scheme would be quite unworkable if two or more SHCs had effect in relation to the same premises at the same time. Assuming that they were subject to different

<sup>e</sup> Editor's note: judgment was given on 12 December 1997 and is reported at [1998] 2 All ER 465.



a limitations under s 78A, or that one contained no such limitations (so that the permitted hours were simply those imposed by s 76) and another did, which SHC would actually be taken to govern the permitted hours? Plainly the question cannot be allowed to arise. There is authority in the context of the regime of justices' on-licences that multiple licences cannot co-exist. In *Drury v Scunthorpe Licensing Justices* (1992) 12 Licensing Review 13 at 15, a decision of the Divisional Court to which I shall have to return, Roch J cited the speech of the Earl of Halsbury LC in *Lacey v E Lacon & Co Ltd* [1899] AC 222 at 229, [1895-9] All ER Rep 223 at 227 and then said: 'It is well established that there cannot be in existence at one time more than one justices' licence in respect of the same premises.'

c Mr Saunders QC for the respondent drew my attention to *Brown v Drew* [1953] 2 All ER 689, [1953] 2 QB 257. That was a case where a licensee applied to the justices for an occasional licence to enable him to sell liquor on a particular night (for a Valentine ball) at a hotel other than his own in respect of which there was already a licence in existence, restricting the supply of liquor to residents or for consumption with a meal. The justices granted the occasional licence. The Divisional Court, presided over by Lord Goddard CJ, held that the fact that the premises in question were already licensed was no bar to the grant of the occasional licence. The argument turned on the construction of s 64 of the Licensing (Consolidation) Act 1910, into which I need not go. The position relating to an occasional licence, granted as the name suggests for a specific occasion, casts in my judgment no light on the question before me. I consider it entirely clear that two or more SHCs cannot have effect in relation to the same premises at the same time.

Mr Saunders in fact accepts this. His argument is, however, that there is all the difference between two licences *having effect*, and two licences being *in force*. He says there is no objection to two SHCs being in force, provided that only one governs the permitted hours at the premises. He accepted that in the normal case a licensee might only seek a second SHC if, on the occasion he does so, he offers to surrender the first. But this case was unusual: no surrender of the first SHC was offered to the justices on 3 June 1996 or to the Crown Court on 24 March because the respondent's advisers were concerned not to jeopardise the outstanding appeal against Keene J's decision by taking a step which might appear to render it academic. Mr Saunders told me, and of course I accept, that he made it plain to the Crown Court on 24 March 1997 that there was in no event any danger that the two SHCs would both be activated in respect of the respondent's premises. Indeed the applicant's Form 86A records at para 7(c) Mr Saunders' submission to the Crown Court 'that the licensee would give an undertaking to surrender at the conclusion of the Court of Appeal proceedings whichever of the two SHCs granted he did not wish to apply under s.76 (though such an undertaking was not in the event required by the Court)'. In fact Mr Saunders told me that he assured Mr Recorder Coates that the earlier one would never be activated. I must deal with the question whether a second SHC may be applied for, at least if the licensee offers to surrender the first when he makes the application.

The Licensing Act 1964 no more makes express provision relating to the surrender of a SHC than it does in relation to the prevention of two or more SHCs having effect at the same time. It is clear, as I think counsel were agreed, that whatever I decide upon the principal issues in the case I must read rules into the statute by implication. Perhaps because the liquor licensing laws go back a

considerable distance in time and are in their present form the product of many changes and amendments, they cannot be regarded as a coherent self-sufficient statutory code such that the court's only task is to apply the statute's letter. In order to give them effect there is no escape from a degree of judicial in-filling. This is not by any means an exercise in glossing the statute by the application of judicial policy-making. It is simply a question of making sense of the provisions in a way which will fulfil the legislature's intention. The proposition that multiple licences cannot be effective at the same time in relation to one set of premises is an example. The question whether a licence may be surrendered raises another.

The possibility of surrender is important for the way Mr Saunders put his case. I apprehend that Mr Quirke was initially disposed to submit that there could be no surrender of a SHC. In his first skeleton argument he asserted: 'There is not (and has never been) an established surrender procedure for an SHC and none has been provided by the statute.' And in opening his case before me, he submitted that the existence of a power to vary limitations imposed under s 78A (see s 78A(4)) meant that there was no point nor purpose in assuming or implying a right to surrender a SHC as a means of obtaining, by the grant of a substitute SHC, a variation of limitations attached to an existing certificate; the statute provides for application to be made to vary the original SHC. However in the course of argument Mr Quirke did not insist that there was no right of surrender. He based his case on the broader submission that whether or not there was any such right, in no event could multiple SHCs co-exist in respect of the same premises. Even so it seems to me that I ought to deal with the question whether a SHC may be surrendered. It is as I have said important for Mr Saunders' argument; the statute is silent about it; and there seemed at the hearing to be a difference of view between Mr Saunders and Mr Quirke as to what is the practice.

The primary question in *Drury's* case, to which I have already referred, was whether a justices' on-licence might be surrendered. It is unnecessary to go into the facts. Roch J said ((1992) 12 Licensing Review at 14, 15):

'Can a justices' licence be surrendered? Both Mr Hugill and Mr Burnett, who appeared as *amicus curiae*, are agreed that the Licensing Act 1964 as amended, no longer contains any provision relating to the surrender of a justices' licence ... Mr Hugill told the court that surrenders have been regularly made when application is made to justices for a new licence in two situations. First, where the existing licence for the premises is subject to a condition which the licensee wishes to have removed. The only way that can be achieved is by the grant of a new licence which does not contain the condition. The licensee therefore makes application for the grant of a new licence without the condition, and undertakes to surrender his old licence. The second situation is where the licensee or the owners of the premises wish to open premises elsewhere and, in making application for the grant of a new licence for the new premises, offer to surrender one or more existing licences for other premises in the same licensing area. In these circumstances the practice has been for the justices, if they decided to grant the new licence to accept the surrender of the old licence. That may be done either by the holder of the old licence undertaking to surrender it, or it being made a condition of the new licence that it will not become effective unless and until the old licence is surrendered, or, simply by the holder of the old licence handing over the licence to the justices in court and declaring that he wishes

a to surrender the old licence. Consideration of the decided cases shows that this practice has been recognised by the courts.'

Roch J then proceeded to discuss a number of authorities, and said (at 16–17):

b '... I accept the submission of Mr Burnett that the practice of surrendering an existing licence must be limited to the two situations in which it has so far been recognised by the courts and which were indicated to us by Mr Hugill.'

c It is right to say, as Mr Quirke submitted, that in *Drury's* case the court was faced with a state of affairs in which there was no power to vary a justices' on-licence, whereas as I have said limitations imposed on a SHC may be varied by application  
d made under s 78A(4). There is, however, no right of appeal to the Crown Court against a decision of justices made on an application under s 78(A)(4); s 81B, dealing with appeals, confers no such right, though it does (s 81B(1)(b)) confer a right of appeal against a decision to attach or not attach limitations under s 78A. Mr Saunders submitted as I understood him that it is a commonplace for licensees  
e to surrender their SHC upon the grant of a substitute SHC and in respect of the latter seek new limitations, for all the world as if what was being asked for was a variation of the limitations placed on the earlier certificate. He said that this is done so as to generate a right of appeal against any limitations on the new SHC to which the licensee objects, precisely because there is no right of appeal against a variation or refusal to vary. If that is right, I am by no means sure that it is a proper practice: it has at least the appearance of a means of obtaining a right of appeal in circumstances where Parliament, no doubt advisedly, has declined to confer one.

f However that may be, I am none the less satisfied that there are at least some circumstances in which a SHC may properly be surrendered. The licensee may wish to obtain a fresh SHC for other premises, and there may be objections to the existence of two (or more) sets of premises in the same area all with SHCs. In that case I see no reason why the first SHC should not be surrendered. This would, I think, correspond to the second situation described by Roch J in *Drury's* case in which it may be proper to surrender a justices' on-licence. Moreover, as Mr Saunders submitted, the Act makes no provision for the holder of a SHC to apply  
g for its revocation: see s 81. There may be good reason why a licensee should wish to have his SHC revoked. He cannot surely be fixed with it for all time. Mr Saunders told me, and I have no reason to doubt (though I think it is not in evidence), that on occasion the police will invite a licensee to surrender his SHC. There may be much practical good sense in procedures of that kind.

h But the fact that at any rate in some circumstances a SHC may be surrendered by no means concludes the case in Mr Saunders' favour. It does not of itself establish that two SHCs may co-exist in relation to the same premises. The circumstances in which a justices' on-licence may be surrendered are shown by *Drury's* case to be strictly consistent with the proposition that no two or more  
j such licences may so co-exist. Mr Quirke submitted that the existence of a power of surrender cannot help Mr Saunders' client, since he has not in fact (either before the justices on 3 June 1996 or before the Crown Court on 24 March 1997) sought to surrender the first SHC. Given that, as I have held, two or more SHCs cannot be allowed to have effect contemporaneously, the power of surrender is on the facts of the case neither here nor there; the respondent has not exercised it, and to date both SHCs are in force.



In the events which have happened it seems to me that the issue in this case, as to the possible co-existence of multiple SHCs, is not in the end to be determined by reference to the possibility of surrender. I repeat my earlier summary of Mr Saunders' position: there is all the difference between two licences *having effect*, and two licences being *in force*. This is an important distinction, because while no doubt a SHC is *in force* from the moment it is granted, it has no *effect* until the licensee gives notice under s 76(7), which I will not repeat. Mr Saunders says that this provision means that there is no vice in multiple licences being in force; And I think he would add that there is no analogue to s 76(7) in the provisions governing justices' on-licences. He submits that no difficulty arises if the licensee applies only one SHC under the subsection; and if an earlier SHC was effective because of an earlier notice under s 76(7), its application could and should be terminated by a notice to that effect under the same subsection.

But that is not a procedure which s 76(7) contemplates. It provides for notice to be given to apply the *section*, not the *certificate*. Obviously it would be possible to draft a notice which refers to a particular SHC; perhaps, I know not, that is what has been done so as to allow the respondent to trade under the second SHC to date, as I understand he has been doing. But that would be to give a notice quite beyond, and qualitatively different from, what the subsection provides. This seems to point strongly to the conclusion that by implication the statute contradicts the possibility that multiple SHCs may co-exist. However it is not the only such pointer. I have already set out the terms of s 81(3). That provision seems to me to assume that at the time when a SHC is revoked under it, no other SHC is in force.

Mr Quirke submitted also that the possibility of multiple SHCs would invite what he called 'forum shopping'. A licensee might make successive applications to the justices, obtaining successive certificates, until he obtained one with limitations that suited him (or no limitations), or if he did not, might revert to and apply the least unfavourable of those he had obtained. There is of course, as Mr Quirke acknowledged, nothing in principle to prevent repeated applications where earlier applications have failed; though no doubt if such applications were made the justices would be astute to see that their jurisdiction was not being abused (though the existence or absence of abuse would by no means always be clear-cut: see the decision of Macpherson J in *R v City of London Licensing Justices, ex p Davys of London Wine Merchants Ltd* (1985) Times, 27 June: the fact there had been no apparent change of circumstances between one application and the next might well not be determinative). I cannot believe that the scheme of the Act contemplates or allows successive applications for SHCs where an earlier application has succeeded, with or without limitations imposed under s 78A. There is a clear available route, provided by s 78A(4), by which variations of limitations may be applied for. That is the route which should be used. I have already expressed my doubts as to the propriety of other devices which seek to erect a right of appeal against what is in substance a variation decision when that has not been provided by Parliament.

In my judgment there is no place in the scheme of the relevant part of the 1964 Act for the co-existence of multiple SHCs in relation to the same premises. This application succeeds. I will hear counsel as to the appropriate form of relief.

*Application granted.*

a **Sierra Leone Telecommunications Co Ltd v  
Barclays Bank plc**

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

b CRESSWELL J

6 FEBRUARY 1998

c *Conflict of laws – Contract – Proper law of contract – Bank – English bank holding account for Sierra Leone company owned by Sierra Leone government – Company's articles of association providing that board of directors to consist of eight members appointed by 'the Government of Sierra Leone' – Mandate completed authorising four signatories to sign payment requests on company's behalf – Coup subsequently taking place, new board appointed by junta and authority of signatories purportedly revoked – Whether mandate determined – Whether law governing contract English law – Contracts (Applicable Law) Act 1990, Sch 1, art 4.*

d *Conflict of laws – Foreign government – Recognition – Articles of association of Sierra Leone company owned by Sierra Leone government providing that board of directors to consist of eight members appointed by 'the Government of Sierra Leone' – Company holding bank account with English bank and mandate completed authorising four signatories to sign payment requests on company's behalf – Coup subsequently taking place, new board appointed by junta and authority of signatories purportedly revoked – Whether junta 'the Government of Sierra Leone' – Whether authority of signatories validly revoked.*

f The plaintiff company was incorporated in Sierra Leone on 1 April 1995 and was wholly owned by the Sierra Leone government which controlled its business dealings. By art 71(1) of its articles of association, its board of directors consisted of eight members appointed by 'the Government of Sierra Leone'. The plaintiff held a US dollar account with the defendant bank in London and on 31 July 1996 a bank mandate was completed authorising four signatories to sign payment requests on the plaintiff's behalf, two signatures being required for any payments.

g On 25 May 1997 a coup took place in Sierra Leone. The UK government consistently condemned the coup and continued to deal with the democratically elected government. On 24 December the bank received a letter dated 22 December purportedly from the plaintiff suspending with immediate effect three signatories to the account and informing the bank that the company's board of directors had been dissolved and a new board appointed. The letter was signed by the Secretary of State, Transport and Communications and the executive chairman of the board. The bank replied by fax on 31 December and a response by fax of the same date was received from the executive chairman, which stated that payments outlined had not been authorised by the board and were not to be

h honoured without reference to the board. The bank thereafter refused to meet several payment requests on the ground that it had reasonable grounds for believing that they had been made without authority, although they were regular and in accordance with the mandate, and it was therefore justified in refusing to honour them. The plaintiff applied to the court for a declaration that the account remained subject to the terms of the mandate of 31 July and to instructions given by the signatories named therein, contending (i) that the mandate had not been

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determined under English law, which was the law governing the contract under art 4 of the Rome Convention on the law applicable to contractual obligations (which had the force of law in the United Kingdom by virtue of s 2(1) of the Contracts (Applicable Law) Act 1990 and was set out in Sch 1 thereto), and (ii) that the authority of the signatories had not been validly revoked, since the new board of directors had not been appointed by 'the Government of Sierra Leone'.

**Held** – (1) Under art 4(1) of the convention the basic rule was that, in the absence of a choice of law, a contract was governed by the law of the country with which it was most closely connected. For that purpose it was presumed that the contract was most closely connected with the country where the party who was to effect 'characteristic performance' had, in the case of a body corporate, its central administration, and in the case of a bank account, such party would be the bank. Performance, ie repayment of the sum deposited in a bank account, was effected through the branch where the account was kept and it was the law of the country where the account was kept which governed the contract. It followed, in the instant case, that the governing law of the contract was English law (see p 827 *b* to *e*, post); *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] 3 All ER 252 considered.

(2) In deciding whether a government existed as the government of a state the factors to be taken into account were (i) whether it was the constitutional government of the state, (ii) the degree, nature and stability of the administrative control, if any, that it of itself exercised over the territory of the state, (iii) whether the UK government had had any dealings with it and (iv) in marginal cases, the extent of international recognition that it had as the government of the state. In the instant case, the UK government continued to deal with the democratically elected government and had no dealings with the military junta. Moreover, the junta had no control over two-thirds of the country, and the coup had been condemned by the Commonwealth, the Organisation of African Unity and the European Community. In those circumstances, the military junta were not 'the Government of Sierra Leone' for the purposes of art 71(1) of the plaintiff's articles of association. Accordingly, the mandate to the bank of 31 July 1996 stood and was not affected by anything that the junta had purported to do since May 1997; the letters of 22 and 31 December 1997 from those associated with the junta were therefore of no effect and the new directors were not validly appointed. It followed that the plaintiff was entitled to the declaration sought (see p 829 *e* *f*, p 830 *b* *c*, p 831 *h* and p 832 *b* *e* *f*, post); dictum of Hobhouse J in *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA, The Mary* [1993] 1 All ER 371 at 384 applied.

## Notes

For determination of the governing law in the case of contracts made after 1 April 1991, see 8(1) *Halsbury's Laws* (4th edn reissue) paras 844–856.

For the recognition of states and governments generally, see 18 *Halsbury's Laws* (4th edn) paras 1425–1435.

For the Contracts (Applicable Law) Act 1990, Sch 1, art 4, see 11 *Halsbury's Statutes* (4th edn) (1991 reissue) 224.

## Cases referred to in judgment

*Arantzazu Mendi, The* [1939] 1 All ER 719, [1939] AC 256, HL.

*Barclays Bank plc v Quincecare Ltd* (1988) [1992] 4 All ER 363.



- a *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd (No 2)* [1966] 2 All ER 536, [1967] 1 AC 853, [1966] 3 WLR 125, HL.
- GUR Corp v Trust Bank of Africa Ltd (Government of the Republic of Ciskei, third party)* [1986] 3 All ER 449, [1987] QB 599, [1986] 3 WLR 583, QBD and CA.
- Libyan Arab Foreign Bank v Bankers Trust Co* [1989] 3 All ER 252, [1989] QB 728, [1989] 3 WLR 314.
- b *Libyan Arab Foreign Bank v Manufacturers Hanover Trust Co* [1988] 2 Lloyd's Rep 494.
- Lipkin Gorman (a firm) v Karpnale Ltd* (1989) [1992] 4 All ER 409, [1989] 1 WLR 1340, CA; *rvsd in part* [1992] 4 All ER 512, [1991] 2 AC 548, [1991] 3 WLR 10, HL.
- c *Somalia (Republic) v Woodhouse Drake & Carey (Suisse) SA, The Mary* [1993] 1 All ER 371, [1993] QB 54, [1992] 3 WLR 744.

### Cases also cited or referred to in skeleton arguments

- Banco de Bilbao v Rey, Banco de Bilbao v Sancha* [1938] 2 All ER 253, [1938] 2 KB 176, CA.
- d *Duff Development Co Ltd v Government of Kelantan* [1924] AC 797, [1924] All ER Rep 1, HL.

### Action

- e The plaintiff, Sierra Leone Telecommunications Co Ltd (Sierratel), brought an action against the defendant, Barclays Bank plc, seeking by amended points of claim a declaration that its US dollar account held at the bank's Knightsbridge International Banking Centre remained subject to the original terms of a mandate dated 31 July 1996 and in particular remained subject to instructions given on behalf of the plaintiff by the named signatories identified therein and no others. The facts are set out in the judgment.

- f Timothy Saloman QC (instructed by Stephenson Harwood) for Sierratel.  
Richard de Lacy (instructed by Lovell White Durrant) for the bank.

- g **CRESSWELL J.** This case raises important issues as to international recognition and international banking. It reflects the problems faced by an international bank when it holds an account of a company wholly owned by a foreign government and there is a military coup in the country in question.

- h This matter came before me on 23 January 1998 on an application by the plaintiff company, Sierra Leone Telecommunications Co Ltd (to whom I shall refer as 'Sierratel'), for a mandatory injunction. On that occasion it was accepted by both parties that the appropriate relief to be claimed by those representing the plaintiff company was a declaration. Accordingly I gave leave to serve amended points of claim seeking declaratory relief and in addition gave directions for a speedy trial of the issue whether the plaintiff is entitled to declaratory relief.

- j The trial has come on for hearing today two weeks after the first application to the court. In this way the court has demonstrated its readiness to bring on a trial in a very short period of time, so as to resolve questions of immediate importance in the commercial and international field. By letter dated 29 January Messrs Lovell White Durrant gave notice of today's hearing to The Secretary, Sierratel, Freetown, Sierra Leone. Sierratel's claim as pleaded in the amended points of claim is for—

'a declaration that the Plaintiff's US Dollar account no. 83051922 held at the Defendants' Knightsbridge International Banking Centre remains subject to the original terms of the Mandate dated 31 July 1996 and, in particular, remains subject to instructions given on behalf of the Plaintiffs by the named signatories identified therein (and no others) ...'

### *The background*

Sierratel is a company incorporated in Sierra Leone as a parastatal company, ie a company wholly owned by the Sierra Leone government which controls its business dealings. Sierratel holds a US dollar account at Barclays Bank plc's (Barclays) Knightsbridge International Banking Centre, London, SW1. On 25 May 1997 a coup took place in the Republic of Sierra Leone. The democratically elected government of President Kabbah has since then continued as the government of Sierra Leone from Conakry, Republic of Guinea. The British government has consistently condemned the military coup and continues to deal with the democratically elected government of Sierra Leone under President Kabbah.

Sierratel was incorporated in Sierra Leone on 1 April 1995. Since the coup in May 1997 the company has continued to carry on its business activities from Washington, London and Guinea. In mid-1996 Sierratel opened the US dollar bank account with Barclays. The account became operational in October 1996. On 31 July 1996 a bank mandate was completed authorising the following signatories to sign payment requests on the company's behalf: (1) F E Jarrett, managing director; (2) S R Tumoe, deputy managing director; (3) A R Wurie, financial controller; (4) A E O Brima, manager, financial accounts. Two signatures from the above are required by the mandate for any payments. A security code system was established between Sierratel and Barclays with each payment request carrying this code. After the coup a new security code was established in London in August 1997. This new code is still in operation.

Sierratel by the above signatories continued to use, and Barclays continued to authorise the use of, the account following the coup. The bank has, however, not met several payment requests issued by Sierratel recently and presented to the bank. These requests, which total approximately \$US1,080,000 and DM108,192, are in respect of outstanding payments to creditors. All the payment requests relate to contracts entered into prior to the coup.

The reason for Barclays' failure to meet the payment requests is as follows. On 24 December 1997 Barclays received a letter dated 22 December purportedly from Sierratel in Freetown as follows:

'At the Board meeting of the New Board of Directors of ... (SIERRATEL)—minutes attached ... it was resolved that the Signatories of the following be suspended with immediate effect:—(1) Mr. Frank E. Jarrett, Managing Director (2) Mr. Sahr R. Tumoe, Deputy Managing Director (3) Mr. Allmamy Wurie, Financial Controller ...'

The letter was signed by Mr Osho Williams (described as Secretary of State, Transport and Communications) and Mr Victor B Foh (described as executive chairman, board of directors, Sierratel). Enclosed with that letter were what purport to be minutes of a meeting of the board of directors of Sierratel on Wednesday, 3 December 1997. At para 1 of the minutes it is stated: '... the old

a Board was dissolved by letters from the Ministry of Transport and Communications on the 28 August 1997 ...' At para 3(2) it is stated:

'... It was resolved that in the interim, the signatures of the first three senior members of staff currently out of the country be suspended from all Local and Foreign Accounts.'

b Barclays replied by fax on 31 December 1997. A response of the same date was received in the form of a handwritten fax from Mr Foh, which stated: 'Your fax of 31 December 1997 refers. Payments outlined not authorised by Board and must not be honoured without reference to Board ...'

c Since that date Barclays has not responded to the payment requests referred to above. Barclays denies that the position it has taken amounts to a breach of contract. Mr Timothy Saloman QC, who is instructed by the Sierra Leone High Commissioner, who represents the government of President Kabbah, has not suggested that the initial stance taken by Barclays in freezing the account was other than reasonable. The affidavit of Mr Matthew Harrison, international corporate manager with Barclays, puts the matter in this way:

d 'Barclays has been effectively asked by the original signatories to make a difficult choice whether to ignore completely the letter of 22 December 1997 addressed to Barclays from the head office of Sierratel, or the conflicting instructions emanating from the original signatories.'

e Barclays says that the payment instructions of Sierratel will be honoured immediately once this court has decided and declared how and by whom instructions are to be given on behalf of Sierratel.

### *The evidence*

f I record that the evidence before the court comprises (a) the first and second affidavits of Mr Gibbons and the first affidavit of Mr Solomon Berewa, the Attorney General and Minister of Justice in President Kabbah's government, on behalf of Sierratel and (b) the first affidavit of Mr Harrison, on behalf of the bank. In accordance with the directions that I gave on 23 January 1998 those affidavits stand as evidence for the purpose of this trial. Neither party has given notice to the other requiring any deponent to attend for cross-examination.

g

### *The submissions by Mr Saloman on behalf of Sierratel*

h Mr Saloman (instructed by the Sierra Leone High Commissioner, Professor Foray, who represents the government of President Kabbah) submitted as follows. The defendant bank's duty is based on contract or agency. On either basis, its duty was to comply with the terms of its mandate, paying sums and debiting its accounts as therein authorised. The terms of the mandate were agreed by Sierratel's board of directors on 31 July 1996. The mandate has not been determined or varied as a matter of the proper law of the contract (English law). Prima facie, therefore, the plaintiff's account remains subject to the terms of the mandate dated 31 July 1996 and to instructions given by the signatories named therein (and no others) and they are entitled to a declaration accordingly. j As to any defence or question that the authority of the named signatories to represent the plaintiff has been validly revoked, this is unsustainable for two reasons. (1) The 'new Board of Directors' (including Mr Victor B Foh, signatory of the letters of 22 and 31 December 1997) was not appointed by the government of Sierra Leone or the President. The acts of the 'new Board' in purportedly



suspending the named signatories are not valid acts binding upon the plaintiff company. (2) The authority of the signatories and directors named in the mandate (Mr Jarrett, Mr Tumoe and Mr Wurie) has never been validly revoked. The first two mentioned (at least) are directors and they have never been validly removed from their positions.

*The submissions by Mr de Lacy on behalf of the bank*

Mr de Lacy on behalf of the bank submitted as follows. A bank's obligation to its current account customer is generally to honour its customer's orders in the ordinary course of business with reasonable skill and care, subject to the availability of funds or credit. Where the bank has reasonable grounds (falling short of proof) for believing that a payment order has been made without authority, although it is regular and in accordance with the mandate, it is justified in refusing to honour the order: *Barclays Bank plc v Quincecare Ltd* (1988) [1992] 4 All ER 363 at 375–376 per Steyn J and *Lipkin Gorman (a firm) v Karpnale Ltd* (1989) [1992] 4 All ER 409 at 421, [1989] 1 WLR 1340 at 1356 per May LJ and [1992] 4 All ER 409 at 439, 441, [1989] 1 WLR 1340 at 1376, 1378 (particularly the reference to 'serious or real possibility albeit not amounting to a probability') per Parker LJ. A case where a bank has reasonable grounds for believing that there is a possibility that the existing mandate has been revoked is a case a fortiori to the case of a regular order complying with a mandate but in fact unauthorised by the customer (eg because of the customer's agent's fraud).

Where the issue is as sensitive and important as the question of the continued authority of a foreign government, the bank was entitled to take the stand which it did, and effectively freeze the account. In all the circumstances of this case, however, the evidence shows that Sierratel, acting through the agency of the former board, is entitled to a declaration that the former board has not been effectively displaced and is able to control the terms of the bank's mandate and hence the accounts of Sierratel. In the special circumstances of this case the bank (1) claims no interest of its own in the issue; (2) seeks to assist the court impartially to determine whether the declaration as to the control of Sierratel should be granted; (3) leaves it to the court to make that determination.

*The law governing the contract between Sierratel and Barclays*

Rule 180 in *Dicey and Morris on the Conflict of Laws* (12th edn, 1993) vol 2, p 1259 states:

'(1) The law applicable to a contract by virtue of Rules 175 and 176 governs in particular: (a) interpretation; (b) performance; (c) within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law; (d) the various ways of extinguishing obligations, and prescription and limitation of actions. (2) In relation to the manner of performance and the steps to be taken in the event of defective performance regard is to be had to the law of the country in which performance takes place.'

It was held in *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] 3 All ER 252 at 266, [1989] QB 728 at 746 that as a general rule the contract between a bank and its customer is governed by the law of the place where the account is kept, in the absence of agreement to the contrary. The rule was reaffirmed in *Libyan Arab Foreign Bank v Manufacturers Hanover Trust Co* [1988] 2 Lloyd's Rep 494 at 502, in

a which it was said that solid grounds are needed for holding that this general rule does not apply. It is a rule of the greatest commercial importance, and there is a risk of grave difficulty and confusion if some other law is the governing law.

These cases must now be reconsidered in the light of the Rome Convention on the law applicable to contractual obligations, which was given the force of law in the United Kingdom on 1 April 1991 by the Contracts (Applicable Law) Act 1990.

b The basic rule under the convention is that in the absence of a choice of law, a contract is governed by the law of the country with which it is most closely connected: art 4(1). The rule is qualified by a number of rebuttable presumptions. It is presumed that the contract is most closely connected with the country where the party who is to effect 'characteristic performance' has its central administration. In the case of a bank account, such party will be the bank.

c However, if the contract is entered into in the course of that party's trade, the governing law will be that of the country in which the principal place of business is situated or, where performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated: art 4(2). As to bank accounts it seems to me that the

d principle established in the Libyan assets cases is substantially unchanged. Performance, ie repayment of the sum deposited, is to be effected through the branch where the account is kept. It is the law of the country where the account is kept which governs the contract. This view appears to be consistent with that expressed in the Giuliano and Lagarde Report (see OJ 1980 C282 p 21), which

e states that 'in a banking contract the law of the country of the banking establishment with which a transaction is made will normally govern the contract'. The governing law of the contract between Sierratel and Barclays is thus English law.

#### f *Payment within mandate*

It is a basic obligation owed by a bank to its customer that the bank will honour on presentation a cheque drawn by the customer on the bank provided that there are sufficient funds in the customer's account to meet the cheque or the bank has agreed to provide the customer with overdraft facilities sufficient to meet the cheque. Where the bank honours such a cheque or other instructions it acts

g within its mandate, with the result that the bank is entitled to debit the customer's account with the amount of the cheque or other instruction.

#### *Capacity and internal management of Sierratel*

h The law of Sierra Leone determines who are Sierratel's officials authorised to act on its behalf. Rule 156 in *Dicey and Morris* vol 2, p 1111 states:

j '(1) The capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation and by the law of the country which governs the transaction in question. (2) All matters concerning the constitution of a corporation are governed by the law of the place of incorporation.'

The law of the place of incorporation determines who are the corporation's officials authorised to act on its behalf: *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd* (No 2) [1966] 2 All ER 536 at 556, 568 and 588, [1967] 1 AC 853 at 919, 939 and 972.

*The new board of directors was not appointed by the government of Sierra Leone: its purported acts are accordingly invalid*

Sierratel has a memorandum and articles in many respects similar to those of companies incorporated in England and Wales. Under Sierratel's articles of association only 'the Government of Sierra Leone' may appoint the directors. Article 71(I) provides:

'The Board of Directors of the Company shall consist of eight members appointed by the Government of Sierra Leone: one of whom shall be appointed Chairman of the Board.'

According to the evidence of Mr Berewa, pursuant to s 70 of the Constitution of Sierra Leone 1991 the appointment of the directors of all parastatals must be made by the President and approved by Parliament. Section 70 of the Constitution provides:

'The President may appoint, in accordance with the provisions of this Constitution or any other law the following persons ... (e) the Chairman and other Members of the governing body of any corporation established by an Act of Parliament, a statutory instrument, or out of public funds, subject to the approval of Parliament.'

See further ss 40(3) and (4), 46(4) of and Sch 2 to the Constitution.

Mr Berewa further states that the junta has not lawfully set aside or revised the constitution itself.

In the field of foreign relations the Crown in its executive and judicial functions ought to speak with one voice and the recognition of a foreign state or government is a matter of foreign policy on which the executive is in a markedly superior position to form a judgment: see *GUR Corp v Trust Bank of Africa Ltd (Government of the Republic of Ciskei, third party)* [1986] 3 All ER 449 at 454, [1987] QB 599 at 604 per Steyn J, and see further [1986] 3 All ER 449 at 459 and 466-467, [1987] QB 599 at 616 and 625 per Donaldson MR and Nourse LJ.

The policy of the United Kingdom is now not to confer recognition on governments as opposed to on states. The new policy of Her Majesty's government was stated in parliamentary answers in April and May 1980: see 48 HL Official Report (5th series) cols 1121-1122, 28 April 1980; 983 HC Official Report (5th series) written answers cols 277-279, 25 April 1980 and 985 HC Official Report (5th series) written answers col 385, 23 May 1980:

'In future cases where a new régime comes to power unconstitutionally our attitude on the question whether it qualifies to be treated as a Government will be left to be inferred from the nature of the dealings, if any, which we may have with it, and in particular on whether we are dealing with it on a normal Government to Government basis.'

In *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA, The Mary* [1993] 1 All ER 371 at 382, [1993] QB 54 at 65-66 Hobhouse J stated:

'Where Her Majesty's government is dealing with the foreign government on a normal government to government basis as the government of the relevant foreign state, it is unlikely in the extreme that the inference that the foreign government is the government of that state will be capable of being rebutted and questions of public policy and considerations of the interrelationship of the judicial and executive arms of Government may be



a paramount: see *The Arantzazu Mendi* [1939] 1 All ER 719 at 722, [1939] AC 256 at 264 and *GUR Corp v Trust Bank of Africa Ltd (Government of the Republic of Ciskei, third party)* [1986] 3 All ER 449 at 466, [1987] QB 599 at 625. But now that the question has ceased to be one of recognition, the theoretical possibility of rebuttal must exist.'

b Hobhouse J pointed out that it would be contrary to public policy for the court not to recognise as a qualified representative of the head of state of a foreign state the diplomatic representative recognised by Her Majesty's government (see [1993] 1 All ER 371 at 382, [1993] QB 54 at 66).

Hobhouse J stated ([1993] 1 All ER 371 at 383, [1993] QB 54 at 67):

c '... it is relevant to distinguish between regimes that have been the constitutional and established government of a state and a regime which is seeking to achieve that position either displacing a former government or to fill a vacuum. Since the question is now whether a government *exists*, there is no room for more than one government at a time nor for separate *de jure* and *de facto* governments in respect of the same state. But a loss of control  
d by a constitutional government may not immediately deprive it of its status, whereas an insurgent regime will require to establish control before it can exist as a government.' (Hobhouse J's emphasis.)

The factors to be taken into account in deciding whether a government exists as the government of a state are set out by Hobhouse J as follows:

e 'Accordingly, the factors to be taken into account in deciding whether a government exists as the government of the state are: (a) whether it is the constitutional government of the state; (b) the degree, nature and stability of administrative control, if any, that it of itself exercises over the territory of the state; (c) whether Her Majesty's government has any dealings with it and  
f if so what is the nature of those dealings; and (d) in marginal cases, the extent of international recognition that it has as the government of the state.' (See [1993] 1 All ER 371 at 384, [1993] QB 54 at 68.)

See further *The Arantzazu Mendi* [1939] 1 All ER 719 at 722, [1939] AC 256 at 264 as to 'exercising effective administrative control'.

g I turn to consider the factors identified by Hobhouse J in turn.

(a) *Whether it is the constitutional government of the state*

On 27 June 1997 Mr Tony Lloyd, Minister of State at the Foreign and Commonwealth Office, issued the following statement on Sierra Leone:

h 'The British Government has followed the events in Sierra Leone since the illegal overthrow of President Kabbah's government on 25 May with serious concern. It has been actively involved in attempts to find a peaceful resolution which will lead to the restoration of the legitimate government of President Kabbah. In this regard it welcomes the meeting of ECOWAS  
j states held in Guinea on 26 June, and looks forward to the report of the Committee established by ECOWAS to take the process forward. In recognition of the close ties which have always existed between United Kingdom and Sierra Leone, the Government underlines its continued support to the courageous people of Sierra Leone who have so steadfastly rejected this attempt to reverse the progress to democracy achieved last year. It looks forward to recommencing its assistance to the reconstruction,

rehabilitation and development of Sierra Leone once, but not until, constitutional order has been restored.'

On 28 November 1997 the Foreign and Commonwealth Office wrote to Messrs Stephenson Harwood as follows:

'You asked me to set out the British Government's policy towards Sierra Leone ... The British Government welcomed the election in Sierra Leone of President Ahmad Tejan Kabbah in February 1996. We have consistently condemned the military coup of 25 May 1997 which overthrew the democratically elected government of Sierra Leone. We look forward to the restoration of constitutional order in that country. We continue to deal with the democratically elected government of Sierra Leone under President Kabbah. We have no dealings with the military junta in Freetown.'

In a letter to Professor Foray, Sierra Leone High Commissioner, dated 13 January 1998 the Foreign and Commonwealth Office stated:

'... I attach a copy of my letter to Stephenson Harwood of 28 November 1997. British Government policy on Sierra Leone has not changed since then. I also attach for your information an extract from Hansard showing a written answer to the House of Lords of 12 January 1998. This sets out the British Government's position on Sierra Leone.'

The written answer to the House of Lords of 12 January 1998 stated:

'Baroness Symons of Vernham Dean: Where democratic governments have been overthrown by violence we have often worked with them in exile as part of our global support for democracy. Tejan Kabbah is not the "former" President of Sierra Leone; he remains the legitimate leader of that country.'

(b) *The degree, nature and stability of administrative control, if any, that it of itself exercises over the territory of the state*

According to the Sierra Leone High Commissioner the military junta presently has no control whatsoever over the country outside of Freetown and there are civil unrest problems in Freetown. There are still defence units loyal to President Kabbah throughout the country. These units have imposed an internal blockade. A soldier loyal to the junta visited a shop in Freetown recently and made various demands to the shopkeeper. The shopkeeper refused to bow to the soldier's demands and the shopkeeper was then shot. A local crowd subsequently lynched the soldier. This sort of thing has happened on a number of occasions recently. The junta has very little real control over the administrative affairs of the country. There were some civil servants left after the coup who had not managed to flee the country. They only number approximately a quarter of the full complement under the legitimate government and therefore none of the departments of government are functioning properly, if at all.

According to the affidavit of Mr Berewa, Attorney General and Minister of Justice in President Kabbah's government, it is precisely because there is in fact no semblance of order in Freetown that the expatriate community and diplomatic missions, which were evacuated following the coup, still remain out of the country. Looting and robbery still remain the order of the day in Freetown and are often perpetrated by members of the junta itself. It has been the clear aim

a of the junta to coerce the civil population to collaborate with them. They have failed in this aim, and to such an extent that there has been a very significant defection by members of the Sierra Leone army and civilian police to the forces of the West African Peace Keeping Force ECOMOG, and the Civil Defence Militia, which is loyal to President Kabbah.

b Of the three tiers of superior courts (the High Court, Court of Appeal and Supreme Court), none are sitting or hearing cases. Over 80% of the judges of the superior courts have fled the country since the coup. Of the inferior (ie magistrates) courts only three are nominally sitting in Freetown. These three courts are not functioning properly, since the junta is a law unto itself and settles matters arbitrarily. It often hands down sentences of summary execution, which are carried out indiscriminately.

c The situation described in para 9(d) of Mr Harrison's affidavit is accurate:

d 'The Bank of Sierra Leone (Central Bank) and Sierra Leone Commercial Bank Limited (wholly owned by Government) are operating. The other commercial banks namely Barclays Bank of Sierra Leone Limited, Standard Chartered Sierra Leone Limited and Union Trust Bank Limited, accounting for over 75% of the banking sector business, have remained closed since the coup. The manufacturing sector has virtually ceased production. The majority of the working population has not returned to work and numerous Sierra Leoneans, including many professionals, have fled the country.'

e This situation results from the lack of a semblance of order in Sierra Leone and the refusal by the civil population, both manual workers and professionals, to co-operate with the junta. The majority of the citizens of Sierra Leone are waiting for the democratically elected government to be restored. The infrastructure of the country has collapsed. Basic amenities such as water and electricity are virtually non-existent. Owing to the embargo on postal activities f by the Universal Postal Union there is no postal communication between Sierra Leone and the outside world. Hospitals function only at the behest of Médecin Sans Frontières or the International Red Cross. The junta itself is not providing medical services. Despite strenuous attempts by the junta to reopen schools, the majority of schools have remained closed since the coup because parents do not g co-operate with the junta and are afraid that their children may be kidnapped, harmed or raped. Petrol is in extremely short supply and although the diesel that runs generators is sometimes available, a shortage of essential fuels has meant that Freetown has had rotating power cuts ever since the coup. The junta has no control over more than two-thirds of the country. They do not control the h country's only international airport situated at Lungi, near Freetown, nor the main internal airfield at Hastings. Both these airfields are controlled by the forces of ECOMOG. The Port of Freetown at Queen Elizabeth II Quay is also under the control of the ECOMOG Forces. Similarly ECOMOG controls the main routes to and from the capital city, Freetown, and even members of the junta are not j allowed to move freely from Freetown to the provinces and back. The civil defence units which remain loyal to President Kabbah and which are fighting for the restoration of democracy are in control of a very significant portion of the territory up-country. There have been some armed hostilities recently and the government of President Kabbah has received reports of some casualties. The most recent reports show that forces loyal to President Kabbah are in control of the most important areas up-country.



(c) *Whether Her Majesty's government has any dealings with it and if so what is the nature of those dealings*

See under (a) above.

(d) *In marginal cases, the extent of international recognition that it has as the government of the state*

The United Nations has imposed sanctions relating to the supply of arms and petroleum products to Sierra Leone: see United Nations Resolution SCR 1132 of 8 October 1997. The resolution has been enacted in England by various statutory instruments. In addition the coup has also been condemned by the Commonwealth, the Organisation of African Unity and the European Community. A number of West African states, which together formed the Economic Community of West African States (ECOWAS), have been involved in attempts to stabilise the situation in Sierra Leone. ECOWAS troops are presently in Freetown and ECOWAS' representatives have met with representatives of the military junta. At a meeting in Conakry, Guinea, on 22/23 October 1997 a peace plan between ECOWAS Ministerial Committee of Five on Sierra Leone, and representatives of the military junta leader, Major Johnny Koroma, adopted a ECOWAS peace plan for Sierra Leone. This peace plan provides for the reinstatement of the legitimate government of President Kabbah within a period of six months. The peace plan remains operative and it is fully expected that the legitimate government of President Kabbah will be reinstated in Sierra Leone within the stated timeframe.

In the light of my analysis of the factors in *The Mary* [1993] 1 All ER 371, [1993] QB 54 I conclude that the military junta are not 'the Government of Sierra Leone'. The mandate to Barclays of 31 July 1996 stands. Nothing that the military junta has purported to do since May 1997 affects that mandate. The letters of 22 December 1997 and 31 December 1997 from those associated with the junta to the bank are of no effect. The military junta is not the government of Sierra Leone. The 'new directors' were not validly appointed. It follows that Sierratel is entitled to the declaration sought and I order accordingly.

*Declaration granted.*

Lawrence Nesbitt Esq Barrister. g

## Baker v Black Sea and Baltic General Insurance Co Ltd (Equitas Reinsurance Ltd intervening)

HOUSE OF LORDS

LORD BROWNE-WILKINSON, LORD WOOLF, LORD LLOYD OF BERWICK, LORD HOFFMANN AND LORD HUTTON

16, 17, 18 MARCH, 20 MAY 1998

*Insurance – Reinsurance – Proportional reinsurance – Costs incurred in investigating, settling or defending claims by insured – Whether insurer able to recover proportion of such costs from reinsurer – Whether term to that effect to be implied into contract of reinsurance.*

The defendants carried on insurance and reinsurance business in London. They reinsured Lloyd's Syndicate 947 under a continuous contract of reinsurance incepted in 1957. It was a 50/50 proportional reinsurance, with an equal sharing of premiums and losses in respect of risks ceded by the syndicate. The premium to be shared was the original premium received by the syndicate net of brokerage, less a deduction of 5% 'overriding commission'. The contract was terminated on notice being given on 31 December 1968. The run off operated satisfactorily until 1984, when the defendants refused to reimburse the syndicate in respect of outstanding asbestos claims emanating from the United States, and claims by US soldiers for long term injury to their health due to the use of chemical defoliants during the war in Vietnam. From the third quarter of 1988, the defendants declined all further liability. Thereafter the plaintiff, a member of the syndicate, suing on his own behalf and on behalf of all other members of the syndicate, commenced proceedings against the defendants. When the matter came before the Commercial Court, the judge identified ten questions for decision and answered nine of them in favour of the syndicate. The syndicate lost on the single issue, namely: whether an insurer could recover a proportion of the costs incurred in investigating, settling or defending claims by his insured under a quota share or other form of proportional reinsurance. The defendants appealed and the syndicate cross-appealed in respect of the single issue on which it had lost, contending that it was of the very nature of proportional reinsurance that the reinsurer was liable for a proportion of the reasonable costs of defending and settling claims by the insured and that such a term was to be implied by law to give the contract business efficacy or by reason of a trade practice or usage in the insurance market in London. The Court of Appeal dismissed both the appeal and the cross-appeal and the syndicate appealed to the House of Lords. The rights and liabilities of all the Lloyd's members in respect of the 1992 account and prior years were subsequently taken over by Equitas, which was granted leave to intervene in the proceedings and applied for leave to adduce fresh evidence on the question of trade practice or usage.

**Held** – In a proportional reinsurance treaty, there was no basis for implying a term to the effect that the reinsurers were liable for a share of the costs incurred by the insurer when investigating, settling or defending claims made by the insured on the underlying policies on the ground of necessity to give the contract business efficacy. The further question whether such a term was to be implied

by reason of trade practice or usage in the London insurance market could only be established by firm evidence of a universal and acknowledged practice of the market for reinsurers to pay a proportion of the legal costs and expenses of the reinsured. In view of the overriding importance of establishing on adequate evidence for the market as a whole whether the alleged trade practice or usage existed, the sensible course, in the instant case, would be to set aside the judgments below so far as they related to that issue and remit the case back to the Commercial Court for further argument, after hearing the fresh evidence. Accordingly, the intervener's application would be granted and the appeal would be allowed to the limited extent indicated (see p 835 *a* to *c j*, p 837 *d e*, p 838 *b*, p 841 *a b*, p 842 *e* to *h* and p 843 *c* to *f h* to p 844 *b*, post); *Scottish Metropolitan Assurance Co Ltd v Groom* (1924) 20 Ll L Rep 44 and *Insurance Co of Africa v Scor (UK) Reinsurance Co Ltd* [1985] 1 Lloyd's Rep 312 considered.

### Notes

For reinsurance, see 25 *Halsbury's Laws* (4th edn reissue) paras 204–210.

### Cases referred to in opinions

*Beckhuson and Gibbs v Hamblet* [1901] 2 KB 73, CA.

*British Dominions General Insurance Co Ltd v Duder* [1915] 2 KB 394, [1914–15] All ER Rep 176, CA; *rvsg* [1914] 3 KB 835.

*Insurance Co of Africa v Scor (UK) Reinsurance Co Ltd* [1985] 1 Lloyd's Rep 312, CA; *affg* [1983] 1 Lloyd's Rep 541.

*Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489, CA.

*Liverpool City Council v Irwin* [1976] 2 All ER 39, [1977] AC 239, [1976] 2 WLR 562, HL.

*Scottish Metropolitan Assurance Co Ltd v Groom* (1924) 20 Ll L Rep 44, CA; *affg* (1924) 19 Ll L Rep 131.

*Uzielli & Co v Boston Marine Insurance Co* (1884) 15 QBD 11, CA.

### Appeal

The plaintiff, Colin Baker, suing on his own behalf and on behalf of all the other members of Lloyd's Syndicate 947 since 1957 (the syndicate), appealed with leave of the Appeal Committee of the House of Lords given on 15 January 1997 from the decision of the Court of Appeal (Staughton, Millett and Otton LJJ) ([1996] LRLR 353) on 20 June 1996 affirming that part of the decision of Potter J ([1995] LRLR 261) on 24 January 1994, whereby, in the course of adjudicating on a number of sample claims in proceedings brought by the syndicate for the purpose of determining the liability of Black Sea and Baltic General Insurance Co Ltd (the reinsurers), he had determined that the reinsurers were not liable for a proportion of the syndicate's costs of investigating, settling or defending claims. *Equitas Reinsurance Ltd*, which had become responsible for the conduct of the syndicate's claims against the reinsurers, intervened by leave of the House of Lords. The facts are set out in the opinion of Lord Lloyd.

*Stewart Boyd QC* (instructed by *Freshfields*) for *Equitas*.

*Christopher Clarke QC* and *Sarah Lee* (instructed by *Norton Rose*) for the syndicate.

*Angus Glennie QC* and *David Joseph* (instructed by *Holman Fenwick & Willan*) for the reinsurers.

Their Lordships took time for consideration.



20 May 1998. The following opinions were delivered.

**LORD BROWNE-WILKINSON.** My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Lloyd of Berwick. I agree with it and for the reasons which he gives I would allow the appeal to the limited extent which he proposes and would remit the question to which he refers to further hearing in the Commercial Court.

**LORD WOOLF MR.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Lloyd of Berwick. For the reasons he gives I would allow the appeal to the extent which he proposes and would remit all questions relating to trade practice and usage for a further hearing in the Commercial Court.

**LORD LLOYD OF BERWICK.** My Lords, the plaintiff, Mr Colin Baker, is a member of Lloyd's Syndicate 947 (the syndicate). He sues on his own behalf, and on behalf of all other members of the syndicate. The defendant reinsurers, Black Sea and Baltic General Insurance Co Ltd (Black Sea), carry on insurance and reinsurance business in London. They reinsured the syndicate under a continuous contract of reinsurance which inceptioned in 1957 and terminated on notice being given on 31 December 1968.

The run off operated satisfactorily until 1984, when Black Sea refused to reimburse the syndicate in respect of outstanding asbestos claims emanating from the United States, and claims by US soldiers for long-term injury to their health due to the use of chemical defoliants during the war in Vietnam. From the third quarter of 1988 Black Sea declined all further liability.

The syndicate commenced proceedings on 3 May 1989. Two other writs were issued at a later date. On 22 March 1991 Saville J made an order for the trial of preliminary issues in respect of 12 sample claims insured by the syndicate. The preliminary issues came before Potter J in the Commercial Court in May 1993. Potter J identified ten questions for decision. He answered all questions save one in favour of the syndicate. This enabled him to allow or disallow all the items in the sample claims. The work involved in preparing the case for hearing was prodigious, since much of the documentation had long since been lost or destroyed. The hearing lasted 11 days. The judgment of the judge ([1995] LRLR 261) is a model of how such cases should be handled. In a subsequent judgment ([1995] LRLR 287) he dealt with the question of interest costs and a number of other matters.

On 24 March 1995 Black Sea served notice of appeal. The syndicate cross-appealed in respect of the single issue on which it had lost. The appeal and cross-appeal came before the Court of Appeal on 13 May 1996, and were both dismissed with costs ([1996] LRLR 353).

The syndicate are the appellants before your Lordships. There is a cross-appeal by Black Sea in respect of one only of the many issues on which they lost in the Court of Appeal. In the course of the hearing before your Lordships the parties reached agreement on that issue, as a consequence of which the cross-appeal has now been withdrawn with no order as to costs. That leaves only the single issue on which the syndicate lost before the judge and the Court of Appeal. That issue may be stated as follows: Where an insurer incurs costs in investigating settling or defending claims by his insured, can the insurer recover a proportion of these costs under a quota share or other form of proportional reinsurance?

Three points need to be emphasised at the outset. The first is that the costs in question are not the costs incurred by the insured in meeting third party claims. These will often be recoverable from the reinsurer as one of the risks insured under the underlying policy. The costs which are in issue are the costs incurred by the insurer in investigating and defending claims by the insured.

It is said on behalf of the syndicate that a proportion of these costs ought to be recoverable, not because they are insured under the underlying policy—they clearly are not—but because it is of the very nature of proportional reinsurance that the reinsurer is liable for a proportion of the reasonable costs of defending and settling claims by the insured. The essential characteristic of a proportional reinsurance, so it is said, is that there is a sharing of the same underwriting fortunes, both as to risk and premium. If the syndicate were to be liable for the whole of the costs of defending and settling claims by the insured, while receiving only a proportion of the premium, the nature of the bargain would be fundamentally altered. The central question is whether the syndicate's argument in this respect is correct in law.

The second point to emphasise at the outset is that the syndicate does not seek to include among the costs of defending claims any part of their overheads or fixed costs. The costs in issue are the variable costs which are specific to a particular claim. Thus, to take an example mentioned during the hearing, the costs of briefing counsel to defend a claim by the insured would be included, but not the costs of employing a claims' manager. The line may be difficult to draw in practice. But the principle underlying the distinction is sound.

The third point is that the syndicate's argument is confined to proportional reinsurances. It is not suggested that the reinsurer is liable for costs under a non-proportional reinsurance, such as an excess of loss or stop loss policy, unless, of course, there is an express provision to that effect.

The only contractual document to have survived is a copy of the cover note dated 10 April 1957 issued by the brokers, Messrs Swann & Everett Ltd. It provides:

'We beg to advise you that we have reinsured on your account 100% *FIRST SURPLUS CONTRACT IN RESPECT OF UNITED STATES AND CANADIAN BUSINESS (FIRE AND CASUALTY)*. Permanent Contract attaching 1st April, 1957, subject to three months notice by either side to take effect 31st December any one year. Basis of cession: one retention equal to a maximum of \$50,000 possible loss any one risk surplus to One retention. Being a reinsurance subject to all terms, clauses and conditions as the original and to follow the settlements and agreements of Hudson and Vernon Esq., and Names in all respects. 20% Profit Commission. Quarterly Accounts. Provisional Bordereaux. Wording to be agreed. Original Nett Premium of Hudson and Vernon Esq., and Names less 5% overriding commission. F.O.B. REINSURED WITH: Black Sea & Baltic General Insurance Co., Ltd.'

The meaning of the words 'basis of cession: one retention equal to a maximum of \$50,000 possible loss any one risk surplus to one retention' might not spring to the non-expert eye. Fortunately the effect of the provision has been agreed between the parties. The syndicate was not obliged to cede any of its United States or Canadian business risks. But if it did, then Black Sea was bound to accept a line equal to the line retained by the syndicate up to a maximum of \$50,000 any one risk. In other words, it was a 50/50 proportional reinsurance, with an equal

a sharing of premiums and losses in respect of risks ceded by the syndicate. The premium to be shared was the original premium received by the syndicate net of brokerage, less a deduction of five per cent 'overriding commission'. This was explained as follows: for every £100 of net premium due to the syndicate, Black Sea would receive £47.50, and the syndicate would receive £52.50. In profitable years the syndicate would also be entitled to receive 20% profit commission. This was not explained. But I infer (subject to correction) that if, in any period of insurance, premiums amounted to £100 and claims to £60, the syndicate would be entitled to receive 20% of £40 before distribution, with the result that Black Sea would receive £16 and the syndicate £24. Putting profit commission and overriding commission together, Black Sea would receive £13.50 and the syndicate £26.50.

c In the courts below the syndicate's case was put on three grounds. In the first place it was said that Black Sea was liable for its share of the costs under the 'follow the settlements and agreements' provision in the contract. But that way of putting the case met with little favour before Potter J, and still less in the Court of Appeal. It has not been pursued before your Lordships.

d Secondly, the syndicate relied on an implied term of the contract, such term to be implied in order to give the contract business efficacy, or because it is what the parties to the contract must, as reasonable men, have intended. Thirdly, the syndicate relied on a term to be implied by reason of a trade practice or usage in the insurance market in London.

e I shall consider each of the two latter arguments in turn. But first of all I should mention an important development which has occurred since the case was before the Court of Appeal. In September 1996 the offer which had been made to members of Lloyd's as part of the reconstitution scheme became unconditional. That meant that a company called Equitas Reinsurance Ltd (Equitas) took over the rights and liabilities of all members in respect of the 1992 year of account and prior years, for a premium in excess of £14bn. Equitas now has the responsibility, as equitable assignee, of pursuing claims by members against their reinsurers, including the syndicate's claim in the present proceedings. The question whether members can recover a proportionate share of the cost of defending claims from their pro rata reinsurers has substantial consequences for the parties to the present proceedings. The amount at stake is about £200,000. But it has vast consequences for Equitas. The amount to be spent by Equitas in defending asbestosis and pollution claims in a single year is estimated at \$100m. Of this it is thought that about five to ten per cent would be recoverable from reinsurers if the appeal on the present point succeeds. Because of its market-wide interest in the outcome of the present proceedings Equitas petitioned the House for leave to intervene in May 1997, and your Lordships granted leave shortly thereafter.

j In their written case the interveners indicated that they would be content to adopt the submissions advanced by the syndicate in the syndicate's written case. By agreement it was Mr Boyd QC, for the interveners, who opened the case on behalf of the syndicate, rather than Mr Clarke QC. But more important, the interveners said that they would be applying at the hearing of the appeal for leave to adduce fresh evidence on the question of trade practice or usage. Mr Boyd argued that the House has a discretion to admit fresh evidence, and suggested various ways in which the fresh evidence might be received. But it is convenient to put that question on one side, and deal first with the other ground on which



the syndicate relies, namely that they are entitled to succeed by virtue of a term implied by law. a

*Implied term in the absence of trade practice or usage*

Millet LJ ([1996] LRLR 353 at 362–363) regarded this as the strongest of the syndicate's arguments. But even so he did not accept it. I find his reasons convincing. The starting point of the argument has already been mentioned. b  
This being a proportional reinsurance it does not make sense for the syndicate to bear the whole of the cost of defending claims. Since Black Sea receive half the premium in respect of risks ceded under the reinsurance, they ought to bear half the losses, including the cost of reducing losses by defending or settling claims, from which the reinsurers benefit. That argument would indeed be a strong one if proportional reinsurance were in the nature of a partnership. But this has never been the law. c  
It might also have been a strong argument if the profits on the business ceded to Black Sea were to be shared equally. But they were not. For the syndicate was entitled to 20% commission on profits before any distribution. Even in a year when no profits were being made (as must have been the position from quite early on) the syndicate was entitled to 5% overriding commission. d  
It may well be that the parties intended the cost of defending claims to come out of the 20% profit commission, or the 5% override, or both. In the absence of any information as to how these provisions worked in practice, your Lordships do not have the material on which to say that a term is to be implied by law. As Mr Boyd conceded in reply, we simply do not know enough to decide. e

Reference was made to a well-known passage in Lord Wilberforce's speech in *Liverpool City Council v Irwin* [1976] 2 All ER 39 at 43, [1977] AC 239 at 253, where he discussed the different 'varieties' of implication, all of which, as he explained, shade into each other. The only variety of implication which fits the circumstances of the present case is the first, which he stated as follows: f

'Where there is, on the face of it, a complete, bilateral contract, the courts are sometimes willing to add terms to it, as implied terms; this is very common in mercantile contracts where there is an established usage; in that case the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain.' g

I will return to this variety of implication when I come to the question of trade practice or usage. I do not regard any of the other varieties of implication as applying in the present case, since they all depend in one form or another on a test of necessity. I would not regard that test as being satisfied in the present case, for the reasons which I have already given. h

I turn briefly to see how the matter stands in the leading textbooks. In *MacGillivray on Insurance Law* (9th edn, 1997) p 914, para 33-65 we find:

'The key to the extent of the reinsurer's liability is that the contract of reinsurance is one of indemnity against specified liabilities of the reinsured ... Another consequence is that, in the absence of a specific clause concerning recovery of costs, the reinsured has no entitlement to recover the costs incurred by him in defeating a claim brought by the insured, since there is no liability towards the insured to form the subject matter of an indemnity.' j

a A little later (pp 915–916, para 33–67, we find: ‘In the absence of an express provision there is no indemnity for costs incurred in successfully resisting the insured claim.’

The underlying authorities are not easy to reconcile, or even, in some cases, to understand. I have found most assistance from *Scottish Metropolitan Assurance Co Ltd v Groom* (1924) 20 Ll L Rep 44; *affg* (1924) 19 Ll L Rep 131 and *Insurance Co of Africa v Scor (UK) Reinsurance Co Ltd* [1985] 1 Lloyd’s Rep 312.

b In the former case the insurers incurred expenses in successfully defending a claim for a total loss under a marine insurance policy. The insurers sought to recover in respect of these expenses from their reinsurer, Mr Groom. There was no express term in the reinsurance contract under which they were entitled to recover. But Mr R A Wright KC argued that they could recover under an implied term. The implication was put on two grounds: first, that Mr Groom had expressly agreed that the claim should be contested by the insurers, and, secondly, that there was an implied obligation arising from the relationship between the parties. Bailhache J and the Court of Appeal rejected both grounds.

d It was submitted on behalf of the syndicate that the case was decided on the first ground only, and that the second ground was never argued. But it is clear from the report of the argument in the Court of Appeal (20 Ll L Rep 44) that both grounds were argued before Bailhache J. It is clear also that if that very experienced commercial judge could have found a way of deciding the case in favour of the insurers he would have done so. It may be that the second ground e was not pressed in the Court of Appeal (the report is not altogether clear) but if not, it could only have been because the future Lord Wright did not think it worth pressing.

f It was also argued that the case is of no assistance, since the contract was not one of proportional reinsurance. My impression is otherwise. The sum reinsured was £600 total loss only, of which Mr Groom’s share was £75. It was not suggested that the reinsurers were liable for the whole of the cost of defending the claim, but only their share. This suggests that the reinsurance was surplus business, as in the present case. The fact that the underlying policy covered partial loss as well as total loss does not mean, as Mr Boyd argued, that the reinsurance was not proportional. It follows that *Scottish Metropolitan Assurance Co Ltd v Groom* is strong authority in favour of Black Sea.

j *Insurance Co of Africa v Scor (UK) Reinsurance Co Ltd* is another authority to the same effect. The underlying policy in that case covered a warehouse in Liberia against fire. The sums insured were \$500,000 for buildings and \$3m for contents. h The warehouse became a total loss. The owners of the warehouse brought proceedings in the Liberian courts. The proceedings were defended by the insurers, but they did not succeed. In addition to being held liable for \$3,500,000 as the sum insured, they were ordered to pay general damages of \$600,000 and \$58,000 costs. Leggatt J ([1983] 1 Lloyd’s Rep 541 at 557) held that the insurers could recover a proportion of the damages and costs from the reinsurers under an implied term of the reinsurance contract. But the Court of Appeal by a majority disagreed. Robert Goff LJ ([1985] 1 Lloyd’s Rep 312 at 331–332) held that there was no basis for implying a term that the reinsurers should bear a proportion of the costs of defending the claim on the ground of business efficacy. Fox LJ said (at 334) that the contract worked effectively without any such implication. Moreover the consequences of implying such a term would be that

the reinsurers' potential liability would be increased beyond, and possibly far beyond, the sum insured under the contract of reinsurance. a

It was argued that the reinsurance policy was not a proportional contract. This may be the reason why Potter J attached less importance to the decision in the *Scor* case than I would do. It is true that the insurers took a very high proportion of the risk. But as Millett LJ ([1996] LRLR 353 at 363) pointed out in the Court of Appeal, the extent of the cover is not reduced as the proportion taken by the insurers is increased: b

'If it is not implicit in a [98.6%] reinsurance contract that the indemnity covers the legal costs and expenses of the reinsurer, then it is not implicit in a 50 per cent. reinsurance contract either.'

So I would regard the *Scor* case as another authority in favour of the view that, if the syndicate is to succeed against Black Sea, it cannot be by virtue of a term implied by law. Indeed as Millett LJ again pointed out, the present case is a fortiori. In the *Scor* case there was a provision which conferred on reinsurers the right to withhold their approval of a settlement. It was the effect of this provision in particular which made it necessary, in Leggatt J's view, and in the minority view of Stephenson LJ in the Court of Appeal, to apply a term in favour of the insurers. But there is no such provision in the present case. c

The cases principally relied on by Mr Boyd were *Uzielli & Co v Boston Marine Insurance Co* (1884) 15 QBD 11 and *British Dominions General Insurance Co Ltd v Duder* [1915] 2 KB 394, [1914-15] All ER Rep 176. I say nothing about the *Uzielli* case, since, like others before me, I find it difficult to understand. It should not be regarded as authority for any principle relevant to the present case. As for *Duder's* case, the question was whether the insurers, having settled the owners' claim for a constructive total loss at 66% of the sum insured could recover 100% from their reinsurers. Bailhache J ([1914] 3 KB 835) held that they could, with the result that the insurers would have made a profit out of the reinsurance. The Court of Appeal disagreed. The contract of reinsurance is a contract of indemnity. Accordingly the insurers could not recover more than they had lost. At the end of his judgment Buckley LJ said ([1915] 2 KB 394 at 403, [1914-15] All ER Rep 176 at 179): d

'The plaintiffs are, however, entitled to indemnity, and this is not necessarily confined to the 66 per cent. They are entitled to such further sum, if any, as is required to give them an indemnity. The costs, for instance, of obtaining the compromise at 66 per cent. should be added to the 66 per cent.'

Mr Boyd naturally relies on the reference to the costs being recoverable. There is a similar reference in the judgment of Pickford LJ ([1915] 2 KB 394 at 408, [1914-15] All ER Rep 176 at 181). But it may be that the costs which Buckley LJ had in mind are the costs which the owners had incurred: see the statement of facts ([1915] 2 KB 394 at 395), where there is a reference to the insurers having settled the action 'on the terms of paying 66 per cent. of the claim and the owners' costs'. Or it may be, as suggested in *MacGillivray* p 916, para 33-67, n 25, that the point was conceded. In any event there was no suggestion that the costs could be recovered under an implied term of the reinsurance contract. So the case is not authority for any such general proposition. If it had been, it would surely have been cited ten years later in *Scottish Metropolitan Assurance Co Ltd v Groom*, since e  
f  
g  
h  
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a Mr R A Wright was counsel in both cases, and in both cases Bailhache J was the judge at first instance.

Although the authorities are not perhaps compelling, the weight of the authorities is certainly consistent with the view that the syndicate cannot succeed in these proceedings by virtue of a term implied by law. On this point therefore I find myself in complete agreement with the judge and the Court of Appeal.

b *Trade practice or usage*

The starting point here must be the passage which I have already quoted from Lord Wilberforce's speech in *Liverpool City Council v Irwin* [1976] 2 All ER 39 at 43, [1977] AC 239 at 253. As he pointed out, it is very common in mercantile contracts, where there is an established market usage, to add a term to an otherwise complete bilateral contract, on the grounds that it is what the parties would unhesitatingly have agreed. This was indeed the fabric out of which much of the modern commercial law was created in the eighteenth and early nineteenth centuries. Unfortunately the evidence of usage in the present case was left in a somewhat unsatisfactory state, owing to the fact that there were many other issues to be covered at the trial, and it was only at a late stage that the points of claim were amended so as to allege an implied term 'in accordance with what is customary in proportional reinsurance'.

d Evidence for the syndicate was given by Mr D W Jordan. He has been in underwriting all his working life. In para 65 of his report dated 6 October 1992 (which stood as his evidence-in-chief) Mr Jordan says:

e 'There are two types of expenses that I understand have arisen. The first is the expense incurred by the Plaintiffs by instructing a lawyer or loss adjuster to determine that a claim is a proper loss in accordance with the terms and conditions of a policy of insurance or reinsurance. Under a pro rata reinsurance it is customary that these expenses are shared on a pro rata basis. f Needless to say these expenses are beneficial to both parties and are incurred as a necessary part of the demonstration of the duty of good faith owed to the reinsurers.'

g A little later (para 67) he says: 'If the cession requires the services of an assessor the reinsurers pay their share.' Evidence was also given by Mr Dodds, the syndicate's claims manager. He was asked what the practice is in relation to surplus reinsurances. He replied:

h 'All I can say is that I have seen surplus treaties handled for many years and I have seen claims of this nature, fees of this nature paid under those treaties in just the way they are being submitted here.'

*Potter J.* But can you say whether or not the original arrangements were embodied in a treaty or at least some fuller arrangement than a slip of this kind or slips of this kind?

j A. ... my experience is that these treaties didn't go into that detail, it was just market practice that this was the way these sorts of things were handled.

Q. You had never known a dispute of it, at any rate?

A. I can't recall one, no.'

Neither Mr Jordan nor Mr Dodds were cross-examined on these points. It is fair to add that the pleading had not been formally amended at that stage so as to allege a trade practice. But as Mr Glennie QC very fairly conceded, he could have

resisted the amendment, or at least applied for Mr Jordan and Mr Dodds to be recalled for further cross-examination. a

Mr Fryer, who gave expert evidence for Black Sea, said in chief that it was 'common for defence costs to be apportioned proportionate to the interests of the parties involved' but he added that this was not universal. In cross-examination he drew a distinction between proportional insurance on the one hand, and excess of loss and other non-proportional insurance on the other. In the former b he would normally expect the reinsurers to pay their share of defence costs, but not in the latter. It was left unclear whether Mr Fryer was dealing only with cases where the parties had made an express provision one way or the other. What was needed was evidence as to the practice where there is no express provision.

Potter J ([1995] LRLR 261 at 281) in the course of his judgment correctly summarised the effect of the evidence. But when he came to state his conclusion (at 282), he unfortunately fell into error. In the first place he said that, despite various amendments made by the parties in the course of the proceedings, no such custom had ever been pleaded by the syndicate. This must have been an oversight, for he had himself given leave for the amendment. Secondly, he said that the evidence did not go beyond an assertion that reinsurers often or usually c pay a proportion of the insurer's expenses. But with respect Mr Jordan's evidence goes further than this. d

These errors serve to undermine Potter J's conclusion that the evidence was insufficient to establish a practice 'so universally recognised and followed' as to lead to the implication of a term in the contract.

In the Court of Appeal Millett LJ said ([1996] LRLR 353 at 362): e

'The Judge rejected the third [submission, ie trade practice or usage] on the ground that it was not supported by the evidence. This did not extend beyond testimony that reinsurers usually pay a proportion of the legal costs and expenses of the reinsured. The Judge was not satisfied that a universal practice to this effect was established. In any case, as he pointed out, it was possible that reinsurers usually paid because there was usually an express provision in the treaty requiring them to do so. I think that this conclusion was inevitable. What was needed was evidence of a universal and acknowledged practice of the market for reinsurers to pay such costs whether this is expressly provided for in the treaty or not; or (to put it f another way) that it is well understood by underwriters that if it is not intended that the indemnity should extend to the legal costs and expenses of the reinsured, these need to be expressly excluded. There was no such evidence.'

The test applied by the Court of Appeal was, if I may respectfully say so, entirely h correct. Where I differ from Millett LJ is in his view of the evidence. On its face, Mr Jordan's evidence does go beyond establishing what is usual. Mr Jordan says, in so many words, that it is 'customary' for the expense of defending claims to be shared on a pro rata basis. He may have been using the word 'customary' in a loose sense. But as there was no cross-examination we cannot tell. j

It is at this point that Mr Boyd's application to admit fresh evidence becomes relevant. The House did not find it necessary to look at the fresh evidence. Your Lordships were told that it is directly relevant to the point at issue. What should be done? One possible course would be to allow the concurrent findings of Potter J and the Court of Appeal to stand in the present proceedings, and to leave it to

a Mr Boyd to establish a trade practice by fresh evidence in other proceedings. For  
the failure to establish a trade practice in one set of proceedings does not  
prejudice other parties in subsequent proceedings: see *Beckhuson and Gibbs v*  
*Hamblet* [1901] 2 KB 73. I would not for my part regard that as a satisfactory  
solution for two reasons. In the first place I would not be happy to leave the  
adverse findings of Potter J and the Court of Appeal to stand when *both* courts  
b seem to have mistaken the effect of Mr Jordan's evidence. But I would be equally  
unhappy to substitute a contrary finding in favour of the syndicate on such scanty  
material. Mr Glennie himself shared this concern.

Secondly, there is the overriding importance of establishing on adequate  
evidence for the market as a whole whether the alleged trade practice or usage  
exists or not. The sooner this is done the better. For these reasons the sensible  
c course would seem to be to admit the fresh evidence in the current proceedings.  
The exceptional nature of Mr Boyd's intervention on behalf of *Equitas* justifies,  
in my view, any breach of the rules in *Ladd v Marshall* [1954] 3 All ER 745, [1954]  
1 WLR 1489. Although Mr Glennie's formal position was that the rules in *Ladd v*  
*Marshall* were not satisfied, he did not seek to press the point.

d Then comes the question how the evidence should be received. Mr Boyd said  
there were two choices. Either the House could direct the evidence to be taken  
before an examiner. The House could then itself determine on the basis of the  
evidence whether or not the syndicate had succeeded in proving the existence of  
the trade practice or usage. This would have the advantage of finality. The  
e alternative would be to allow the syndicate's appeal, set aside the judgments  
below, so far as they relate to trade practice or usage, and remit the case to the  
Commercial Court for further argument on that issue, after hearing the fresh  
evidence, and any fresh evidence which Black Sea may wish to introduce.

f Of these alternatives I much prefer the second. Difficult questions may arise in  
the course of hearing the fresh evidence. For example, it may be necessary for  
the parties to amend their pleadings. Or there may be questions as to the  
admissibility of some of the evidence. It is important that these questions should  
be the subject of an authoritative ruling. This could be given by the commercial  
judge, but not by an examiner.

g But quite apart from the handling of the evidence, it is desirable, in a case of  
this importance to the market as a whole, to have the views of the commercial  
judge himself. In that connection counsel may find it convenient to cite a recent  
article by Mr William Hoffman 'On the use and abuse of custom and usage in  
reinsurance contracts' [1998] LMCLQ 43. It is true that a judgment on the central  
question at first instance could be appealed to the Court of Appeal and thence  
h back to the House. But it is to be hoped that after a full hearing the parties to  
these proceedings, and the market as a whole, would accept the judgment of the  
commercial judge. If your Lordships agree, therefore, I would allow the appeal  
to the extent indicated, and remit all questions relating to trade practice and usage  
for a further hearing in the Commercial Court. The costs before your Lordships  
j and in the Court of Appeal on the remitted issue should await the outcome of that  
hearing.

**LORD HOFFMANN.** My Lords, I have had the advantage of reading in draft the  
speech of my noble and learned friend Lord Lloyd of Berwick. I agree with it and  
for the reasons which he gives I would allow the appeal to the limited extent



which he proposes and would remit the question to which he refers to further hearing in the Commercial Court.

**LORD HUTTON.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Lloyd of Berwick. For the reasons he gives I would allow the appeal to the extent which he proposes and would remit all questions relating to trade practice and usage for a further hearing in the Commercial Court.

*Appeal allowed to extent indicated.*

Celia Fox Barrister.

## British Broadcasting Corporation v Kelly-Phillips

COURT OF APPEAL, CIVIL DIVISION

EVANS, PETER GIBSON AND THORPE LJJ

10, 11 MARCH, 8 APRIL 1998

*Unfair dismissal – Right to claim for unfair dismissal – Exclusion of right by agreement – Agreement by person employed under contract for fixed term of one year or more – Extension of period of contract by variation of contract – Whether fixed term being whole of period covered by contract as varied or period added to contract by variation – Employment Rights Act 1996, ss 95(1), 197(1).*

The respondent, K-P, was offered a new fixed term contract of employment with her former employers, the BBC, to run from 4 September 1994 to 5 September 1995 inclusive. The terms of the new contract contained a clause waiving her rights to claim for unfair dismissal or for any redundancy payment, pursuant to s 142(1) of the Employment Protection (Consolidation) Act 1978 (now s 197(1)<sup>a</sup> of the Employment Rights Act 1996), which allowed an employer and employee to contract out of the application of Pt X of the 1996 Act where there was a dismissal from employment under a contract for a fixed term of one year or more if the dismissal consisted only of the expiry of that term without it being renewed. K-P signed the contract. On 23 August 1995 the BBC offered to extend her fixed term contract beyond 5 September 1995 to 31 December 1995. A letter confirming that variation and the continuance of the provisions of the fixed term contract was sent to K-P, who signed a form of acceptance. The BBC subsequently wrote to K-P to inform her that her contract would come to an end on 31 December 1995 and would not be renewed because the question arose of the appropriateness of her approach to the position. Accordingly, her dismissal took effect on the expiry of the term. K-P applied to an industrial tribunal complaining of unfair dismissal, and the BBC contended that she had contracted out of her right to do so. At a preliminary hearing on the issue, the tribunal held, *inter alia*, that if, at the date of her dismissal, K-P was engaged on a fixed term contract that contract was for a period of less than four months and so s 197(1) did not apply. The BBC appealed to the Employment Appeal Tribunal, which upheld the industrial tribunal's holding on the period of the fixed term contract. On appeal by the BBC, the issue arose as to whether, if the period of a fixed term contract was extended by a variation of that contract, the fixed term referred to in s 197(1) of the 1996 Act was the whole of the period covered by the contract as varied, or the period added to it by virtue of the later contract which varied it.

**Held** – The reference to a contract for a fixed term within s 197(1) of the 1996 Act encompassed a contract which had been varied by an extension of the term under the same contract. Consequently, where there had been a renewal of the fixed term under the same contract, the period of the contract ran from the commencement date under the original contract to the expiry date of the extended term. Such a construction was supported by the fact that s 95(1)(b)<sup>b</sup> of

<sup>a</sup> Section 197(1), so far as material, is set out at p 849 *b c*, post

the Act recognised that there could be an extension of a fixed term contract 'under the same contract', and the natural construction of those words was to treat them as referring to a renewal (including an extension) of the term on the same, or substantially the same, terms as the original contract, the contrast being with a new contract. Since, in the instant case, the extension of the term had been made under the original contract and was not a new contract and (Evans LJ concurring) the original contract itself had been for a period of one year and two days, the requirements of s 197(1) had been satisfied. Accordingly, the employer's appeal would be allowed and K-P's application to the industrial tribunal would be dismissed (see p 850 g to p 851 h, p 855 g h, p 856 j, p 857 a and p 858 h to p 859 b, post).

*BBC v Ioannou* [1975] 2 All ER 999 and *Mulrine v University of Ulster* [1993] IRLR 545 considered.

### Notes

For restrictions on contracting out and contracts for a fixed term, see 16 *Halsbury's Laws* (4th edn reissue) paras 69, 316.

For the Employment Rights Act 1996, ss 95, 197, see 16 *Halsbury's Statutes* (4th edn) (1997 reissue) 649, 757.

### Cases referred to in judgments

*BBC v Ioannou* [1975] 2 All ER 999, [1975] QB 781, [1975] 3 WLR 63, CA.

*Bhatt v Chelsea and Westminster Health Care Trust* [1997] IRLR 660, EAT.

*BP Oil Ltd v Richards* (12 April 1983, unreported), EAT.

*Dixon v BBC* [1979] 2 All ER 112, [1979] QB 546, [1979] 2 WLR 647, CA.

*Hogg v Dover College* [1990] ICR 39, EAT.

*Housing Services Agency v Cragg* [1997] ICR 1050, EAT.

*Morris v Baron* [1918] AC 1, HL.

*Mulrine v University of Ulster* [1993] IRLR 545, NI CA.

*Open University v Triesman* [1978] ICR 524, EAT.

### Appeal

The British Broadcasting Corporation (the BBC) appealed from the decision of the Employment Appeal Tribunal ([1998] ICR 1), given on 25 June 1997, whereby the tribunal dismissed the BBC's appeal from the decision of the London (North) Industrial Tribunal given on 31 October 1996, which found that the employee, Miss Linda Kelly-Phillips, was not excluded, by virtue of a waiver clause within the terms of her fixed term contract, from pursuing a claim for unfair dismissal against her former employer, the BBC. The facts are set out in the judgment of Peter Gibson LJ.

*Patrick Elias QC* and *John Bowers* (instructed by *Elena Moran*) for the BBC.

*John Hendy QC* and *Jennifer Eady* (instructed by *Thompsons*) for Miss Kelly-Phillips.

*Cur adv vult*



8 April 1998. The following judgments were delivered.

**PETER GIBSON LJ** (giving the first judgment at the invitation of Evans LJ). This appeal gives rise to a short but important point on the true construction of s 197(1) of the Employment Rights Act 1996. In strictness, because of the dates at which the relevant events occurred, the point arises on the antecedent statutory provision, s 142(1) of the Employment Protection (Consolidation) Act 1978. But the parties' counsel have sensibly agreed that as the minor differences between the language used in that and other relevant provisions of the 1996 Act and the language used in the earlier legislation do not amount to any change in substance, we can confine our attention to the 1996 Act.

Under Pt X of the 1996 Act an employee has the right not to be unfairly dismissed and if so dismissed to bring a complaint to an industrial tribunal and to obtain remedies for such dismissal. Those rights are protected by s 203(1), which provides that any provision in an agreement (whether a contract of employment or not) is void in so far as it purports to exclude or limit the operation of any provision of the 1996 Act or to preclude a person from bringing any proceedings under that Act before an industrial tribunal. That subsection is, however, made inapplicable by s 203(2)(d) to any provision of an agreement relating to dismissal from employment such as is mentioned in s 197(1) or (3). Section 197(1) allows an employer and an employee to contract out of the application of Pt X where there is a dismissal from employment under a contract for a fixed term of one year or more if the dismissal consists only of the expiry of that term without it being renewed.

Unhappily there have been inconsistent interpretations of the statutory provisions in question, the Employment Appeal Tribunal in *Housing Services Agency v Cragg* [1997] ICR 1050 at 1055 rightly describing the state of the authorities as confused. The point has also divided commentators (compare *Harvey on Industrial Relations* D[126] with [1997] IRLR 657). The problem arises over extensions by agreement of the fixed term of a contract, the dismissal occurring on the expiry of the extended term. Is the contract governing the employment from which the employee is dismissed the varied contract and is it one for the extended fixed term? Or is the contract governing that employment the agreement by which the original fixed term is extended, the term of which is the extension only?

The facts can be stated shortly. The respondent, Linda Kelly-Phillips, on 23 August 1993 agreed in writing to work for the appellant, the British Broadcasting Corporation (the BBC), as a temporary assistant in the Community Programmes Unit. By cl 3 of the agreement the term was from 6 September 1993 to 5 March 1994 unless previously determined by a month's written notice on either side. The agreement provided:

'In so far as it is permitted by current employment legislation, non-renewal or non-extension of this engagement when its term expires shall not constitute grounds either for a claim of unfair dismissal or for any redundancy payment.'

I shall call such a provision a 'waiver clause'.

Miss Kelly-Phillips took up that employment on 6 September 1993. On 10 January 1994 she was asked to agree to extend her fixed term contract beyond 5 March 1994 to 3 September 1994. She was asked to sign a copy of what the BBC

called 'a variant letter', by which cl 3 of the earlier contract was amended so that the term of her employment expired on 3 September 1994. She was told that the other provisions of her contract would continue in force, including her agreement to a waiver clause. On 17 January 1994 she signed an acceptance of that variation. a

By a letter of 5 September 1994 the BBC offered her 'a new fixed term contract of employment' as assistant in the Disability Programmes Unit from 4 September 1994 to 5 September 1995 inclusive. It was explained to her that she was being sent a new contract rather than extending her old contract because on the new contract she was eligible to join the group personal pension scheme, and she was also eligible for severance payments after a qualifying period of two years' service. The terms again included a waiver clause. Miss Kelly-Phillips signed the contract on 20 September 1994. On 14 November 1994 she was told that her designation was to change to 'facilitator DPU' from that date and she signed an acceptance of that variation of her contract on 28 November 1994. Neither side regards that variation as significant. b  
c

On 23 August 1995 the BBC wrote to her, offering to 'extend your fixed term contract beyond 5th September 1995 until 31st December 1995'. In a second letter of the same date the personnel and training manager said: d

'I write to confirm that we would like to vary the provisions of your fixed term contract dated 4th September 1994 as follows: The term of your engagement shall now expire on 31st December 1995; clause 3 of your contract being amended to that effect. The other provisions of your contract will continue in force, including your agreement that, in so far as it is permitted by current employment legislation, non-renewal of this engagement when its term expires shall not constitute grounds either for a claim of unfair dismissal or for any redundancy payment. I must emphasise that this variation does not imply that there is any prospect of your employment continuing beyond the expiry date of your fixed term contract or of your transfer to a pensionable staff contract.' e  
f

Miss Kelly-Phillips on 30 August signed a form of acceptance: 'On the terms and conditions set out above I accept the variation of my fixed term contract dated 4th September 1994.' g

By letter dated 22 December 1995 the BBC wrote to Miss Kelly-Phillips to tell her that her contract would come to an end on 31 December 1995 and was not being renewed 'because the question arose of the appropriateness of your approach to your position'. Accordingly her dismissal took effect on the expiry of the term. h

On 27 March 1996 Miss Kelly-Phillips applied to an industrial tribunal complaining of unfair dismissal. The BBC opposed that claim, relying on the fact that she had contracted out of claiming for unfair dismissal. The Industrial Tribunal in London (North) held a preliminary hearing on the issue, which it determined in favour of Miss Kelly-Phillips. It held that (1) at the time of her dismissal she was not engaged on a fixed term contract, (2) if wrong on that point, she was at the date of her dismissal engaged on a fixed term contract for a period of a little less than four months and so s 197(1) did not apply, and (3) the dismissal did not consist only of the expiry of the term of a fixed term contract without its being renewed. Accordingly her complaint of unfair dismissal could proceed. j

a The BBC appealed. The Employment Appeal Tribunal ([1998] ICR 1) held that the industrial tribunal was wrong in the first and third of its holdings but right in its second holding and so dismissed the appeal. The BBC now appeals to this court.

It is convenient at this point to set out the relevant statutory provisions. Section 197, so far as material, is in the following form:

b '(1) Part X does not apply to dismissal from employment under a contract for a fixed term of one year or more if—(a) the dismissal consists only of the expiry of that term without its being renewed, and (b) before the term expires the employee has agreed in writing to exclude any claim in respect of rights under that Part in relation to the contract ...

c (3) An employee employed under a contract of employment for a fixed term of two years or more is not entitled to a redundancy payment in respect of the expiry of that term without its being renewed (whether by the employer or by an associated employer of his) if, before that term expires, the employee has agreed in writing to exclude any right to a redundancy payment in that event.

d (4) An agreement such as is mentioned in subsection (1) or (3) may be contained—(a) in the contract itself, or (b) in a separate agreement.

e (5) Where—(a) an agreement such as is mentioned in subsection (3) is made during the currency of a fixed term, and (b) the term is renewed, the agreement shall not be construed as applying to the term as renewed; but this subsection is without prejudice to the making of a further agreement in relation to the renewed term.'

Two other provisions in the 1996 Act should be noted. One is that by s 235(1) of the Act 'renewal', except in so far as the context otherwise requires, includes extension and any reference to renewing a contract or a fixed term is to be construed accordingly. The other is s 95(1)(b), by which for the purposes of Pt X an employee is dismissed by his employer if, amongst other things, 'he is employed under a contract for a fixed term and that term expires without being renewed under the same contract'.

It may be noted that the last four words are not to be found in s 197(1)(a). But it is not suggested that there is any difference in meaning between the reference in s 95(1)(b) to the expiry of the fixed term without being renewed under the same contract and the reference in s 197(1)(a) to the expiry of the fixed term without being renewed. In other words the concept of dismissal in s 197(1)(a) is the same as that in s 95(1)(b).

Lindsay J, giving the judgment of the Employment Appeal Tribunal, first considered the statutory provisions in the absence of authority. He referred to the argument of the BBC that the contract of employment under which Miss Kelly-Phillips was dismissed was one which was for a fixed term which had began in September 1993 and which by renewal (by way of extension) had an end-date of 31 December 1995. The judge commented (at 12): 'A difficulty in accepting that is that it reads the statutory meaning of "renewal" as including extension to the opening words of [s 197].' He set out the opening words and continued:

'They make no mention of renewal or extension. One cannot, merely by giving a large meaning to the word "renewal," reach the conclusion that a later contract which is a "renewal" of an earlier one is the same contract as the earlier one or is to be treated as having been made when the earlier one



was or for a term which had begun when the earlier one's term had begun. Both [s 95(1)(b)] and [s 197] deal with cases "without" renewal; they have no need to regulate what has been an earlier renewal. Whatever the meaning of the word "renewal," it has no place in the construction of those opening words which are therefore to be construed by reference only to the ordinary and natural meaning of words.'

Lindsay J then considered the facts and said that the contract for employment under which Miss Kelly-Phillips was dismissed was the contract made on 30 August 1995. He then turned to the authorities and found nothing that required the Employment Appeal Tribunal to depart from the view which he had expressed on the meaning of s 197(1).

Like the Employment Appeal Tribunal I shall start by considering the statutory wording in the absence of authority. Mr Hendy QC for Miss Kelly-Phillips submitted that one must start such consideration from three basic propositions. (1) Any term in any contract between an employer and an employee will be void if and in so far as it purports to contract out of the statutory rights afforded by the 1996 Act unless it can be shown that the term in question falls within an exception specially provided for by that Act; (2) it is for the party relying upon an exception to this underlying proposition to prove the existence of the term in question and to prove that it meets the requirement of the statutory exception upon which reliance is placed; and (3) under both domestic and European law, any exception or derogation from statutory rights must be construed narrowly. Mr Patrick Elias QC for the BBC did not dispute those propositions.

Mr Hendy supported the reasoning of the Employment Appeal Tribunal. He submitted that s 197(1) should be construed as having its literal meaning: the requirement of para (a) for 'that term', ie that which expires without being renewed, is that it is 'a fixed term for one year or more'. An employee, he said, who is engaged under a fixed term contract for one year and who then has his engagement extended for a further three months is properly to be regarded as having been employed on a fixed term contract for one year followed by a further fixed term of three months, and Mr Hendy suggested that to regard the contract and the agreed extension as one fixed term contract of 15 months for the purposes of s 197(1) distorts the natural meaning of the language.

For my part I can see force in this reasoning if s 197(1) could be construed on its own. But, as Mr Elias submitted, it cannot be so construed. In particular, s 95(1)(b) is of crucial importance because that recognises that there can be an extension of a fixed term of a contract 'under the same contract'. In other words the extension does not necessarily mean that there is a new contract whereby the term is extended. That gives rise to the question of the significance of the preposition 'under'. In the course of argument I raised the possibility that it might signify that the extension was effected pursuant to some right or power in the contract, and Mr Hendy adopted that suggestion. But on reflection I do not think that it would be right to give the word so limited a meaning. Such a provision would, I think, be unusual to find in a contract of employment for a fixed term and it would mean that save in such a case there was a dismissal every time the fixed term expired, even though the employee continued to be employed on precisely the same terms and the only variation of the contract was the extension of the term. In my judgment the more natural construction of the words in s 95(1)(b) is to treat them as referring to a renewal (including an extension) of the term on the same, or substantially the same, terms as the

a original contract, the contrast being with a new contract. Some support for this can be obtained from the contrast drawn in ss 138 and 141 between renewals of a contract and re-engagement under a new contract: in the former case the renewal of the contract causes the same contract to continue, whereas in the latter a new contract comes into existence. Because, under s 95(1)(b), there can be an extension of the term without there being a new contract, thereafter the term of that contract must be the extended term, so that on its expiry a further extension under the same contract would also mean that there was no dismissal. b If one imports these considerations into s 197(1), it would follow that, contrary to Lindsay J's understanding of the opening words of the subsection, the reference to a contract for a fixed term does encompass a contract which has been varied by an extension of the term under the same contract.

c That construction receives some support from s 197(5), referring, as it does, to 'the term as renewed' and 'the renewed term'. These references seem to me to point clearly to the fact that where there has been a renewal of the fixed term under the same contract the term from the commencement date under the original contract to the expiry date of the extended term was in contemplation. d True it is that s 197(5) refers to a case within s 197(3) relating to contracting out of entitlement to a redundancy payment, whereas s 197(1) relates to contracting out of the right to complain of unfair dismissal. But that difference does not mean that the draftsman could not, by the language used in s 197(1), have intended to refer to dismissal from employment under a varied contract for an extended term. In my judgment, as a matter of construction he must be taken so to have e intended and I respectfully disagree with the views of the Employment Appeal Tribunal on this point. It may well be that the argument for the BBC was developed more fully before us than it had been below.

On this approach, when one applies that construction to the facts, there was a new contract, described as such, which was entered into in September 1994 and f the term commenced on 4 September. That contract was 'varied' in August 1995 by the extension of the contract beyond its expiry date of 5 September 1995 until 31 December 1995, but save for the amendment of cl 3 relating to the term, all the other provisions of the contract continued in force. The extension of the term was effected by a contract but did not create a new contract of employment. The extension was therefore under the same contract as that entered into in g September 1994, and for the purposes of s 197(1), there was no dismissal on 5 September 1995 within s 95(1)(b). But there was a dismissal from employment under a (varied) contract for an (extended) fixed term of one year or more when the (extended) term expired on 31 December 1995 without being renewed.

h I turn next to consider whether that provisional conclusion is falsified by the authorities or by policy considerations.

The earliest authority is *BBC v Ioannou* [1975] 2 All ER 999, [1975] QB 781. In that case Mr Ioannou was employed by the BBC on a three-year contract determinable on notice. The contract was renewed by a two-year extension, i followed by a one-year extension, and a waiver clause was agreed for the latter extension. At the time the statutory predecessor of s 197(1) required the fixed term to be of two years or more for contracting out to be permissible. This court held that as the contract was determinable on notice, it was not a contract for a fixed period. However observations were also made on the view taken in the National Industrial Relations Court that the final year's extension was not a

renewal of the previous contract but a re-engagement under a new contract of employment. a

Lord Denning MR said ([1975] 2 All ER 999 at 1006, [1975] QB 781 at 786):

‘I do not think it necessary in these cases to enquire whether there is a “renewal” of a previous contract of employment or a “re-engagement” under a new contract of employment. That is too fine a distinction for ordinary mortals to comprehend. Suffice it to say that you must always take the final contract which expires, and on the expiration of which he claims redundancy payment or compensation for unfair dismissal. If the final contract is for a fixed term of two years or more, it is permissible for the employee in writing to agree to exclude his rights, so long as he does it before the term expires. If the final contract is for less than two years, as for instance for a fixed term of one year, then he cannot exclude his right. It matters not whether the final contract is a renewal or re-engagement. It is the final contract alone which matters in this regard.’ b  
c

I agree with Lord Denning MR that it is the final contract that matters, but I respectfully disagree with his assumption that the last agreement for an extension is the relevant final contract. Nor did the majority in this court agree with Lord Denning MR. Stephenson LJ, whilst agreeing with Lord Denning MR in the result, said of the first extension effected by a letter and by Mr Ioannou signing a declaration of agreement ([1975] 2 All ER 999 at 1007, [1975] QB 781 at 787–788): d

‘It is not and cannot be disputed that the effect of that letter and declaration is that he was not re-engaged under a new contract of employment, but his existing contract of employment was renewed ...’ e

He contrasted that with the one-year extension effected by a letter, in which Mr Ioannou was ‘offered a further year’s contract’, and said: f

‘I agree with both the tribunal and the court that what described itself as the offer of a short term engagement on terms and conditions which he accepted by signing was a new contract and not a further renewal or extension of the old.’

He referred to the new provisions which were agreed and concluded that ‘the parties meant what they wrote and were not again renewing the original contract but were re-engaging the respondent under a new contract.’ g

Geoffrey Lane LJ commenced his judgment by posing the question ([1975] 2 All ER 999 at 1007, [1975] QB 781 at 788):

‘Was the document [offering the further year’s contract] a new contract for 12 months or simply an extension of the previous agreement which had run for five years?’ h

Thereby he recognised that the original three-year contract had been extended for two years without that extension creating a new contract. He answered his question by noting that the letter offering a further year’s contract materially altered Mr Ioannou’s rights and said ([1975] 2 All ER 999 at 1008, [1975] QB 781 at 789): j

‘In the ordinary meaning of words, “extension” is not apt to describe that document. It was a new contract. Consequently Mr Ioannou was at the



a material time not employed under a contract of employment for two years or more, but under a contract of employment for one year.'

The ratio of that case was acknowledged by this court, including Lord Denning MR, to be wrong in *Dixon v BBC* [1979] 2 All ER 112, [1979] QB 546: the fact that a term is determinable by notice does not preclude the term being a fixed term.

b In *Open University v Triesman* [1978] ICR 524 an employee was employed under a contract for a fixed term of 18 months. Three months before that period expired she was offered and accepted further employment for seven months subject to a waiver clause. The Employment Appeal Tribunal followed Lord Denning MR's observations in *BBC v Ioannou*, Phillips J (at 528) saying of them, c 'not only because they are of high persuasive authority, but because ... we respectfully agree with them'. He said that in reaching its conclusion the Employment Appeal Tribunal had in mind three considerations. The first was that the validity or otherwise of exclusions of that character should so far as possible be easy to determine, and it would not be if it was necessary to distinguish between re-engagement under a new contract and renewal and extension of an existing contract. The second was that it did not necessarily follow that because a second or subsequent contract of employment was a renewal of an earlier one, it was correct to say that together they constituted a fixed term of a length equivalent to their cumulative length, though Phillips J d acknowledged that one could so describe it. The third was a point on what is now e s 197(5). He said that because it referred to a fixed term of two years or more which was renewed, the renewal must also be of two years or more. With respect, that is an assumption, and if one substitutes a reference to extension for the reference to renewal it is impossible to see why it should follow.

f *Open University v Triesman* was followed by the Employment Appeal Tribunal in *BP Oil Ltd v Richards* (12 April 1983, unreported). Browne-Wilkinson J said that the crucial question was whether one looks at the whole term of the original contract plus extensions as one contract or concentrates solely on the last contractual arrangement made between the parties. He could see no ground for distinguishing *Open University v Triesman* on that point and said:

g 'As a matter of comity and in the interests of orderly industrial relations, it is undesirable for us to depart from that decision and therefore we follow it.'

Thus no view was expressed on the correctness of *Open University v Triesman*, understandably so in view of the fact that no doubt it had been applied for five years by industrial tribunals.

h The point arose again in a case in Northern Ireland, *Mulrine v University of Ulster* [1993] IRLR 545. An employee was employed under a contract of employment for two years with a waiver clause. Five weeks before the end of that period the employer wrote to the employee, extending her contract by nearly four months and specifying that all other conditions of the contract were to remain.

j MacDermott LJ said (at 549):

'In many cases the correct answer may be reached by applying the "Denning test", but if as in this case, an unfair and unreasonable result is produced one must go back and ask the allegedly more difficult question: was the second contract an extension of the first?'

He considered that for an employer to incur a liability to make an unfair dismissal payment by extending for a short period a contract under which the employee had surrendered her compensation rights would be a conclusion which would be 'irrational, unjust and contrary to the clear contractual terms into which the parties had chosen to enter'. Hutton LCJ agreed. He considered (at 549) it clear as a matter of construction that the employee was not employed under a new and separate contract when the original contract was extended but that she was employed under a contract for a fixed term of two years which was extended or renewed to make it a fixed term of two years, three months and three weeks. He thought it unreasonable and unjust to hold that because of the extension the employer lost the benefit of the exclusion clause which would have operated to protect it if the employment had ended on the expiry of the term of two years. He said (at 550):

'I respectfully share the view that in the sphere of industrial relations and employment law comity, the application of simple tests and the avoidance of fine distinctions are important. But I do not consider that this approach should be carried to the point where the application of a simple test, such as that stated by Lord Denning, will lead to an unjust and unreasonable result in a particular case. In my opinion this would be the consequence if the test were applied to this case. Therefore I consider that the proper approach is to ask the question (which can be answered without difficulty in this case): was the appellant's contract extended or renewed (these words being given the same meaning by Stephenson LJ and Lane LJ (as he then was) in the *Ioannou* case), or was there a re-engagement under a new contract?'

I respectfully agree with the conclusion reached by the Northern Ireland Court of Appeal, but I find it difficult to accept that it would be appropriate to apply Lord Denning MR's test in *BBC v Ioannou* [1975] 2 All ER 999, [1975] QB 781 except where it leads to an unfair or unreasonable result. In my judgment that cannot be the right approach to what is a question of statutory construction containing no such exception.

In *Housing Services Agency v Cragg* [1997] ICR 1050 the point arose again in the Employment Appeal Tribunal in a case where an employee had been employed for a fixed term of more than two years under a contract containing a waiver clause, and thereafter entered into contracts for three subsequent extensions of his employment, each for a term of less than a year and each containing a waiver clause. Judge Peter Clark said that the Employment Appeal Tribunal adopted an independent approach, since in its judgment each of the earlier cases overlooked two important factors. One was that there is a difference between the provisions relating to unfair dismissal and redundancy payment waiver agreements, and the other was the statutory definition of 'renewal'. In respect of unfair dismissal waiver the judge (at 1061) stated that the following requirements must be met:

'(1) There must be a fixed term contract ... (2) It must be for a term of one year or more. It is not permissible to aggregate successive fixed terms so as to amount to one year or more. (3) There must be a term of the contract or separate agreement ... entered into before the expiry of the fixed term excluding the right to claim unfair dismissal ... (4) If dismissal, consisting of the expiry of the fixed term without its being renewed (on the same terms) (section 95(1)(b); section 197(1)(a)), occurs, the employee is excluded from the right to bring a complaint of unfair dismissal under section 94(1). (5) If

a there is no dismissal under (4) above, the parties must start again. Whether by renewal or re-engagement, if the employment continues for a further fixed term, that must be for a term of one year or more, and there must be a waiver agreement complying with section 197(4) entered into before the expiry of the new term (section 197(1)(a)).'

b The assertion in the second sentence of para (2) was based on Lord Denning MR's test, which the Employment Appeal Tribunal accepted. It declined to follow *Mulrine v University of Ulster*. To suggest that the previous cases had overlooked the differences between unfair dismissal waiver and redundancy payment waiver is rather bold. There is no reason why in construing the relevant provisions consistency should not be sought. Assistance can be derived from the redundancy payment provisions in construing the unfair dismissal provisions. I doubt if the statutory definition of 'renewal' (which is not to be found in the Industrial Relations Act 1971 relevant to *BBC v Ioannou*) did more than enact what in that case was assumed to be its meaning.

c The next case was the present case in which Lindsay J made a careful review of the authorities, preferring Lord Denning MR's test and declining to follow *Mulrine v University of Ulster* [1993] IRLR 545.

d The last case in which the point has been considered was *Bhatt v Chelsea and Westminster Health Care Trust* [1997] IRLR 660. While that appeal was being heard by the Employment Appeal Tribunal it became known that the present case had been heard by another division of the Employment Appeal Tribunal and when the judgment in the present case was delivered, counsel in *Bhatt's* case made written submissions on it. The Employment Appeal Tribunal had the advantage of submissions from Mr Elias on the lines of those which he advanced to us, and they were in substance accepted, Kirkwood J saying (at 664):

e 'We accept the submission that a contract for a fixed term may be extended as to its term, leaving the same contract in place. We accept too, that when a contract of employment for a fixed term of a year or more is extended as to its term by a lesser period, that extension alone is not to be taken as the correct point of focus for the purposes of s. 197(1). The contract remains in place and the extension does not take it outside s. 197(1).'

f Accordingly, I do not see in the authorities any compelling reason to depart from the view provisionally expressed earlier on the construction of s 197(1), which receives support from the observations of the majority in this court in *BBC v Ioannou* [1975] 2 All ER 999, [1975] QB 781, from the approach of Sir Brian Hutton in *Mulrine v University of Ulster* [1993] IRLR 545 and from *Bhatt's* case.

g Finally, I turn to the considerations of policy on which we were addressed by Mr Elias and Mr Hendy. Mr Elias pointed out that many employers have limited funding sufficient only to enable them to employ employees for fixed periods. He submitted that it would be wrong if an employer employing an employee under a contract which qualifies for the exemption under s 197(1) or (3) were unable to extend the employment for a further period, which on its own would not so qualify, without losing that exemption. Mr Hendy on the other hand stressed the dangers and the undesirability of employers being able, if Mr Elias was right, to give employees short term contracts which were extended repeatedly. This was a consideration which rightly troubled the industrial tribunal in the present case, and it appears to have led the Employment Appeal Tribunal in *Bhatt's* case to incline to the view that the original term must be a fixed term of one year or more



[(1997) IRLR 660 at 664]. Just as in *Bhatt's* case that point did not matter as the original contract was for more than a year, so in the present case it is common ground that the new contract from 4 September 1994 to 5 September 1995 was for more than one year (although the offer was not formally accepted until 20 September 1994). It is therefore unnecessary for us to decide that point, though I recognise that the logic of Mr Elias's argument would lead to the conclusion that it is unnecessary that the original term should be for a year or more.

A further suggestion made by Evans LJ in the course of argument was that at the time an extension was agreed by an agreement which did not amount to a new contract there must be at least a year to run before the expiry of the extended term. With respect, I see difficulty in implying such a qualification into the statutory language. Section 197(1) requires the contract to be 'for a fixed term of one year or more'. That requires one to look only at the term and it is immaterial that the extension should be agreed a year or more before the expiry of the extended term unless the contract was for that fixed term. In the present case, for example, the term was either that provided for under the extension (viz from 6 September to 31 December 1995) or the extended term from 3 September 1994 to 31 December 1995. But no one has suggested nor could suggest that by reason of the contract constituted by the acceptance on 30 August 1995 of the offer of 23 August 1995 that contract was for a term from 30 August 1995 to 31 December 1995. Nor as a matter of policy is it easy to see why the suggested qualification should be implied when by s 197(1)(b) the waiver may be agreed at any time prior to the expiry of the term.

Although I recognise that there may be potential for the abuse of the exemption by fixed term contracts being extended repeatedly, I am not persuaded that that justifies giving the statutory wording a gloss which otherwise it could not bear. Employees must give their consent to the extensions and to the waivers, though I accept that they may at times have little choice if they are to keep their jobs. But ultimately it is for Parliament to correct if this interpretation of the existing statutory language is seen to lead to abuse.

Mr Hendy also submitted that it was an important policy consideration that the test should be kept simple and that is only provided by the Denning test. I agree that simplicity is desirable, but again in my judgment the statutory language should not be distorted to achieve that result. Industrial tribunals have to decide in other contexts whether the terms of employment amount to a different contract from that under which the employee was previously employed (see e.g. *Hogg v Dover College* [1990] ICR 39), and as MacDermott LJ observed in *Mulrine v University of Ulster* [1993] IRLR 545 at 548:

'Sadly, despite all the original anxiety to keep the work of industrial tribunals simple and free from legal complication, experience has shown, and the various series of reported cases confirm, that the work of a tribunal often does involve questions of law.'

I therefore do not find the policy considerations urged upon us by Mr Hendy to be of sufficient weight to require a different interpretation to be given to s 197(1).

In my judgment, therefore, for the reasons which I have given this appeal should be allowed and the application of Miss Kelly-Phillips to the industrial tribunal should be dismissed.

**THORPE LJ.** I have had the advantage of reading in draft the judgment of Peter Gibson LJ, and I too would allow the appeal. I am in complete agreement with his construction of the relevant statutory provisions and his analysis of the conflicting authorities. I do not see much force in the policy submissions advanced by Mr Hendy QC. The rival constructions can be said to produce anomalies either way. If anything, I am of the opinion that the difficulties that might flow from Peter Gibson LJ's construction are less substantial than the difficulties that might flow from adopting the rival construction.

**EVANS LJ.** On 31 December 1995 the respondent's employment by the appellants under a fixed term contract came to an end and the contract was not renewed. This amounted to 'unfair dismissal' within s 95(1)(b) of the Employment Rights Act 1996 and she seeks damages accordingly. However, there is an exclusion of liability in the employer's favour when s 197 applies:

*'Fixed-term contracts.—(1) Part X does not apply to dismissal from employment under a contract for a fixed term of one year or more if—(a) the dismissal consists only of the expiry of that term without its being renewed, and (b) before the term expires the employee has agreed in writing to exclude any claim in respect of rights under that Part in relation to the contract ...'*

The question raised by the appeal is whether her contract, which was for a fixed term, was for 'a fixed term of one year or more' within s 197(1).

The difficulty arises because she was continuously employed by the appellants from August 1993, but under a series of contractual arrangements. Initially, from 6 September 1993 until 5 March 1994 under a 'temporary contract of employment'. This was extended by agreement until 3 September 1994 (letters dated 10 January 1994). On 5 September 1994 she was sent 'a new fixed term contract of employment' running from 4 September 1994 until 3 September 1995, and there was a particular reason why it was 'a new contract'; she had become eligible to join the group personal pension scheme if she wished to do so (letter dated 5 September). That contract, when it was drawn up and signed, covered the period from 4 September 1994 to 5 September 1995—just over one year. It included a term (cl 4) by which she waived her right to claim for unfair dismissal if the contract should not be renewed or extended when the term expired. This waiver did not offend the 1996 Act, because the fixed term was for 'one year or more' (s 197(1)).

Towards the end of the period, she was offered and accepted an extension of the period until 31 December 1995. The offer was contained in a letter dated 23 August and she accepted it by her counter-signature on 30 August. The agreement was expressed as a variation of the fixed term contract dated 4 September 1994 and all other provisions of that contract were to continue in force, including the waiver provision, the terms of which were expressly set out.

At the date of her deemed dismissal, therefore, she was employed under a fixed term contract which had been varied so as to extend the fixed term from 5 September until 31 December 1995, a period of slightly less than four months. But the effect of the variation was to increase the total period of employment under that contract from one year and two days, which had already expired, to nearly 16 months. Was she employed at that date under a contract 'for a fixed term of one year or more'?

There is a clear distinction in law between an agreement which varies an existing contract and one which replaces an existing contract, which ceases to have effect. In employment law terms, 'renewal' is distinguished from 're-engagement', and the concept is the same. Whilst it is sometimes clear into which category a particular agreement falls, the distinction can be notoriously difficult to draw. That was demonstrated by old authorities such as *Morris v Baron* [1918] AC 1 and it has reappeared in more modern decisions on the statutory provisions with which we are concerned, and their predecessors since 1965.

I need not quote the celebrated dictum from Lord Denning MR's judgment in *BBC v Ioannou* [1975] 2 All ER 999 at 1006, [1975] QB 781 at 786. That was a case where what I shall call the renewal contract was clearly a new contract, and the other members of the court based their judgment on that ground. That contract was for one year, but that was less than the two-year statutory minimum which then applied. It had been preceded by a three-year contract which was renewed for two years, making 'a fixed term of five years' (see [1975] 2 All ER 999 at 1005, [1975] QB 781 at 786). The court's decision clearly precludes taking account of the length of employment. The inquiry is as to the length of the period under the fixed term contract in question. So much is common ground in the present case. The issue is whether, if the period of a contract is extended by a variation of that contract, the fixed term referred to in s 197(1) is the whole of the period covered by the contract as so varied or the period added to it by virtue of the later contract which varies it.

The arguments are finely balanced. Some of the subsequent authorities have preferred one view, some have approved the other. We have been pressed with policy considerations and with different examples, of which I would identify the following. (a) Original contract for one year, extended by agreement for a further six months. Total period 18 months, but the final six months are contracted for by the subsequent agreement to vary. (b) Original contract for less than one year, extended successively for similar periods, each being less than one year, but in due course substituting a total period of one year or more for the original shorter period. The first in effect is the present case. The second is the example given by Mr Hendy QC for the respondent as showing that a provision which was intended to protect an employee who benefits from a fixed term contract of a certain length would be misused and could be sidestepped by aggregating a number of shorter periods each resulting from a separate agreement into a total period covered by the original contract as so varied.

In my judgment, the dilemma cannot be resolved merely by stating the issue in these legal terms. The extended period whose expiry counts as dismissal under s 95(1)(b) is contracted for by the agreement to extend, which is itself a contract, but in law it is governed by the original contract. There have been two contracts and both can be said to have been contracts of employment for the period which expires.

This is a powerful argument, and in my judgment it gains strength from the fact that, where the original contract can be for as long a period as two years, and the extension for as little as three months, the employer manifestly did commit himself prospectively (for a period of one year or more). That cannot be said where the total period is an aggregate of successive periods, each of less than one year.

It is important, in my judgment, that the employer can only rely on the s 197(1) exclusion when the employee has agreed in writing to waive his or her right to



a claim the statutory compensation. That agreement must be found in a contract of employment for a fixed term of one year or more. I would hold in agreement with Peter Gibson and Thorpe LJ that the statutory requirement is satisfied when the original contract was for such a period, notwithstanding that the employment was subsequently extended by an agreed variation of that contract, even for a period of less than one year.

b I too would allow the appeal.

*Appeal allowed with costs. Leave to appeal to the House of Lords refused.*

Kate O'Hanlon Barrister.

## Rainbow Estates Ltd v Tokenhold Ltd and another

CHANCERY DIVISION

LAWRENCE COLLINS QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

19, 20, 29, 30 JANUARY, 4 MARCH 1998

*Landlord and tenant – Breach of covenant to repair – Specific performance – Jurisdiction to make order requiring tenant to repair – Circumstances in which order will be made.*

The plaintiff was the freeholder of a listed building, which was occupied by the two defendants under leases expiring in 2004 granted by the former freeholder of the property. The defendants covenanted in the leases to keep and maintain the property in good and tenant-like repair throughout the term and to permit the landlord and its agents reasonable access to examine the condition of the premises. The defendants maintained, however, when the premises subsequently fell into disrepair, that the leases were subject to two agreements which had been entered into prior to the signing of the leases, under which repairs were to be the responsibility of the landlord and the cost of work undertaken by the tenants could be deducted from the rent, and, therefore, that no rent was due under the leases and that they had no repairing obligations. The plaintiff thereupon brought proceedings to recover arrears of rent and determine who was responsible for the repairs. The judge held that, on the assumption that the agreements and the leases were genuine documents, where there was a conflict between a lease and a prior agreement, the rights of the parties were governed by the lease and that in any event there was no credible evidence that the agreements and the leases were part of one transaction. He accordingly found that the tenants were responsible for repairs and were in arrears with their rents, and stood the matter over for further argument on the form of relief. At the resumed hearing the question arose whether the court had power to grant an order for specific performance of a tenant's repairing covenant.

**Held** – The court had power, in appropriate circumstances, to order specific performance of a tenant's repairing covenant, and there were no constraints of principle or binding authority against the availability of the remedy; and even if want of mutuality were a decisive factor, the availability of the remedy against the tenant would restore mutuality as against the landlord, and the problems of defining the work and the need for supervision could be overcome by ensuring that there was sufficient definition of what had to be done in order to comply with the order of the court. Subject to the overriding need to avoid injustice or oppression, specific performance would be granted where it was the appropriate remedy, and that would be particularly so in cases where there was substantial difficulty in the way of the landlord effecting repairs (e.g. he had no right of access to do so) and the condition of the premises was deteriorating. However, the court should exercise great caution in granting the remedy and should, in particular, ensure that it was not used to effectuate or encourage the mischief which the Leasehold Property (Repairs)

- a** Act 1938 was intended to remedy, namely that of speculators or unscrupulous landlords buying the reversion of a lease which had little value, and then harassing the tenant with schedules of dilapidations in order to put pressure on him. In the instant case, there was no adequate alternative remedy, since the leases contained no forfeiture clause or proviso for re-entry, or a term allowing the landlord to enter the premises to carry out the works himself and
- b** there was evidence of serious disrepair and deterioration of the property. Moreover, the schedule of works to be carried out was sufficiently certain to be capable of enforcement. Accordingly, in those unusual circumstances, an order for specific performance was appropriate (see p 868 *f* to p 870 *h* and p 871 *h*, post).

**c Notes**

For landlord's remedies for breach by the tenant of his repairing covenant, see 27(1) *Halsbury's Laws* (4th edn reissue) paras 368–374.

For the Leasehold Property (Repairs) Act 1938, see 23 *Halsbury's Statutes* (4th edn) (1997 reissue) 89.

**d**

**Cases referred to in judgment**

*City of London v Nash* (1747) 3 Atk 512, 26 ER 1095.

*Co-op Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1997] 3 All ER 297, [1998] AC 1, [1997] 2 WLR 898, HL.

*Gordon v Selico Ltd* (1986) 18 HLR 219, CA.

*Grist v Bailey* [1966] 2 All ER 875, [1967] Ch 532, [1966] 3 WLR 618.

*Henderson v Arthur* [1907] 1 KB 10, CA.

*Hill v Barclay* (1810) 16 Ves 402, [1803–13] All ER Rep 379, 33 ER 1037, LC.

*Jervis v Harris* [1996] 1 All ER 303, [1996] Ch 195, [1996] 2 WLR 220, CA.

*Jeune v Queens Cross Properties Ltd* [1973] 3 All ER 97, [1974] Ch 97, [1973] 3 WLR 378.

**f**

*Mosely v Virgin* (1796) 3 Ves 184, 30 ER 959.

*Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1998] 1 All ER 305, [1997] 1 WLR 1627, HL.

*Peninsular Maritime Ltd v Padseal Ltd* [1981] 2 EGLR 43, CA.

*Posner v Scott-Lewis* [1986] 3 All ER 513, [1987] Ch 25, [1986] 3 WLR 531.

**g**

*Price v Strange* [1977] 3 All ER 371, [1978] Ch 337, [1977] 3 WLR 943, CA.

*Rayner v Stone* (1762) 2 Eden 128, 28 ER 845.

*Redland Bricks Ltd v Morris* [1969] 2 All ER 576, [1970] AC 652, [1969] 2 WLR 1437, HL.

*Regional Properties Ltd v City of London Real Property Co Ltd, Sedgwick Forbes Bland Payne Group Ltd v Regional Properties Ltd* [1981] 1 EGLR 33.

**h**

*Tito v Waddell (No 2), Tito v A-G* [1977] 3 All ER 129, [1977] Ch 106, [1977] 2 WLR 496.

*Tustian v Johnston* [1993] 2 All ER 673.

*Verrall v Great Yarmouth BC* [1980] 1 All ER 839, [1981] QB 202, [1980] 3 WLR 258, CA.

**j**

*Wolverhampton Corp v Emmons* [1901] 1 KB 515, CA.

**Summons**

The plaintiff landlord, Rainbow Estates Ltd, who in earlier proceedings had been successful in establishing that the defendant tenants, Tokenhold Ltd and



Herman Herskovic, were responsible under the terms of their leases of Gaynes Park Mansion, Epping, Essex for the repairs outstanding to the property despite an agreement which they claimed had been entered into prior to the leases under the terms of which repairs were the responsibility of the landlord, and were in arrears with rent, applied to the court for an order for specific performance. The summons was heard in chambers but judgment was given by Lawrence Collins QC in open court. The facts are set out in the judgment.

*Mark Warwick* (instructed by *Philippsohn Crawfords Berwald*) for the plaintiff.  
*Helen Soffa* (instructed by *Turners*, Bournemouth) for the defendants.

*Cur adv vult*

4 March 1998. The following judgment was delivered.

## LAWRENCE COLLINS QC.

### I. Introduction

I gave judgment in this matter on 10 December 1997, when I decided that the defendants were bound by tenants' repairing obligations in leases of Gaynes Park Mansion, Epping, a grade II listed building. The summons was stood over for further argument on the form of the relief. I am asked to decide whether the court has power (and, if so, under what conditions) to grant an order for specific performance of a tenant's repairing covenant, which is not the subject of modern authority, although a recent Law Commission report has recommended legislation to give the court power to decree specific performance of a repairing obligation in any lease or tenancy: see *Landlord and Tenant: Responsibility for State and Condition of Property* (Law Com No 238) (1996).

### II. Background

The facts as they appear from the documents are set out fully in my judgment of 10 December 1997, and I summarise them here for convenience. The plaintiff, Rainbow Estates Ltd (Rainbow), is the freeholder of Gaynes Park Mansion, Epping, Essex, a grade II listed building. The first defendant, Tokenhold Ltd, is the leaseholder of the mansion (excluding its eastern annex) and the second defendant (Mr Herskovic) is the leaseholder of the eastern annex.

In 1976 Mr Herskovic and his brother bought the mansion, and subsequently the freehold was transferred to Venrich Ltd, a £100 company owned by Mr Herskovic and his brother. In about 1989 Barclays Bank advanced money on the security of the mansion. In 1993, when Barclays Bank was considering enforcing its charge on the property, Mr Herskovic and his brother revealed to the bank the existence of two leases of the property. Each of the leases was dated 15 December 1987, and each was granted by Venrich: one was to Tokenhold, and comprised the mansion other than the eastern annex: the other was to Mr Herskovic and comprised the eastern annex. In each case the tenants were granted leases until 14 December 2004 at a rent of £5,000 pa, with the tenants covenanting 'to keep and maintain the property in good and tenant-like repair throughout the term' and 'to permit the landlord

a and its agents at all times reasonable access to examine the condition of the premises'. When Barclays' solicitors made inquiries about the leases from Messrs Turners, who had acted for Venrich on the Barclays loan, they told Barclays' solicitors that they, Turners, had been unaware of the existence of the leases.

b In June 1991 Venrich was struck off the Companies Register for failure to comply with filing requirements, and at some time in 1995 Barclays Bank applied to have it restored in order to present a winding-up petition and appoint a liquidator. In 1996 the liquidator sold the property to Senator Properties Ltd (Senator) for £150,000, which on 5 November 1996 then transferred it to Rainbow, for £230,000.

c Subsequently, in the course of correspondence and in these proceedings Tokenhold and Mr Herskovic maintained that no rent was due under the leases, and that there was no repairing obligation on the tenants, because the leases were subject to two agreements dated 17 November 1987 under which the repairs were to be the responsibility of the landlord, Venrich, and under which the cost of work undertaken by the tenants could be deducted from the  
d rent.

In my judgment, I decided (on the assumption that the agreements and the leases were genuine documents): (a) that there was a conflict between the agreements and the leases; (b) that, in general, where there is a conflict between a lease and a prior agreement, the rights of the parties are governed by the lease; (c) that there was no credible evidence that the agreements and the leases were part of one transaction. The consequence was that the  
e defendants were responsible for repairs and were in arrears with the rent. I noted that a prior agreement may be relied on to seek rectification of the later agreement on the basis that the later agreement did not properly give effect to the real agreement between the parties: *Henderson v Arthur* [1907] 1 KB 10 at  
f 13; but I also noted that in the present case there was no suggestion of mistake.

### III. *The rectification claim*

The defendants now seek to amend their defence by adding a plea that the leases were intended to embody the agreements, but failed to do so by failing  
g to provide that the tenants' duties and responsibilities were limited to cleaning, handyman work and repairs, gutter cleaning, grass and hedge cutting, refuse and rubbish clearance, electricity supply, hot water supply, and central heating maintenance; and that the leases were drawn up and signed under a mutual mistake of fact that keeping and maintaining the property in  
h tenant-like repair meant not allowing the property to fall into disrepair rather than putting it into repair; and a draft amendment to the prayer seeks rectification of the leases so as to embody the agreement actually made or their true intentions.

i In my earlier judgment I recorded the unsatisfactory nature of the evidence on behalf of the defendants about the execution of the agreements and the leases. The evidence on the present application does not even begin to address the question of mistake or the origin or execution of the documents. All that Mr Herskovic says is that his brother gave copies of the agreements and the leases to Barclays in 1989, and he produces a copy letter dated 8 June 1989 from his brother and sister-in-law to Barclays referring to the leases. Both he and Miss Maxwell (the defendants' solicitor) rely on the price (£150,000) on the sale

by the liquidator to Senator as indicating knowledge that the freeholder was responsible for repairs. But the price does not tend to indicate knowledge, and has nothing at all to do with mutual mistake.

I refuse the application because (a) the defendants seek leave to defend in circumstances where I have already heard an application under RSC Ord 14 in which evidence of mistake should have been adduced; in the course of that application the defendants did not seek leave to defend on any such basis as is now put forward; (b) the evidence in support of the application to amend and/or for leave to defend does not present any factual basis whatever for the exercise of the discretion to rectify; there is no evidence about the inception and execution of the documents; and there is no evidence that the parties intended the leases to carry out the terms of the agreements and not to vary them; and (c) in any event the remedy is not available if it would prejudice a bona fide purchaser for value without notice, and there is nothing in the assertion that the price paid for the property by Senator indicates that Senator (and still less Rainbow) knew that the repairing obligation fell upon the landlord.

#### IV. *Specific performance of landlord's repairing covenant*

Until relatively recently it was generally accepted that repairing covenants could not be specifically enforced, whether they were landlord's covenants or tenant's covenants. The decision on which that view rested was the decision of Lord Eldon LC in *Hill v Barclay* (1810) 16 Ves 402, [1803–13] All ER Rep 379. In refusing a tenant relief against forfeiture for breach of a repairing covenant, Lord Eldon LC said that the landlord—

'may bring an ejectment upon non-payment of rent: but he may also compel the tenant to pay the rent. He cannot have that specific relief with regard to repairs. He may bring an action for damages: but there is a wide distinction between damages and the actual expenditure upon repairs, specifically done. Even after damages recovered the landlord cannot compel the tenant to repair: but may bring another action. The tenant therefore ... may keep the premises until the last year of the term; and ... the most beneficial course for the landlord would be, that the tenant, refraining from doing the repairs until the last year of the term, should then be compelled to do them.' (See 16 Ves 402 at 405, [1803–13] All ER Rep 379 at 380.)

But, said Lord Eldon LC: 'The difficulty upon this doctrine of a Court of Equity is, that there is no mutuality in it. The tenant cannot be compelled to repair.'

The view that the landlord's covenant could not be specifically enforced came to be based on the theory that there was no mutuality because the tenant's covenant could not be specifically enforced, or because the works could not be adequately defined, or because effective compliance could not be obtained without the constant supervision of the court: cf *Fry on Specific Performance* (6th edn, 1921) pp 42–50, 222–223.

But today there is little or no life in these reasons. First, as regards the requirement of mutuality, it is now clear that it does not follow from the fact that specific performance is not available to one party that it is not available to the other: want of mutuality is a discretionary, and not an absolute, bar to



a specific performance. The court will grant specific performance if it can be done without injustice or unfairness to the defendant: *Price v Strange* [1977] 3 All ER 371 at 383, [1978] Ch 337 at 357 per Goff LJ. Second, as regards the need for precision in the terms of the order, it is—

b ‘a question of degree and the courts have shown themselves willing to cope with a certain degree of imprecision in cases of orders requiring the achievement of a result in which the plaintiffs’ merits appeared strong ... it is, taken alone, merely a discretionary matter to be taken into account ... It is, however a very important one.’ (See *Co-op Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1997] 3 All ER 297 at 304, [1998] AC 1 at 14 per Lord Hoffmann.)

c So also, the objection to an order for specific performance based on the need for the court’s constant supervision is designed to avoid repeated applications for committal which are likely to be expensive in terms of cost to the parties and the resources of the judicial system, but as regards orders to achieve a result, Lord Hoffmann said ([1997] 3 All ER 297 at 303, [1998] AC 1 at 13):

d ‘Even if the achievement of the result is a complicated matter which will take some time, the court, if called upon to rule, only has to examine the finished work and say whether it complies with the order ... This distinction between orders to carry on activities and to achieve results explains why the courts have in appropriate circumstances ordered specific performance of building contracts and repairing covenants (see *Wolverhampton Corp v Emmons* [1901] 1 KB 515 (building contract) and *Jeune v Queens Cross Properties Ltd* [1973] 3 All ER 97, [1974] Ch 97 (repairing covenant)).’

e f In particular, it became settled that the court will order specific performance of an agreement to build if (a) the building work is sufficiently defined; (b) damages would not compensate the plaintiff for the defendant’s failure to build; and (it seems) (c) the defendant is in possession of the land so that the plaintiff cannot employ another person to build without committing a trespass: *Snell’s Equity* (29th edn, 1990) p 595. The analogy with agreements to build was relied on by Pennycuik V-C in *Jeune v Queens Cross Properties Ltd* [1973] 3 All ER 97, [1974] Ch 97 in deciding that the court could specifically enforce a lessor’s repairing covenant. In that case tenants complained of a failure by the landlord to reinstate properly a stone balcony at the front of a house in Westbourne Terrace, London W2, comprising four flats. The tenants sought an order that the landlord should reinstate the balcony in the form in which it existed prior to its partial collapse. Pennycuik V-C ([1973] 3 All ER 97 at 99, [1974] Ch 97 at 99) acknowledged that common sense and justice required the grant of the relief. But he acknowledged the view in some textbooks that ‘specific performance will never be ordered of repairing covenants in a lease’, and said:

j ‘So far as the general law is concerned, apart from a repairing covenant in a lease, it appears perfectly clear that in an appropriate case the court will decree specific performance of an agreement to build if certain conditions are satisfied.’

The conditions were that the work was sufficiently defined by the contract; damages would not be an adequate remedy; and the defendant was in possession, and so the plaintiff could not have the work done without committing a trespass. These conditions were fulfilled, and after referring to the statement of Lord Upjohn in *Redland Bricks Ltd v Morris* [1969] 2 All ER 576 at 580, [1970] AC 652 at 666 that the court must be careful to ensure that the defendant knows exactly what he has to do so that in carrying out an order he can give contractors the proper instructions, Pennycuik V-C said there was no difficulty about that, but a difficulty arose from the decision of Lord Eldon LC in *Hill v Barclay*. In holding that there was no reason in principle why an order should not be made against a landlord to do some specific work, he said (obiter) of *Hill v Barclay*:

‘Now that decision is, I think an authority laying down the principle that a landlord cannot obtain against his tenant an order for specific performance of a covenant to repair.’

In concluding that the landlord’s covenant could be the subject of an order for specific performance, he said:

‘Obviously, it is a jurisdiction which should be carefully exercised. But in a case ... where there has been a plain breach of a covenant to repair and there is no doubt at all what is required to be done to remedy the breach, I cannot see why an order for specific performance should not be made.’ (See [1973] 3 All ER 97 at 99–100, [1974] Ch 97 at 101.)

More recently orders have been made against a landlord to enforce a covenant to employ a resident porter; what had to be done was capable of definition, and enforcing compliance would not involve superintendence by the court to an unacceptable degree: *Posner v Scott-Lewis* [1986] 3 All ER 513 at 519–522, [1987] Ch 25 at 33–37; and against a landlord requiring removal of dry rot, on the basis that, notwithstanding the difficulty of working out the appropriate order, damages would not be an adequate remedy: in particular, the condition of the premises was continually deteriorating: *Gordon v Selico Ltd* (1986) 18 HLR 219. See also *Peninsular Maritime Ltd v Padseal Ltd* [1981] 2 EGLR 43 (interlocutory mandatory injunction to use best endeavours to put a lift into working order) and *Tustian v Johnston* [1983] 2 All ER 673 at 681.

These decisions show that there is no longer any life in the proposition that the court will not grant specific performance against a landlord of a covenant to repair either because of lack of mutuality or because of the supposed need for constant supervision; and in the case of dwellings, there is now a statutory jurisdiction to order specific performance of a landlord’s repairing covenant. Section 17 of the Landlord and Tenant Act 1985 (replacing s 125 of the Housing Act 1974) provides:

‘(1) In proceedings in which a tenant of a dwelling alleges a breach on the part of his landlord of a repairing covenant relating to any part of the premises in which the dwelling is comprised, the court may order specific performance of the covenant whether or not the breach relates to a part of the premises let to the tenant and notwithstanding any equitable rule restricting the scope of the remedy, whether on the basis of a lack of mutuality or otherwise ...’

V. *Specific performance of tenant's repairing covenant*

- a Is there any reason in principle why an order for specific performance should not be made against a tenant in appropriate circumstances? It would not be profitable to consider whether the statements in the older authorities that tenant's repairing covenants were not specifically enforceable were ratio or dicta: in *Rayner v Stone* (1762) 2 Eden 128, 28 ER 845 the basis of the decision
- b was that the work could not be sufficiently defined; in *Hill v Barclay* the actual decision was that the tenant could not obtain relief against forfeiture for breach of the repairing covenant, and one (of several, alternative) reasons was lack of mutuality, in the sense that if there were relief from forfeiture, the landlord would have to bring successive actions for damages since 'the landlord cannot compel the tenant to repair ... there is no mutuality in it. The
- c tenant cannot be compelled to repair' and otherwise the tenant would 'have the option, against the will of the landlord, of keeping the lease upon those terms; from time to time breaking the covenant, which he cannot be compelled to perform' (see (1810) 16 Ves 402 at 405–406, [1803–13] All ER Rep 379 at 380). See also *City of London v Nash* (1747) 3 Atk 512, 26 ER 1095 and
- d *Mosely v Virgin* (1796) 3 Ves 184, 30 ER 959 (dicta suggesting tenant's repairing covenants could not be specifically enforced).

The statement in *Jeune v Queens Cross Properties Ltd* [1973] 3 All ER 97 at 99–100, [1974] Ch 97 at 100 that 'a landlord cannot obtain against his tenant an order for specific performance of a covenant to repair' was obiter, as was the remark by Oliver J in *Regional Properties Ltd v City of London Real Property Co Ltd*,

e *Sedgwick Forbes Bland Payne Group Ltd v Regional Properties Ltd* [1981] 1 EGLR 33 at 34 that there was 'grave doubt whether ... a tenant's covenant is capable of specific performance', although he went on to acknowledge that *Hill v Barclay* 'may logically be much weakened as an authority, if indeed it ever was more than a mere dictum' by the decision of Pennycuik V-C.

- f According to 27(1) *Halsbury's Laws* (4th edn reissue) (ed Colyer et al) para 368: 'Specific performance of a tenant's repairing covenant will not ordinarily be granted', citing *Hill v Barclay*, but the editors go on:

'This has long been stated by textbook writers to be the law but the jurisdiction to grant specific performance of contracts to do building

g works has developed and there seems no reason in principle why such an order should not be made if the works are sufficiently defined ... and the order is not being sought as a means of circumventing the statutory restrictions on the recovery of damages ... It may be that the remedy will often be inappropriate because damages will be a sufficient remedy; but

h this may not be so where the landlord has no right of entry and the property is deteriorating rapidly ...'

Dowding and Reynolds *Dilapidations: The Modern Law and Practice* (1995) pp 555–559 suggest that there is no reason in principle why specific performance should not be granted: first, there is no logical reason for

i distinguishing between covenants to repair and other contractual obligations; second, if specific performance can be granted of a landlord's covenant there is no reason for a different rule for a tenant's covenant; third, there is no reason to distinguish between building obligations (for which specific performance can be granted) and repairing obligations; fourth, even if the older cases do decide that specific performance of a tenant's obligation can never be granted,



the law relating to specific performance has developed significantly. See also *Woodfall Landlord and Tenant* (1994) para 13.099, Jones and Goodhart *Specific Performance* (2nd edn, 1996) p 189 and Spry *Equitable Remedies* (1990) p 116. a

Like the editors of *Halsbury's Laws* and of *Woodfall, Dowding and Reynolds* suggest (p 561) that the court will not allow the remedy of specific performance to circumvent the protection which the Leasehold Property (Repairs) Act 1938 was intended to confer on tenants: although the 1938 Act does not apply to a claim for specific performance, they suggest that the court would be reluctant to make an order where an action for damages or forfeiture would be subject to the restrictions imposed by the 1938 Act and where the circumstances are such that leave would not be granted. The effect of the 1938 Act is that, in the case of a tenancy of not less than seven years with three years or more unexpired, forfeiture or claims for damages for breach of repairing covenants are not available until certain conditions have been fulfilled. The court will only grant leave if the landlord can prove that one of the conditions specified in s 1(5) of the 1938 Act has been fulfilled, and if the court is satisfied in the exercise of its discretion that leave ought to be granted. The conditions are (in summary): (a) that the immediate remedying of the breach is required for preventing substantial diminution in the value; (b) that the immediate remedying of the breach is required to give effect to any enactment, or court order; (c) where the lessee is not in occupation, that the immediate remedying of the breach is required in the interests of the occupier; (d) that the breach can be immediately remedied at an expense that is relatively small in comparison with the much greater expense that would probably be occasioned by postponement of the necessary work; or (e) that there are special circumstances which, in the opinion of the court, render it just and equitable that leave should be given. b  
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In my judgment, a modern law of remedies requires specific performance of a tenant's repairing covenant to be available in appropriate circumstances, and there are no constraints of principle or binding authority against the availability of the remedy. First, even if want of mutuality were any longer a decisive factor (which it is not) the availability of the remedy against the tenant would restore mutuality as against the landlord. Second, the problems of defining the work and the need for supervision can be overcome by ensuring that there is sufficient definition of what has to be done in order to comply with the order of the court. Third, the court should not be constrained by the supposed rule that the court will not enforce the defendant's obligation in part: this is a problem raised by paras 9.10 and 9.13 of the Law Commission Report *Landlord and Tenant: Responsibility for State and Condition of Property*, but it is not raised elsewhere as an objection; it is by no means clear that there is such a principle, and in any event if there is such a principle, it applies where the contract is in part unenforceable (*Jones and Goodhart* pp 57–61); it does not mean that the court cannot in an appropriate case enforce compliance with a particular obligation such as a repairing covenant. f  
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Subject to the overriding need to avoid injustice or oppression, the remedy should be available when damages are not an adequate remedy or, in the more modern formulation, when specific performance is the appropriate remedy. This will be particularly important if there is substantial difficulty in the way of the landlord effecting repairs: the landlord may not have a right of access to the property to effect necessary repairs, since (in the absence of contrary i

a agreement) a landlord has no right to enter the premises, and the condition of the premises may be deteriorating.

In all cases the court must be astute to prevent oppression, even if tenants are no longer (as they were said to be in *Rayner v Stone* (1762) 2 Eden 128 at 130, 28 ER 845) for the most part of 'mean and low circumstances'. The leading texts suggest that the remedy should not be available to circumvent the restrictions on the recovery of damages or forfeiture under the 1938 Act. The 1938 Act, however, does not apply to decrees of specific performance, and it would not be right to treat the legislation as covering the remedy when it does not in terms apply. That would be an impermissible extension of a statute to cover a case where it is not applicable. What the court should do is to prevent specific performance from being used to effectuate or encourage the mischief which the 1938 Act was intended to remedy. The object of the 1938 Act was to remedy the mischief of speculators or unscrupulous landlords buying the reversion of a lease which had little value, and then harassing the tenant with schedules of dilapidations, not with a view to ensuring that the property was kept in proper repair for the protection of the reversion, but to put pressure on the tenant: see authorities cited in *Jervis v Harris* [1996] 1 All ER 303 at 309–310, [1996] Ch 195 at 204–205. Although the court should not use the provisions of s 1(5) of the 1938 Act as if they were applicable, it should be astute to ensure that the landlord is not seeking the decree simply in order to harass the tenant: in so doing, the court may take into account considerations similar to those it must take into account under the 1938 Act.

e It follows that not only is there a need for great caution in granting the remedy against a tenant, but also that it will be a rare case in which the remedy of specific performance will be the appropriate one: in the case of commercial leases, the landlord will normally have the right to forfeit or to enter and do the repairs at the expense of the tenant; in residential leases, the landlord will normally have the right to forfeit in appropriate cases.

#### VI. *The present case*

The present case has the following unusual features. First, as regards the appropriateness of the remedy of specific performance, there is no adequate alternative remedy. The leases, unusually, contain no forfeiture clause or proviso for re-entry: consequently breach of a repairing covenant will not entitle the landlord to forfeit the leases. Nor do the leases contain a term allowing the landlord access to the premises other than for the purpose of examining their condition: consequently the landlord cannot enter the premises, carry out the works and recover the cost from the tenants. The first defendant is a £100 company and the second defendant's means are unknown. There is no evidence as to the value of the repairs involved, but I was told by counsel for Rainbow that it was in the order of £300,000 and counsel for the defendants did not object to that figure, which does not seem at all unrealistic in the light of the photographs of the mansion in the evidence.

j There is evidence of serious disrepair and deterioration of the property. The statement of claim had annexed a substantial schedule of dilapidations. The counterclaim relied on the same schedule for the purposes of the defendants' claim that Rainbow was responsible, under the terms of the November 1987 agreements, for repairs. The affidavit by Rainbow's solicitor in support of its Ord 14 application exhibited the surveyor's report and

schedule of dilapidations and deposed that 'the property has become seriously dilapidated' and that the extent of the disrepair was apparent from the report. The report noted that there was 'very considerable disrepair', and that the schedule concentrated on those defects which affected the value of the reversion, those which if not properly repaired would lead to more extreme damage, and those which would be the subject of local authority enforcement notices. There is nothing in the evidence served on behalf of the defendants in the Ord 14 application which suggests that the contents of the schedule are denied: indeed, on the contrary, the affidavit of Miss Maxwell (the defendants' solicitor) expressly relied on the defendants' counterclaim, and suggested that it was a matter for evidence 'as to who is liable for such repairs'. Only on 28 January 1998 did Mr Herskovic depose that repairs were in hand, and that if an order is made the defendants will have no opportunity to challenge the schedule by introducing their own surveyor's evidence or querying the costings. This falls a long way short of raising triable issues as regards the breach of the repairing obligations, especially in the light of the fact that until then the defendants had been relying on precisely the same schedule of dilapidations.

Evidence has been filed by Rainbow that the Epping Forest District Council has served notices pursuant to the Housing Act 1985 and the Environmental Protection Act 1990. The effect of non-compliance with the notices under the Housing Act 1985 is that if neither the landlord nor the tenant does the work, the council may do so, and its costs are, until recovered, a charge on the premises to which the notice relates: 1985 Act, Sch 10, para 7(1). The same result applies if an abatement notice under the Environmental Protection Act 1990 is not complied with: 1990 Act, s 81A(4). Rainbow provided a schedule showing that there is a considerable overlap between the dilapidations schedule produced by its surveyors and the works required by the Epping Forest District Council under the 1985 and 1990 Acts.

The schedule of works required is sufficiently certain to be capable of enforcement, particularly in the light of the unusual feature that the defendants themselves relied on Rainbow's schedule of dilapidations in making their own counterclaim in reliance on what they claimed were the landlord's obligations under the agreements. As I have said, the defendants' evidence on the Ord 14 application did not challenge Rainbow's evidence verifying the statement of claim and exhibiting the schedule of dilapidations.

Consequently, the lack of any serious alternative remedy, the absence of any real dispute about the repairs required, the scope of the repairs and the deterioration of the state of the property, and the notices served by the Epping Forest District Council together strongly point to specific performance being the appropriate remedy.

Nor is there any force in the grounds on which the defendants rely to resist an order for specific performance. First it is said that because damages could not be awarded if the requirements of the Leasehold Property (Repairs) Act 1938 are not met, then specific performance could not be ordered. There is no logical or legal basis in this argument. In any event, even if the requirements of s 1(5) of the 1938 Act should be applied by analogy, or as discretionary grounds to prevent oppression, it is plain that several of the grounds could be made out, especially ground (a) (to prevent substantial diminution in value);



a ground (b) (to give effect to enactments etc); and ground (d) (increased expense due to postponement of work).

I do not accept the argument (based on *Tito v Waddell* (No 2), *Tito v A-G* [1977] 3 All ER 129 at 311, [1977] Ch 106 at 326) that the order would be made in vain in support of a merely transient interest: first, there is no longer any absolute rule that specific performance will not be granted to protect transient interests: *Verrall v Great Yarmouth BC* [1980] 1 All ER 839, [1981] QB 202; b secondly, the fact that Rainbow hopes, or intends, to sell the property at a profit does not mean that the order would be in vain. Nor can it be said (relying on *Grist v Bailey* [1966] 2 All ER 875, [1967] Ch 532) that the order should be refused because there was a common mistake by the parties to the action as to the terms of the tenancy (ie it can be inferred from the price paid c that Rainbow knew that the repairing obligation fell on the landlord). The evidence put forward by the defendants is that the liquidator of Venrich Ltd (the original freeholder owned by Mr Herskovic and his brother) sold the property to Senator for £150,000, and that shortly afterwards Senator sold the freehold to Rainbow for £230,000; and that in January 1997 Rainbow was d advertising the freehold for sale at £575,000. The inference drawn is that the liquidator of Venrich Ltd sold the property, and Senator bought the property, on the basis that the freeholder was responsible for repairs. But there is no reason for that inference to be made, and if it be the case that Rainbow obtained a bargain, that is no impediment to the making of the order if its object is legitimate: in any event, the fact that Rainbow has put the property e on the market for a much higher price than it paid does not prove anything if (as I was told by counsel for Rainbow) there has been no purchaser interested in such a price.

Finally, it is suggested that because the leases contain options for the lessees to purchase the freehold (although there is no provision for a price or the f fixing of a price and the options are not registered) it would be unjust to grant specific performance of the repairing covenants. But the question of the validity or enforceability of the options is not one for decision at this stage. There is no suggestion that the options have been exercised. The defendants counterclaim for declarations that they have options to purchase the freehold, which Rainbow denies. This unresolved claim does not make it unjust to g grant specific performance of the repairing covenants; although in general the court will not compel a defendant to perform his obligations specifically if it cannot ensure that any unperformed obligations of the plaintiff will be specifically performed (*Price v Strange* [1977] 3 All ER 371 at 392, [1978] Ch 337 at 367–368), here there is no evidence of unperformed obligations of Rainbow h and, even if the options are valid, the repairing obligations are capable of independent enforcement.

In my judgment, therefore, in the unusual circumstances of this case an order for specific performance is appropriate, subject (as in *Gordon v Selico Ltd* (1986) 18 HLR 219 at 241–242) to liberty to apply to a master, who is to have j discretion to make directions for the working out of the order.

#### VII. Interest on overdue rent

The court has a discretion to award interest on a debt as from the date the cause of action accrued: see s 35A(1) of the Supreme Court Act 1981 and *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* (No 2) [1998] 1 All ER

305, [1997] 1 WLR 1627. The cause of action accrued when the rent became due, and an assignee of the reversion is entitled to the rent: Law of Property Act 1925, s 141. Accordingly, interest may be, and will be, awarded as from the dates the rents were due.

*Order accordingly.*

Celia Fox   Barrister.

a **T G A Chapman Ltd and another v Christopher and another**

COURT OF APPEAL, CIVIL DIVISION

b PHILLIPS, WALLER AND MUMMERY LJ

18 JUNE, 8 JULY 1997

c *Costs – Order for costs – Payment of costs by non-party – Insurers' liability to indemnify defendant for accidental damage to material property limited to £1m – Defendant negligently setting plaintiffs' property alight – Insurers contesting plaintiffs' claim to defend their own interest – Plaintiffs awarded damages in excess of policy limit and obtaining order for costs against the insurers – Whether insurers liable to pay plaintiffs' costs – Supreme Court Act 1981, s 51(1).*

d The first plaintiff leased a warehouse and a factory from the second plaintiff, which were extensively damaged by fire after the defendant, C, threw a match into a tin of beeswax. C was covered by a building contents and liability policy indemnifying him against liability at law for accidental damage to material property occurring during the period of insurance solely in a personal capacity to the limit of £1m. The plaintiffs successfully sued C for damages for negligently  
e causing the fire which damaged their property, and were given judgment in the sum of £1,129,212 plus interest and costs. C's insurers agreed to pay the plaintiffs £1m in full settlement of his liability, but without prejudice to the plaintiffs' right to seek an order under s 51 of the Supreme Court Act 1981 that the insurers pay their costs of the action. Subsequently the plaintiffs sought and obtained an order for costs against the insurers, who had been joined in the action as second  
f defendants. The insurers appealed against that order, contending that their interest in the litigation only arose because of a policy of insurance which ensured the plaintiffs a recovery where otherwise there would be none, that their liability was subject to a contractual limit and that they had acted both bona fide and reasonably in fighting the claim.

g **Held** – The court would exercise its discretion under s 51(1) of the 1981 Act to order the insurers of a negligent defendant both to indemnify the defendant to the limit of his insurance policy and to pay the plaintiff's costs of the action in which negligence had been established, where those insurers had taken the  
h decision to contest the litigation and had conducted the defence with a view to avoiding or reducing their liability to the plaintiff. In making such an order, the court was imposing on the insurers a liability which was independent of the terms of the policy and flowed from the action they had chosen to take pursuant to those terms. Moreover, public policy did not require that the insurers' liability for the costs of contesting the plaintiff's claim be limited by the terms of their  
i contract with the defendant; and the principle that costs follow the event did not only apply where a party had acted unreasonably in litigating. In the instant case, the court would exercise its discretion under s 51 and make a costs order against the insurers. Accordingly the appeal would be dismissed (see p 879 g j to p 880 c, p 881 b to g, p 882 e f and p 883 a to c g to p 884 a c d, post).

*Murphy v Young & Co's Brewery plc* [1997] 1 All ER 518 applied.



## Notes

For jurisdiction to award costs, see 37 *Halsbury's Laws* (4th edn) para 713, and for cases on the subject, see 37(3) *Digest* (Reissue) 230–233, 4273–4289.

For the Supreme Court Act 1981, s 51, see 11 *Halsbury's Statutes* (4th edn) (1991 reissue) 1019.

## Cases referred to in judgments

*Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira* [1986] 2 All ER 409, [1986] AC 965, [1986] 2 WLR 1051, HL.

*Bourne v Colodense Ltd* [1985] ICR 291, CA.

*Condliffe v Hislop* [1996] 1 All ER 431, [1996] 1 WLR 753, CA.

*Giles v Thompson* [1993] 3 All ER 321, [1994] 1 AC 142, [1993] 2 WLR 908, HL.

*Hill v Archbold* [1967] 3 All ER 110, [1968] 1 QB 686, [1967] 3 WLR 1218, CA.

*McFarlane v E E Caledonia Ltd (No 2)* [1995] 1 WLR 366.

*Murphy v Young & Co's Brewery plc* [1997] 1 All ER 518, [1997] 1 WLR 1591, CA.

*Roache v News Group Newspapers Ltd* (1992) Times, 23 November, [1992] CA Transcript 1120.

*Symphony Group plc v Hodgson* [1993] 4 All ER 143, [1994] QB 179, [1993] 3 WLR 830, CA.

*Tharros Shipping Co Ltd v Bias Shipping Ltd (No 3)* [1997] 1 Lloyd's Rep 246, CA.

## Cases also cited or referred to in skeleton arguments

*Brice v J H Wackerbarth (Australasia) Pty Ltd* [1974] 2 Lloyd's Rep 274, CA.

*Carr v Allen-Bradley Electronics Ltd* [1980] ICR 603, EAT.

*Groom v Crocker* [1938] 2 All ER 394, [1939] 1 KB 194, CA.

*Insurance Co of Africa v Scor (UK) Reinsurance Co Ltd* [1985] 1 Lloyd's Rep 312, CA; *affg* [1983] 1 Lloyd's Rep 541.

*Singh v Observer Ltd* [1989] 3 All ER 777, CA.

*Thistleton v Hendricks* (1992) 70 BLR 112.

## Appeal

The second defendant, Sun Alliance and London Insurance plc (the insurers) appealed from the decision of Judge Zucker QC, sitting as a judge of the Queen's Bench Division of the High Court, on 23 May 1996 whereby he ordered (i) that the insurers be joined in an action brought by the plaintiffs, T G A Chapman Ltd and Benson Turner Ltd, against the first defendant, Paul George Christopher, for negligently causing a fire which burned down premises leased by the first plaintiff from the second plaintiff and (ii) that the insurers pay the plaintiffs' costs of the action. The facts are set out in the judgment of Phillips LJ.

William Crowther QC and Graham Eklund (instructed by Wansbroughs Willey Hargrave) for the insurers.

Philip Shepherd (instructed by Clyde & Co) for the plaintiffs.

a 8 July 1998. The following judgments were delivered.

b **PHILLIPS LJ.** In this action the plaintiffs successfully sued the defendant, Mr Christopher, for damages for negligently causing a fire which damaged their property. They recovered judgment for £1,129,212 and were awarded their costs. The defendant had no assets, but enjoyed insurance cover against his liability, subject to a limit of £1m, under a policy subscribed by Sun Alliance and London Insurance plc. The insurers had conducted Mr Christopher's defence. After judgment had been entered against Mr Christopher, the insurers agreed to pay the plaintiffs £1m in full settlement of Mr Christopher's liability, but without prejudice to the plaintiffs' right to seek an order under s 51 of the Supreme Court Act 1981 that underwriters pay their costs of the action. In due course they sought such an order and on 23 May 1996 Judge Zucker QC, sitting as a judge of the High Court, granted their application, explaining the basis on which he did so in a carefully reasoned judgment. The insurers now appeal against his order.

d On 20 November 1996 this court handed down judgments in two appeals which had been tried together. Each involved applications for costs orders under s 51 of the Act. In the first action, *Murphy v Young & Co's Brewery plc* [1997] 1 All ER 518, [1997] 1 WLR 1591, an order for costs was sought against Sun Alliance, who had funded the plaintiffs' costs of the action pursuant to obligations under a policy of insurance against legal expenses. The trial judge had refused to order costs against Sun Alliance, and this court upheld his decision. In the course of argument, the court was referred to Judge Zucker's judgment in the present case. In the course of giving the leading judgment, I referred to the reasons given by Judge Zucker for his decision and commented ([1997] 1 All ER 518 at 529, [1997] 1 WLR 1591 at 1602): 'Having regard to these reasons it may be hard to fault the manner in which Judge Zucker exercised his discretion ...' That comment was made without hearing argument on the merits of Judge Zucker's decision. I have now heard such argument and must review his decision in the light of it.

g *The facts*

I cannot improve upon Judge Zucker's summary of the material facts which were as follows. On 28 November 1991 a warehouse and factory premises at Wyke Mills, Huddersfield Road, Bradford, West Yorkshire, and its contents, were extensively damaged in a fire. The fire was caused by the negligence of the defendant, Paul George Christopher, who threw a lighted match which landed in an open tin of beeswax which immediately caught fire. T G A Chapman Ltd leased Wyke Mills from Benson Turner Ltd. Chapmans design, manufacture and supply display fittings, furniture and shopfittings. Their machinery and stock was damaged to a value of £986,696. Benson Turner had to repair the building and lost rent. The loss to them was £142,516. The plaintiffs total joint claim was for £1,129,212.

j Mr Christopher lived at home with his mother. He had no assets. His mother had a building contents and liability policy effected through the Halifax Building Society. The liability provision covered not only Mr Christopher's mother but Mr Christopher as well.

By action commenced by writ issued on 21 April 1993, Chapmans and Benson Turner sought to recover the losses they had incurred from Mr Christopher.

There were terms of the policy as follows. Under section 2, 'Home Contents' para 17:

'The insured is indemnified against liability at law: for damages and/or claimants' costs in respect of accidental bodily injury (including death, disease or illness) or accidental damage to material property occurring during any period of insurance incurred ... (b) solely in a personal capacity (not as occupier or owner of any buildings or land). The limit of indemnity for all damages and claimants' costs resulting from one original cause is £1m except where the claim is for accidental bodily injury to an employee under contract of service to the insured and arises out of and in the course of such employment in which event no limit applies. The insurers will also pay defence costs and expenses incurred with its written consent.'

Under the heading 'Conditions', there are the following paragraphs:

'7. The insurer may take over and conduct in the name of the policyholder or insured with complete and exclusive control the defence or settlement of any claim. 8. The insurer may also start legal action in the name of the policyholder or insured (but at its expense and for its own benefit) to recover from others compensation in respect of anything covered by the policy. 9. The policyholder or insured must give the insurer all the help and information it may need to settle or defend any claim or to start legal proceedings.'

The leading underwriter of the policy was the Sun Alliance and London Insurance plc (Sun Alliance). All the parties to the action were in fact nominal. The insurers had the conduct of the action on behalf of the plaintiffs and throughout Sun Alliance had the conduct of the action on behalf of Mr Christopher.

As appears from paras 12 and 13 of an affidavit sworn on 5 March 1996 by Mr Fleeson, a partner in the firm of solicitors, who have the conduct of this action on behalf of the plaintiffs and their insurers prior to the commencement of the action, it was the plaintiffs' and their insurers' understanding that Mr Christopher was unemployed, had no significant assets and little income and that the Sun Alliance policy provided the only basis upon which any recovery might be made. Mr Fleeson had also obtained, prior to the commencement of the action, a copy of the booklet containing the terms of the insurance policy. He therefore knew the limits of the public liability indemnity.

The action came to trial before Judge Bush. It lasted from 7 December 1994 to 22 December 1994. On the first day of the trial, it was admitted that Mr Christopher had been negligent. The action was fought on the issue of contributory negligence. Judge Bush handed down his judgment on 12 May 1995. He rejected the plea of contributory negligence, found for the plaintiffs and awarded them the damages they claimed. That is a total of £1,129,212 plus interest and costs.



*The law*

- a Section 51 of the Supreme Court Act provides:

‘(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in ... (b) the High Court ... shall be in the discretion of the court ...

- b (3) The court shall have full power to determine by whom and to what extent the costs are to be paid.’

- In *Aiden Shipping Co Ltd v Interbulk Ltd*, *The Vimeira* [1986] 2 All ER 409, [1986] AC 965 the House of Lords held, to the surprise of many, that this  
c jurisdiction extended to ordering non-parties to pay the costs of litigation where justice so required. Since that decision the courts have begun to formulate principles that should be applied to the exercise of this discretion. The relevant authorities are reviewed at some length in *Murphy’s* case, and I do not intend to repeat that exercise in the present judgment. I shall simply  
d set out the passage of the judgment that lists the principles to be deduced from those decisions ([1997] 1 All ER 518 at 528, [1997] 1 WLR 1591 at 1601):

‘(1) In *Giles v Thompson* [1993] 3 All ER 321 at 360, [1994] 1 AC 142 at 164 Lord Mustill suggested that the current test of maintenance should ask the question whether—“there is wanton and officious intermeddling with the  
e disputes of others in [which] the meddler has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse.” Where such a test is satisfied, I would expect the court to be receptive to an application under s 51 that the meddler pay any costs attributable to his intermeddling. (2) Where a non-party has  
f supported an unsuccessful party on terms that place the non-party under a clear contractual obligation to indemnify the unsuccessful party against his liability to pay the costs of the successful party, it may well be appropriate to make an order under s 51 that the non-party pay those costs directly to the successful party. Such an order may, for instance, save time and costs in short-circuiting the Third Parties (Rights against  
g Insurers) Act 1930. *Bourne v Colodense Ltd* [1985] ICR 291 is a case where the court might well have thought fit to make such an order had it appreciated that it had jurisdiction to do so. (3) Where a trade union funds unsuccessful litigation on behalf of a member the following factors, in addition to the funding itself, are likely to be present and, where they  
h are, to make it appropriate to order the union to pay the successful party’s costs should such an order be necessary: (a) an implied obligation owed by the union to its member to do so—see (2) above; (b) an interest on the part of the union in supporting and being seen to support the member’s claim; (c) responsibility both for the decision whether the litigation is to be pursued and for the conduct of the litigation; and (d) expectation based  
j on convention that the union will bear the costs of the successful party should the member lose. (4) Where an unsuccessful defendant’s costs are funded by insurers who have provided cover against liability, which is not subject to any relevant limit, the same considerations that I have set out under (3) are likely to apply. (5) The position is more complex where a defendant’s costs have been funded by insurers at risk under a policy

under which their liability is limited to a sum which is insufficient to cover both liability and costs.' a

I then summarised Judge Zucker's reasons in the present case, and expressed the view in relation to them to which I have already referred. I continued ([1997] 1 All ER 518 at 529, [1997] 1 WLR 1591 at 1602):

'... I am not persuaded that it will always be appropriate to order liability insurers to pay the plaintiffs' costs where they have unsuccessfully defended a claim made against their insured if the result of such an order will be to render them liable beyond their contractual limit of cover. It seems to me that the appropriate order may well turn on the facts of the particular case.' b

I then went on to summarise what seemed to me to be the relevant features of the position in *Murphy*: c

'(1) Sun Alliance have had no interest in the result of this litigation, save in so far as this has affected their liability to pay costs. (2) Sun Alliance did not initiate the litigation. They were contractually bound to fund it up to their limit of liability of £25,000 and would, in consequence, have been better off if the litigation had never been commenced. It has not been suggested, nor could it have been, that Sun Alliance could properly have refused their consent to this litigation. Counsel had advised the Murphys that they had "a strong case". (3) Sun Alliance exercised no control over the conduct of the litigation. (4) Sun Alliance cannot be accused of "wanton and officious intermeddling" in the dispute. Legal expenses insurance is a respectable and well-recognised form of insurance and is subject to express regulation under statutory instruments pursuant to the Insurance Companies Act 1982.' d

I observed that these facts did not bring the case within any of the previous authorities and observed ([1997] 1 All ER 518 at 529, [1997] 1 WLR 1591 at 1603): e

'The critical question is whether the mere fact that Sun Alliance have funded the Murphys' legal expenses under a policy of insurance, up to the limit of the cover under that policy, makes it reasonable and just that Sun Alliance should be ordered to pay Youngs' costs.' f

I concluded ([1997] 1 All ER 518 at 531, [1997] 1 WLR 1591 at 1604): g

'An order under s 51 that a non-party pay costs will only be justified when exceptional circumstances make such an order reasonable and just. In this judgment I have explored some of the categories of exceptional circumstances that may justify such an order. This case does not fall into any of them. I have reached the conclusion that the existence of legal expenses insurance with a limit of cover that has been exhausted does not make it reasonable or just to order the insurer to pay the costs of the adverse successful party. For these reasons I would dismiss this appeal.' h

The facts of *Murphy*'s case were remote from those of the present case, and I now turn to consider the factors which led Judge Zucker to make a costs order against the insurers. The judge referred to the following authorities: *Hill* j

a v *Archbold* [1967] 3 All ER 110 at 112, [1968] 1 QB 686 at 694, *McFarlane v E E Caledonia Ltd (No 2)* [1995] 1 WLR 366 and *Condliffe v Hislop* [1996] 1 All ER 431, [1996] 1 WLR 753. He then observed:

b 'In my judgment, those authorities clearly establish the principle that, as a general rule, in a business context, a party who maintains litigation should be liable for the costs of a successful adverse party. The authorities show that that is the case, even where the party does not have a direct interest in the litigation. The case for ordering the maintainer to pay costs is even stronger where, as here, the maintainer has a direct interest in the litigation and takes over the conduct and management of the action to protect that interest.'

c He later summarised the particular features of this case which, in his judgment, rendered it appropriate to give effect to the principle that he had identified:

d '(1) The plaintiffs' claim from the outset exceeded and was known by Sun Alliance to exceed the limit of the indemnity, ie £1m. (2) Sun Alliance had the sole conduct and direction of the defence which it pursued in order to protect its own interest, ie its liability to pay out £1m under the insurance policy. I reject any suggestion that Sun Alliance was acting in the interests of Mr Christopher. (3) Sun Alliance knew from the outset that Mr Christopher had no means to meet any judgment or order for costs. (4) Each and every one of the defences put forward by Sun Alliance were either abandoned or failed. (5) By putting forward those defences, Sun Alliance and no one else caused the plaintiffs to incur costs of £250,000. (6) Sun Alliance further prejudiced the plaintiffs by keeping them out of their money for three years and seven months and, in the meantime, had the use of £1m.'

g In *Murphy's* case the defendants did not suggest that Sun Alliance had been guilty of maintenance. I referred to the current test of maintenance in the passage that I have already cited and stated that an order under s 51 was likely to succeed where that test was satisfied (see [1997] 1 All ER 518 at 528, [1997] h 1 WLR 1591 at 1601). In the present case there can be no question of that test being satisfied. The insurers were not guilty of unlawful maintenance in supporting this litigation, notwithstanding that they have declined liability for the plaintiffs' costs. Thus the simple principle propounded by Judge Zucker does not provide the answer in this case. Mr Crowther QC, for the insurers, has argued that there is a further criticism to be made of Judge Zucker's approach. Mr Eklund, who argued the case below, had contended that it was unjust that the insurers, by being ordered to pay costs, should be subjected to an overall liability which exceeded the limit of £1m, which they had contractually undertaken. The judge observed that the contractual position between Mr Christopher and the insurers was not relevant to the issue which i he had to determine. Mr Crowther has argued that the contractual limit of the insurers' liability is a very relevant factor in the present case, relying particularly upon *Tharros Shipping Co Ltd v Bias Shipping Ltd (No 3)* [1997] 1 Lloyd's Rep 246 the appeal that was tried at the same time as *Murphy's* case. In the *Tharros* case this court approved, on the facts of that case, an approach that made the liability in costs of the P & I club which had supported the



litigation of its member co-extensive with the club's contractual liability to its member. Furthermore, in *Murphy's* case [1997] 1 All ER 518 at 528, [1997] 1 WLR 1591 at 1601 I drew the distinction between the position of an insurer who has provided cover against liability without relevant limit of liability and the insurer whose liability is subject to limit. For these reasons I agree with Mr Crowther that the insurers' contractual limit of liability is a relevant feature in the present case. In these circumstances, I consider that Mr Crowther is correct to submit that this court must exercise a fresh discretion in deciding upon the appropriate costs order. This is, however, a somewhat academic consideration for, but for one exceptional feature, the facts of this case are an example of a standard form situation which may well recur, and which requires an extension of the task of formulating principles which this court addressed in *Murphy's* case. Before I turn to that task I must deal with the exceptional feature.

### *The effect of the settlement*

At the conclusion of the action, an agreed order was made by the trial judge, which included the following provision: 'The defendant agrees to pay the plaintiffs' costs. Such costs to be agreed and in default of agreement to be taxed on a standard basis.' In agreeing this order, the plaintiffs' solicitors expressly reserved the right to argue that the insurers should be liable for the costs of the action over and above the cover limit of £1m. They made the same reservation when they subsequently accepted from insurers £990,000, together with £10,000 that had been paid into court 'in full and final satisfaction of all claims against Mr Paul Christopher personally'.

Mr Crowther accepts that the settlement agreement cannot prejudice the plaintiffs' claim under s 51, but he argues that the settlement should not result in the plaintiffs being in a better position overall than they would have been had the insurers not settled the plaintiffs' claim. I accept the merit of that contention. By making a payment of £1m by way of settlement of the judgment, the insurers saved the plaintiffs the delay and the costs that would have been involved in proceeding against the insurers under the Third Parties (Rights against Insurers) Act 1930. In exercising its discretion under s 51 the court should ensure that the insurers are not worse off as a result of the settlement.

Had no settlement been made, the plaintiffs could have sought an order for costs against the insurers under s 51 and would then have had to make Mr Christopher bankrupt in order to pursue a claim under the 1930 Act. Mr Crowther argues that, had they taken this course, the plaintiffs could not have recovered from the insurers more than a total of £1m. This is because any costs paid by the Insurers pursuant to an order made under s 51 would have discharged their liability under the policy to indemnify Mr Christopher in respect of his liability to pay the costs of the litigation and thus made inroads into the £1m limit. Only the balance could have been recovered in the 1930 Act proceedings. As the plaintiffs could not have recovered more than £1m from the insurers in the absence of the settlement and as they have already been paid £1m under the settlement, no further payment should be ordered under s 51.

This argument was not advanced before the judge. Mr Crowther told us that it occurred to him as a result of the following comment that I made in

a *Murphy's case* [1997] 1 All ER 518 at 529, [1997] 1 WLR 1591 at 1602, in relation to the effect of Judge Zucker's order:

'... it is not clear to me why Sun Alliance will not be entitled to take account of the costs that they pay in consequence of his order when calculating their residual liability under the policy, in which case the plaintiffs will be no better off at the end of the day.'

b When I made that comment I was unaware of the settlement. Mr Shepherd for the plaintiffs has, however, persuaded me that, even if the settlement had not taken place, any payment made by the insurers pursuant to Judge Zucker's order would not have been treated as discharging in part the insurers' liability to Mr Christopher under the policy. This is because such payment would be made to discharge the insurers' own liability to the plaintiffs under the policy and not by way of an indemnity to Mr Christopher. The insurers' liability to Mr Christopher would have remained at £1m. Thus, absent the settlement, the plaintiffs could have recovered costs against the insurers under s 51 and £1m under the 1930 Act proceedings. The settlement poses no impediment to the plaintiffs' claim under s 51. I turn then to consider the merits of that claim.

*Is this an exceptional case?*

c Mr Crowther submitted that this case lacks the exceptional features that will always be a prerequisite to an order for costs against a non-party (see the *Aiden Shipping case* [1986] 2 All ER 409 at 416, [1986] AC 965 at 980 and *Symphony Group plc v Hodgson* [1993] 4 All ER 143 at 152, [1994] QB 179 at 192). The features relied upon by the plaintiffs to justify seeking a costs order against the insurers include the following: (1) the insurers determined that the claim would be fought; (2) the insurers funded the defence of the claim; (3) the insurers had the conduct of the litigation; (4) the insurers fought the claim exclusively to defend their own interests; and (5) the defence failed in its entirety.

d In my judgment all these features are established. Only the fourth has been challenged by the insurers. Judge Zucker rejected their submission that the defence was undertaken, in part, in the interests of Mr Christopher and so do I. Mr Christopher was without means. Had the insurers requested him to agree to a settlement at the outset I have no doubt that he would have agreed. In any event, the insurers were contractually entitled to require him to do so and I have no doubt that they would have taken this course had it been necessary and had they thought that it was in their best interests.

e In the context of the insurance industry, the features to which I have just referred may not be extraordinary. But that is not the test. The test is whether they are extraordinary in the context of the entire range of litigation that comes to the courts. I have no doubt that they are. It must be rare for litigation to be funded, controlled and directed by a third party motivated entirely by its own interests. These are not the only relevant features of this case. The insurers rely particularly upon the following further features: (6) their interest in the litigation only arises because of a policy of insurance which ensures the plaintiffs a recovery when otherwise they would have none; (7) their liability under that policy is subject to a contractual limit; and (8) they acted both bona fide and reasonably in fighting the claim.

The combination of all these features is one which must be experienced from time to time in the field of liability insurance and the question of whether or not they justify making a costs order against the insurers raises a question of principle of some importance. a

The insurers argued that public policy requires that insurers should not be rendered liable to costs in circumstances such as those of the present case. They advanced three arguments in support of this contention. b

First they argued that a plaintiff must take his defendant as he finds him. Where, as here, the defendant is impecunious, he is nonetheless entitled to defend the claim. Where he does so, the plaintiff will not recover his costs. Similarly, a defendant with only limited funds is entitled to use all those funds in conducting his defence, even though this will deprive the plaintiff of the fruits of success in the litigation. The plaintiff should not be in a better position because the defendant is insured. c

This argument begs the question. The basis upon which the plaintiffs have sought a costs order against the insurers is that, in reality, it is the insurers rather than Mr Christopher who are the defendants. Nor can I see any principle that requires the plaintiffs to be placed in no better position when suing an insured defendant than when suing a defendant who is uninsured. There are some circumstances where the law requires the fact of the existence of insurance to be ignored. Once judgment has been obtained, however, the law makes provision to ensure that the plaintiff is better off because the defendant is insured (see the Third Parties (Rights against Insurers) Act 1930). Where costs fall to be considered I can see no reason in principle why the plaintiffs should not be better off because the defendant is insured if justice otherwise so requires. If, in the present case, the policy of insurance had provided cover without limit, I do not believe that the insurers would be challenging their liability to pay the plaintiffs' costs. This brings me to the principal argument relied upon by the insurers. d

The insurers argue that it is unjust and undesirable that they should be exposed to greater overall liability in relation to damages and costs than the limit of £1m to which the policy was subject. They provided cover to Mr Christopher in respect of both liability and costs that was subject to a limit of £1m. This provided a benefit to the plaintiffs, but the benefit was subject to a limit. That limit should be respected. The premium reflected it. If costs orders are to expose insurers to liability beyond the policy limit, liability insurance will be discouraged. e

I do not think it right to approach the issue in this case on the footing that the insurers were philanthropically providing the plaintiffs with the benefit flowing from the insurance cover and that it shows an unworthy lack of gratitude on their part to seek to obtain more. The insurance cover was provided because it was paid for and the plaintiffs were entitled to the benefit of it because the law so provides. Nor am I moved by the argument that premium rates for liability cover will go up if insurers are at risk as to costs orders which expose them to liability in excess of their contractual limits. There is no evidence as to the extent to which this is likely to be the case, if at all, but in any event I see no reason why the assured should not be expected to pay a premium which properly reflects the insurers' exposure to costs orders if the interests of justice otherwise require that the insurers should be subject to such exposure. f



a As to the insurers' argument that it is inherently unjust that they should be exposed to a total liability that exceeds the policy limit, I do not agree. Where insurers are contractually liable to indemnify an impecunious defendant in respect of his liability in costs, this can constitute good reason for an order under s 51 that the insurers pay those costs. The effect of the policy limit in this case means that this reason is absent. It does not follow, however, that no costs order should be made against the insurers. To make such an order is not to rewrite the policy. It is to impose on underwriters a liability which is independent of the policy. The grounds advanced by the plaintiffs for imposing such liability do not turn on the terms of the policy, but on the action that underwriters have chosen to take pursuant to those terms. This brings me to the third argument relied upon by the insurers.

c The insurers argue, and I quote from their skeleton argument, that—

d 'insurers who have legitimate commercial interests in defending proceedings and who thereby afford access to justice to impecunious assureds should be encouraged to defend actions on their merits without fear that they will be subject to additional orders for costs if their quite legitimate arguments are not preferred at trial.'

In my judgment this argument turns the relevant principle on its head. That principle is that costs should normally follow the event. It is currently reflected by the provisions of RSC Ord 62, r 3. Judge Zucker referred to the statement by Bingham MR in *Roache v News Group Newspapers Ltd* (1992) Times, 23 November, [1992] CA Transcript 1120 that the principle is 'of fundamental importance in deterring plaintiffs from bringing and defendants from defending actions which they are likely to lose'. This does not mean that the principle only applies where a party has acted unreasonably in litigating. Were that the case awarding costs would involve an inquiry that might be as substantial as the litigation itself. The averment by the underwriters that their arguments in resisting the claim were 'legitimate' is not only tendentious but also irrelevant. Whether, from the viewpoint of the costs order, a litigant was justified in contesting the litigation is normally to be judged simply from the result.

g In this litigation the underwriters were the defendants in all but name. By reason of the 1930 Act they were contingently liable to the plaintiffs up to the policy limit of £1m. They took the decision to contest the litigation, and subsequently conducted the defence, in an attempt to avoid or reduce their liability to the plaintiffs. In these circumstances I agree with Mr Shepherd that this is a paradigm case for the exercise of the court's discretion under s 51 to make a costs order against a non-party.

h There is one additional feature in this case which reinforces the merits of the plaintiffs' application. Because the plaintiffs have been held entitled to damages which exceeded the policy limit of £1m, they have been unable to enforce the award of interest on those damages. They have received no compensation for being kept out of their money during the three years that elapsed before judgment was given in the action. During that period the insurers have enjoyed the use of that money. In an ideal world, the court might have jurisdiction to award interest against the insurers to redress the balance, but it does not. As it is, the burden of having to pay the plaintiffs' costs will be off-set by the benefit of the use of £1m over three years.

Conversely that burden will have prevented the insurers from reaping a financial benefit from defending a claim on grounds which have proved to be without merit. This is a satisfactory result. a

By way of postscript I should recognise the fact that the plaintiffs, also, are litigants only in name. They have been indemnified by their insurers, who have conducted this litigation in the exercise of their rights of subrogation. This in no way undermines the judge's decision. Had the plaintiffs' claim failed I have little doubt that their insurers would have discharged the plaintiffs' liability under the costs order that would have resulted in favour of the defendant. Had they not done so, it would have been appropriate to make an order under s 51 requiring them to pay the defendant's costs. What has been sauce for the goose would have been sauce for the gander. b

For the reasons that I have given I would dismiss this appeal. c

**WALLER LJ.** I agree.

**MUMMERY LJ.** I also agree.

*Appeal dismissed. Leave to appeal to the House of Lords refused.* d

L I Zysman Esq Barrister.

## *a* Dilieto v Ealing London Borough Council

QUEEN'S BENCH DIVISION

ROSE LJ AND SULLIVAN J

2 APRIL 1998

*b* *Town and country planning – Breach of condition notice – Validity – Challenge to validity – Criminal proceedings for failure to comply with breach of condition notice – Whether defendant entitled to challenge validity of notice and validity of planning condition in criminal proceedings – Town and Country Planning Act 1990, ss 171B, 187A.*

*c* In July 1964 planning permission was granted for the change of use of a studio to use as a warehouse for storage, subject to the condition 'that the yard area be maintained clear at all times to the satisfaction of the local planning authority'. In August 1994, following complaints by neighbours, one of the respondent council's planning officers visited the premises and found that the yard was being used by the appellant for the parking and storage of ice-cream vans in breach of the condition. In April 1995 the council served a breach of condition notice on the appellant under s 187A<sup>a</sup> of the Town and Country Planning Act 1990 requiring him, within 60 days, to cease the use of the yard for the storage and operation of ice-cream vans and to remove any vans parked there. The appellant failed to comply with the notice, and in October 1995 the council laid an information against him alleging a breach of the notice, contrary to s 187A(9) of the 1990 Act. At the trial in October 1997 the appellant sought to challenge the validity of the notice on the grounds (i) that it was out of time under s 171B(3)<sup>b</sup> of the Act and (ii) that the planning condition was so vague and imprecise as to be a nullity. The justices held that the appellant was not entitled to challenge the validity of the breach of condition notice or of the planning condition and convicted him of the offence charged. The appellant appealed.

*g* **Held** – On the true construction of s 187A of the 1990 Act, a 'breach of condition notice' meant a breach of condition notice which had been served within the time limits prescribed by s 171B of the Act. Accordingly, having regard to the fact that there was no right of appeal against such notices to the Secretary of State and hardship would be caused by requiring all challenges to them to be made by way of judicial review, a defendant charged with breaching such a notice was entitled by way of defence in criminal proceedings before a magistrates' court to challenge the validity of the notice on the ground that it was out of time under s 171B(3). Furthermore, he was also entitled by way of defence in such proceedings to challenge the lawfulness of the planning condition. In the instant case, however, the planning condition was not so uncertain as to be unlawful. The appeal would, therefore, be allowed and the case remitted for rehearing (see p 886 *j*, p 897 *d* to p 898 *a j* to p 899 *a g* and p 900 *a*, post).

*j* *R v Wicks* [1997] 2 All ER 801 considered.

*a* Section 187A, so far as material, is set out at p 888 *j* to p 889 *d*, post

*b* Section 171B, so far as material, is set out at p 887 *h* to p 888 *a*, post



**Notes**

For breach of condition notices, see 46 *Halsbury's Laws* (4th edn reissue) para 682. a

For the Town and Country Planning Act 1990, ss 171B, 187A, see 46 *Halsbury's Statutes* (4th edn) (1998 reissue) 673, 696.

**Cases referred to in judgments**

*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223, CA. b

*Bugg v DPP*, *DPP v Percy* [1993] 2 All ER 815, [1993] QB 473, [1993] 2 WLR 628, DC.

*Miller-Mead v Minister of Housing and Local Government* [1963] 1 All ER 459, [1963] 2 QB 196, [1963] 2 WLR 225, CA. c

*Newbury DC v Secretary of State for the Environment* [1980] 1 All ER 731, [1981] AC 578, [1980] 2 WLR 379, HL.

*R v Jenner* [1983] 2 All ER 46, [1983] 1 WLR 873, CA.

*R v Wicks* [1997] 2 All ER 801, [1998] AC 92, [1997] 2 WLR 876, HL.

**Cases also cited or referred to in skeleton arguments** d

*DPP v Head* [1958] 1 All ER 679, [1959] AC 83, HL.

*Quietlynn Ltd v Plymouth City Council* [1987] 2 All ER 1040, [1988] QB 114, DC.

*R v Crown Court at Reading, ex p Hutchinson*, *R v Devizes Justices, ex p Lee* [1988] 1 All ER 333, [1988] QB 384, DC.

*Scarborough BC v Adams* (1983) 47 P & CR 133. e

*Wandsworth London BC v Winder* [1984] 3 All ER 976, [1985] AC 461, HL.

**Case stated**

Alfonso Dilieto appealed by way of case stated by the Ealing Justices from their adjudication on 22 October 1997, whereby they convicted the appellant on an information preferred by the respondents, Ealing London Borough Council, of breaching the terms of a breach of condition notice served by the council on 21 April 1995, contrary to s 187A(9) of the Town and Country Planning Act 1990. The questions of law for the opinion of the High Court are set out at p 890 j to p 891 d, post. The facts are set out in the judgment of Sullivan J. f

*William Hansen* (instructed by *Keith Hall Juviler & Co*, Greenford) for the appellant g

*Andrew Baughan* (instructed by *Richard Polson*) for the respondents.

**SULLIVAN J** (delivering the first judgment at the invitation of Rose LJ). This is an appeal by case stated against a decision of the Ealing justices convicting the appellant on 22 October 1997 of breaching the terms of a 'breach of condition notice' served by the respondent council on 21 April 1995, contrary to s 187A(9) of the Town and Country Planning Act 1990. The case raises, for the first time, the extent to which the validity of a breach of condition notice may be challenged in a prosecution before the magistrates. h

The background facts are as follows. On 20 July 1964 planning permission was granted under the Town and Country Planning Act 1962 for the change of use of a studio at what is now called 55A Hessel Road, Ealing, W13, to use as a warehouse. The premises comprise a single storey warehouse building and an adjoining yard, and are located within a residential area. Planning j

a permission was granted subject to three conditions, the third of which was 'that the yard area be maintained clear at all times to the satisfaction of the local planning authority'. The reason given for the imposition of this condition was 'to ensure that a suitable standard of visual amenity is maintained in this primarily residential area'. Following complaints by neighbours, one of the council's planning officers visited the premises in August 1994 and found that the yard was being used for the parking and storage of ice-cream vans. She wrote to the appellant on 15 September 1994 saying that this was in breach of condition three and that his use of the yard was unauthorised. There was no response to the letter and so the council served a breach of condition notice upon the appellant on 21 April 1995 requiring him, within 60 days, to cease to use the yard for the storage and operation of ice-cream vans and to remove any vans that were parked there. He did not comply with the notice, because on 15 August 1995 the yard was inspected and found to be still occupied by ice-cream vans, and so the council laid an information on 26 October 1995 alleging a breach of the notice. Some two years later, on 22 October 1997, the appellant came before the magistrates, was convicted, fined £300 and ordered to pay £900 costs.

d Before turning to the submissions made before the magistrates, it is convenient to set out the statutory context within which a breach of condition notice may be served. The enforcement provisions in the 1990 Act as originally enacted were substantially amended by the Planning and Compensation Act 1991, which introduced (*inter alia*) the power to serve a breach of condition notice.

e Part VII of the Act, which deals with enforcement, begins with s 171A, which defines certain expressions used in connection with enforcement as follows:

f '(1) For the purposes of this Act—(a) carrying out development without the required planning permission; or (b) failing to comply with any condition or limitation subject to which planning permission has been granted, constitutes a breach of planning control.

g (2) For the purposes of this Act—(a) the issue of an enforcement notice (defined in section 172); or (b) the service of a breach of condition notice (defined in section 187 A), constitutes taking enforcement action.

(3) In this Part "planning permission" includes permission under Part III of the 1947 Act, of the 1962 Act, or of the 1971 Act.'

h Section 171B deals with time limits. Subsections (1) and (2) prescribe a four-year period for operational development and a change of use to a single dwelling house, respectively. Subsections (3) and (4) provide:

j '(3) In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

(4) The preceding subsections do not prevent—(a) the service of a breach of condition notice in respect of any breach of planning control if an enforcement notice in respect of the breach is an effect; or (b) taking further enforcement action in respect of any breach of planning control if, during the period of four years ending with that action being taken, the

local planning authority have taken or purported to take enforcement action in respect of that breach.'

Not only may no enforcement action be taken after the end of ten-year period, but s 191(3) provides:

'For the purposes of this Act any matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful at any time if—(a) the time for taking enforcement action in respect of the failure has then expired; and (b) it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force.'

If the use is lawful, the land owner may apply for a certificate to that effect under s 191. Section 172 gives the local planning authority power to issue an enforcement notice where it appears to them there has been a breach of planning control.

Pausing there, it is clear that failing to comply with condition three in the 1964 planning permission was a breach of planning control in respect of which an enforcement notice could have been issued, but that such enforcement action could not be taken if the condition had been breached for ten years or more. Indeed, if the use of the yard for parking and storage had taken place in breach of the condition for ten years or more it would be lawful for the purposes of the Act by virtue of s 191. Section 174 confers a right of appeal to the Secretary of State for the Environment against an enforcement notice upon the landowner and occupiers. The grounds on which appeal may be made under s 174(2) are very wide-ranging. An appellant against an enforcement notice may argue, for example, that there was no breach of planning control, that if there has been a breach of planning control, planning permission ought to be granted or, if all else fails, that he ought to have more time to comply with the requirements of the enforcement notice. Specifically, by s 174(2)(d) he may argue—

'that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters.'

If the Secretary of State errs in law in reaching a decision on the appeal, the appellant may, with leave, appeal to the High Court under s 289 of the Act. If there is no appeal to the Secretary of State, or if the Secretary of State upholds the enforcement notice on appeal, any breach of its requirements is a criminal offence by virtue of s 179 of the Act. In view of the wide-ranging right of appeal to the Secretary of State which is conferred by s 174, it is no surprise to find that s 285(1) of the Act provides:

'... the validity of an enforcement notice shall not, except by way of an appeal under Part VII, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought.'

Turning from enforcement notices to breach of condition notices, s 187A provides:

'(1) This section applies where planning permission for carrying out any development of land has been granted subject to conditions.



a (2) The local planning authority may, if any of the conditions is not complied with, serve a notice (in this Act referred to as a "breach of condition notice") on—(a) any person who is carrying out or has carried out the development; or (b) any person having control of the land, requiring him to secure compliance with such of the conditions as are specified in the notice ...

b (8) If, at any time after the end of the period allowed for compliance with the notice—(a) any of the conditions specified in the notice is not complied with; and (b) the steps specified in the notice have not been taken or, as the case may be the activities specified in the notice have not ceased, the person is in breach of the notice.

c (9) If the person responsible is in breach of the notice he shall be guilty of an offence ...

d (11) It shall be a defence for a person charged with an offence under subsection (9) to prove—(a) that he took all reasonable measures to secure compliance with the conditions specified in the notice; or (b) where the notice was served on him by virtue of subsection (2)(b), that he no longer had control of the land.'

e Those two defences provided by sub-s (11) are similar to those afforded by s 179(3) and (4) to those who are charged with breach of an enforcement notice. But, unlike s 174, there is no right of appeal to the Secretary of State or any other body against the service of a breach of condition notice. By contrast with s 285(1), s 286(2) merely provides that the validity of a breach of condition notice shall not be challenged on the ground that it ought to have been issued by the county council, rather than by the district council, or vice versa.

f Against that statutory background, the appellant wished to challenge the validity of the breach of condition notice in this case on two grounds. First, that it was out of time under s 171B(3) and secondly, that condition 3 was so vague and imprecise as to be a nullity. For those two reasons, it was submitted that it was *Wednesbury* unreasonable (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223) for the council to serve the notice.

g To explain the second ground of challenge, whilst s 70 of the Act (like its predecessors in the 1971 and 1962 Acts) provides that the local planning authority in granting planning permission may impose such conditions 'as they think fit', the courts have said that the local planning authority's power to impose conditions is not unfettered.

h In *Newbury DC v Secretary of State for the Environment* [1980] 1 All ER 731, [1981] AC 578 the House of Lords decided that, in order to be valid, a planning condition must satisfy three tests; it must have a planning purpose, it must relate to the permitted development to which it was annexed and thirdly, and relevant for present purposes, it must be 'reasonable' in the *Wednesbury* sense, that is to say, not so clearly unreasonable that it could not have been imposed  
j by any reasonable local planning authority: see the speeches of Lord Fraser and Lord Scarman ([1980] 1 All ER 731 at 746, 754, [1981] AC 578 at 608, 618) respectively.

The most recent advice on the imposition of conditions, Department of the Environment Circular 11/95 (The use of conditions in planning permissions), states in para 31 of the annex to the circular:

'*Vague Conditions* 31. A condition which is not sufficiently precise for the applicant to be able to ascertain what must be done to comply with it is *ultra vires* and cannot be imposed. Vague expressions which sometimes appear in conditions, for example such as "keep the buildings in a tidy state", or "so as not to cause annoyance to nearby residents", give occupants little idea of what is expected of them. Conditions should not be made subject to qualifications such as "if called upon to do so", or "if the growth of traffic makes it desirable", which do not provide any objective and certain criteria by which the applicant can ascertain what is required.'

The respondent council argued that whilst the magistrates could decide whether the notice was a nullity in the sense of being invalid on its face, they could not consider whether it was invalid on the two grounds raised by the appellant. They based that submission on the decision of the House of Lords in *R v Wicks* [1997] 2 All ER 801, [1998] AC 92.

The council submitted that the defences to a prosecution for breach of the notice were limited to those in s 187A(11) which I have read, and that the ten-year limitation period prescribed by s 171B(3) was not an element of the offence requiring proof by the prosecution. It was further submitted that condition 3 was not so uncertain or unintelligible as to be invalid.

On behalf of the appellant it was sought to distinguish the case of *Wicks* on the basis that it related to an enforcement notice, and attention was drawn to the views of the learned editor of the *Encyclopaedia of Planning Law and Practice* (loose leaf edn) vol 2, para 187A.12-14 p3684/21.

The magistrates accepted the respondents' submissions and were of the opinion:

'(a) The decision in *R v Wicks* was sufficiently analogous to the matter before us, that any arguments as to validity (rather than nullity) of the breach of condition notice was a matter we were not competent to investigate and determine.'

They did not feel that the opinions of the learned editors of the *Encyclopaedia of Planning Law and Practice* were persuasive. They went on:

'The ten year limitation period in s 171(B)(3) of the Town and Country Planning Act 1990 is not an element of the offence in s 187(A)(9). Accordingly any argument as to the limitation period is a matter as to the validity of the breach of condition notice and therefore not a matter following the decision in *R v Wicks* we were competent to consider and determine. We were competent to hear arguments as to whether the notice in question was a nullity. Condition three of the planning permission granted on 20 July 1964 was clear and unambiguous and therefore we were of the opinion that the notice was not a nullity and accordingly we found the matter proved.'

They then posed six questions for this court:

'1. Whether we were right to hold that the appellant was not entitled to require the prosecution to prove that enforcement action took place within the relevant time limit and the appellant was not entitled to prove

a as a defence that enforcement action had not taken place within the specified time limit.

2. Whether we were right to hold that the appellant was not entitled to challenge the validity of the breach of condition notice and/or the planning condition which formed the basis of the proceedings.

b 3. If not, whether we ought to have held that the planning condition was invalid, on the grounds that it was not sufficiently precise and/or lacked any objective and certain criteria by which the appellant could ascertain what was required of him.

4. If so, whether we ought to have held that the breach of condition notice was also invalid.

c 5. Whether we were right to hold that the appellant was not entitled to challenge the decision of the Local Authority to serve a breach of condition notice on the grounds that in the circumstances, it was *Wednesbury* unreasonable to take enforcement action.

d 6. Whether we ought to have held that the planning condition which formed the basis of the proceedings was a nullity and/or *ultra vires* on the grounds that it was unreasonable and/or not sufficiently precise and/or lacked any objective and certain criteria by which the appellant could ascertain what was required of him.'

e Before this court Mr Hansen for the appellant submits that a defendant charged with breaching a breach of condition notice is entitled to argue the ten-year limitation point in his defence. There is nothing in the Act from preventing him from doing so and judicial review would be an inappropriate procedure for resolving the issues of fact which inevitably arise in arguing such a limitation point. He refers the court to *R v Jenner* [1983] 2 All ER 46, [1983] 1 WLR 873. That case was concerned with a stop notice. The defendant f wished to argue that a stop notice was out of time because the activity had been carried on for more than 12 months before it was served. The Crown Court ruled that he could not raise that as a defence. Watkins LJ said ([1983] 2 All ER 46 at 49–50, [1983] 1 WLR 873 at 877):

g 'How then is a person who receives a stop notice to defend himself against the effects of it? Is he to be utterly powerless in this respect, or is he entitled to go to the magistrates' court or a Crown Court ... to raise the defence of not in fact being in contravention of the prohibition set out in a stop notice? ... Counsel for the local planning authority nevertheless submitted that we have to apply, in examining the right of this appellant h to defend himself, the principles pertaining to challenges to orders (such as stop notices, enforcement orders and the like) in civil proceedings. We should therefore take cognisance of various pronouncements which have been made in the Court of Appeal and the House of Lords in a number of cases on the permissible manner in which challenges may be made to the validity of notices and orders of that kind. We feel it unnecessary in this i judgment to refer either to the cases in which those pronouncements appear or to the circumstances which gave rise to them. Needless to say, they are wholly different from those which confront this court. So far we know, this is the first time that a point of this kind has been the subject of an appeal. It matters not, so counsel for the local planning authority says, that the proceedings taken against the appellant were of a criminal nature,



the notice is sacrosanct. It is unchallengeable, except in a conventional way. The only conventional way available to the appellant here was to challenge the validity of the notice by judicial review in the Divisional Court, pursuant to the leave given. We do not agree. The process of judicial review, which rarely allows of the reception of oral evidence, is not suited to resolving the issues of fact involved in deciding whether activity said to be prohibited by it is caught by s 90. These issues could not possibly be decided on the contents of affidavits which is the form of evidence usually received by the Divisional Court.' a b

Mr Hansen also referred to the *Encyclopaedia of Planning Law and Practice* vol 2, para 171B.11, p 3598/1, which states: 'failure to observe the limitation period must necessarily provide an absolute defence to the offence to the offence under s 187A(9).' Mr Hansen concedes that the onus of establishing that the condition in question has been breached for 10 years or more lies on the defendant, who must establish this exception on the civil standard of proof: s 101 of the Magistrates' Courts Act 1980. c

As to the second ground, he submits that breach of condition notice in s 187A means a valid breach of condition notice, and there can be a valid breach of condition notice only where the condition which is alleged to have been breached is itself valid. In this context he refers to the *Encyclopaedia of Planning Law and Practice* vol 2, para 187A.07, p 3684/19. He submits that an appellant must be able to challenge the validity of the underlying condition if the basis of the breach of condition notice is that he is not complying with the condition. He cites Wade and Forsyth *Administrative Law* (7th edn, 1994) p 321. Condition 3 is so uncertain as to be *Wednesbury* unreasonable and therefore unlawful. *R v Wicks*, he submits, is distinguishable because it is an enforcement notice case. d e

Mr Baughan, for the respondents, submits that the defences available to a defendant prosecuted under s 187A are limited to those in sub-s (11). Section 171B(3) whilst it refers to enforcement action is not mentioned in s 187A and does not provide a defence to a prosecution under it. He submits that *R v Jenner* must be read in the light of *R v Wicks*. Looking at the latter authority, he submits that a breach of condition notice in s 187A(9) means a notice which complies with the formal requirements of s 187A and has not been quashed by judicial review. He says that the appellant's remedy in this case would have been to challenge the breach of condition notice by judicial review. f g

As to the second ground, he submits that condition 3 is not uncertain. The additional words 'to the satisfaction of the planning authority' are mere surplusage. They are there, if anything, to emphasise that the planning authority may enforce against a breach of the planning condition, but the basic requirement is to keep the yard clear at all times and that was not done. h

I find it unnecessary to consider the numerous authorities to which the magistrates were referred, some of which have been analysed in the submissions before this court, because all were considered by the House of Lords in *R v Wicks*. Moreover, none was concerned with a breach of condition notice, nor with the exception of *R v Wicks*, were they concerned with the legislative context within Pt VII of the Act as amended following the 1991 Act. It is necessary to look at the facts of *R v Wicks* in a little more detail. Mr Wicks had appealed to the Secretary of State against the service of an enforcement notice. His appeal was dismissed, but he failed to comply with the i j

a enforcement notice. When he was prosecuted for non-compliance, he elected trial on indictment and wished to base his not guilty plea on the ground that the local authority's decision to serve the enforcement notice was ultra vires because it was taken in bad faith and for improper motives. The judge ruled that such matters should have been raised by way of judicial review and the enforcement notice must be treated as valid. Mr Wicks thereupon changed his  
b plea to guilty, was convicted and appealed against his conviction. The Court of Appeal, Criminal Division dismissed his appeal and the House of Lords dismissed the appeal from the Court of Appeal, Criminal Division.

Lord Hoffmann (with whom the remainder of their Lordships agreed) said that the question was one of construction ([1997] 2 All ER 801 at 817, [1998] AC 92 at 119):

c 'What is meant by "enforcement notice" in s 179(1) of the 1990 Act? Does it mean a notice which is not liable to be quashed on any of the standard grounds in public law? Or does it mean a notice issued by the planning authority which complies with the formal requirements of the  
d Act and has not actually been quashed on appeal or judicial review? The words "enforcement notice" are in my view capable of either meaning. The correct one must be ascertained from the scheme of the Act and the public law background against which it was passed. In my view, when one examines Pt VII of the 1990 Act, the scheme of enforcement of  
e planning control which it exhibits and the history of its provisions, one is driven to the conclusion that "enforcement notice" means a notice issued by the planning authority which is formally valid and has not been quashed.'

f As I have indicated, Mr Baughan, for the respondents, submits that such an approach is equally applicable to a breach of a condition notice. I accept that there is much to be said for that submission, since both enforcement notices and breach of condition notices are to be found in the same part of the same Act, but I consider that it is too simplistic an approach, for the following reasons. First, in considering the question of construction, s 187A must not be  
g considered in isolation, but in context of the other enforcement provisions in Pt VII of the Act. *R v Wicks* was decided against the background of the elaborate provisions that are made by s 174 for appellants who wish to challenge enforcement notices to appeal to the Secretary of State for the Environment. No such provision is made in the case of breach of condition  
h notices.

The 1991 Act, in addition to introducing breach of condition notices, also introduced the ten-year limitation period in s 171B, which applies to both enforcement notices and breach of condition notices. Parliament having provided that 'no enforcement action', by issuing an enforcement notice or  
j serving a breach of condition notice, shall be taken after the end of the ten-year period cannot, in my view, be taken to have intended that the landowner/occupier who wishes to allege that he has been served with a breach of condition notice after the expiration of the ten-year period should have no avenue of appeal whatsoever. That would enable a local planning authority which was uncertain as to whether an enforcement notice in a breach of condition case would be out of time, to side-step s 171B(3) by the simple

expedient of serving a breach of condition notice. I do not believe that could have been Parliament's intention in enacting s 187A.

Mr Baughan does not submit that that was Parliament's intention. He submits that the recipient of a breach of condition notice who wishes to challenge it should proceed by way of judicial review. In my view, it would be surprising if that was Parliament's intention. Deciding whether or not premises had been used in breach of a condition for ten years or more will usually involve a detailed examination of oral and written evidence. In enforcement notice appeals witnesses give their evidence, are cross-examined on oath, maps, aerial photographs, old trade directories, rating records, electoral rolls, etc are all minutely examined. The magistrates are much better equipped to perform that fact-finding task than the High Court in judicial review proceedings. Unlike certain questions which arise in enforcement notice proceedings, such as whether planning permission should be granted or whether a condition should be discharged on the merits, the fact-finding task requires no particular planning expertise.

Sections 174 and 285(1) ensure that almost every aspect of the merits of a decision to serve an enforcement notice can now be raised before the Secretary of State, and only before the Secretary of State. By way of contrast the ambit of s 286(2) which applies to a breach of condition notices, is much more limited.

In *R v Wicks* Lord Nicholls (with whom the remainder of their Lordships also agreed) considered whether the argument that an enforcement notice was motivated by immaterial considerations and served for an improper purpose was 'outside the boundary of the issues which can be raised in and decided by the criminal court' (see [1997] 2 All ER 801 at 804, [1998] AC 92 at 104). He observed that there was confusion over where, as a matter of general principle the boundary should be drawn. He went on to say ([1997] 2 All ER 801 at 805, [1998] AC 92 at 106):

'Against this background one turns to seek the general principle or principles which underlie the boundary and the need for it. The terms of the enabling legislation will always need to be considered, and I shall come to this important aspect presently. Leaving that on one side for the moment, what are the reasons why some challenges to the lawfulness of an impugned order can only be raised in judicial review proceedings? Prima facie one would expect, surely, that in the criminal proceedings an accused should be able to challenge, on any ground, the lawfulness of an order the breach of which constitutes his alleged criminal offence. That seems the proper starting point.'

I pause there to observe that that is similar to the starting point which was adopted by Watkins LJ in *R v Jenner*.

An entirely different starting point had been adopted by Woolf LJ (as he then was) in *Bugg v DPP*, *DPP v Percy* [1993] 2 All ER 815 at 827, [1993] QB 473 at 500. He had said:

'So far as procedural invalidity is concerned, the proper approach is to regard byelaws and other subordinate legislation as valid until they are set aside by the appropriate court with the jurisdiction to do so. A member of the public is required to comply with byelaws even if he believes they have a procedural defect unless and until the law is held to be invalid by a



a court of competent jurisdiction. If before this happens he contravenes the byelaw, he commits an offence and can be punished. Where the law is substantively invalid, the position is different. No citizen is required to comply with a law which is bad on its face. If the citizen is satisfied that that is the situation, he is entitled to ignore the law.'

b Lord Nicholls ([1997] 2 All ER 801 at 807–808, [1998] AC 92 at 108) said in respect of Woolf LJ's reasoning:

c 'This reasoning, with the consequences just mentioned, calls for the most careful and rigorous examination. At present I am not persuaded of its soundness. I am not persuaded that, *for the purpose of affording a defence to a criminal charge*, there is a distinction as suggested in *Bugg* or, if there is, that the boundary line is as suggested in that case, with the availability of a defence depending, for instance, on whether the invalidity is patent as distinct from latent.' (Lord Nicholls' emphasis.)

d Lord Hoffmann ([1997] 2 All ER 801 at 815, [1998] AC 92 at 116–117) agreed with this. Thus, it would appear that the approach in *Bugg*'s case is not the proper starting point. Lord Nicholls ([1997] 2 All ER 801 at 808, [1998] AC 92 at 109) said it was unnecessary to resolve the far-reaching questions raised by *Bugg*'s case:

e 'It is unnecessary because the general principles discussed so far must always take effect subject to any contrary indication in the relevant legislation. With some byelaws, for instance, the enabling legislation is likely to give no guidance on the forum in which challenges to the lawfulness of the byelaw may be made. Then the general principles will guide. In other cases, of which the present is an example the legislation will itself afford the necessary guidance. The criminal offence of not taking steps required by an enforcement notice, created by s 179 of the Town and Country Planning Act 1990, is embedded in an elaborate statutory code, with detailed provisions regarding appeals. For the reasons given by my noble and learned friend, Lord Hoffmann, I agree with him that as a matter of statutory interpretation "enforcement notice" f in s 179(1) means a notice issued by the authority which is formally valid and has not been set aside. The appellant's contention, that the decision to issue the enforcement notice was influenced by bias and improper motives on the part of a councillor, is not a contention he can raise before the criminal court.'

h In his speech Lord Hoffmann indicated that generalisation was not possible:

i 'The question must depend entirely upon the construction of the statute under which the prosecution is brought. The statute may require the prosecution to prove that the act in question is not open to challenge on any ground available in public law, or it may be a defence to show that it is. In such a case, the justices will have to rule upon the validity of the act. On the other hand, the statute may upon its true construction merely require an act which appears formally valid and has not been quashed by judicial review. In such a case, nothing but the formal validity of the act will be relevant to an issue before the justices. It is in my view impossible to construct a general theory of the ultra vires defence which applies to

every statutory power, whatever the terms and policy of the statute.' (See [1997] 2 All ER 801 at 815, [1998] AC 92 at 117.)

He then went on to consider the question raised by Mr Wicks' challenge ([1997] 2 All ER 801 at 817, [1998] AC 92 at 119):

'In my view the question in this case is likewise one of construction. What is meant by "enforcement notice" in s 179(1) of the 1990 Act? Does it mean a notice which is not liable to be quashed on any of the standard grounds in public law? Or does it mean a notice issued by the planning authority which complies with the formal requirements of the Act and has not actually been quashed on appeal or judicial review? The words "enforcement notice" are in my view capable of either meaning. The correct one must be ascertained from the scheme of the Act and the public law background against which it was passed. In my view, when one examines Pt VII of the Town and Country Planning Act 1990, the scheme of enforcement of planning control which it exhibits and the history of its provisions, one is driven to the conclusion "enforcement notice" means a notice issued by the planning authority which is formally valid and has not been quashed.'

He then set out the history of enforcement notice provisions, and summarised the effect of that history in this way ([1997] 2 All ER 801 at 818, [1998] AC 92 at 119):

'The history shows that over the years there has been a consistent policy of progressively restricting the kind of issues which a person served with an enforcement notice can raise when he is prosecuted for failing to comply. The reasons for this policy of restriction are clear: they relate, first, to the unsuitability of the subject matter for decision by the criminal court; secondly, to the need for the validity of the notice to be conclusively determined quickly enough to enable planning control to be effective and to allow the timetable for service of such notices in the Act to be operated; and thirdly, to the fact that the criminal proceedings are part of the mechanism for securing the enforcement of planning control in the public interest.'

Having referred to the 'residual grounds' which were outside s 174(2) and thus not caught by s 285 (1), he said:

'Questions of whether the planning authority was motivated by mala fides or bias or whether the decision to issue the notice was based upon irrelevant or improper grounds are quite unsuitable for decision by a planning inspector. The question then is whether Parliament regarded them as suitable for decision by a criminal court.' (See [1997] 2 All ER 801 at 818, [1998] AC 92 at 120.)

Taking into account the complexity and sophistication of law relating to those residual grounds, he concluded that they were not suitable for decision by a criminal court. He then referred to the question of timing, making the point that challenges to the validity of the enforcement notice should be decided as soon possible after it has been served. It will be noted that this observation was in the context of any prosecution having to be deferred until after an

a appeal to the Secretary of State, and thereafter to the High Court had been concluded.

Thirdly, he referred to the purpose of the provisions for the enforcement by criminal proceedings. In conclusion he said ([1997] 2 All ER 801 at 820, [1998] AC 92 at 122):

b 'I do not think that in practice hardship will be caused by requiring the residual grounds to be raised in judicial review proceedings. The statutory grounds of appeal are so wide that they include every aspect of the merits of the decision to serve an enforcement notice. The residual grounds will in practice be needed only for the rare case in which enforcement is objectively justifiable but the decision that service of the notices is "expedient" ... is vitiated by some impropriety ... All these reasons lead me to conclude that "enforcement notice" in s 179(1) means a notice issued by a planning authority which on its face complies with the requirements of the Act and has not been quashed on appeal or by judicial review. There was no dispute that Mr Wicks had failed to comply with such an enforcement notice and he was therefore guilty of the offence. d The matters which he proposed to raise at his trial were irrelevant.'

e I realise that one should not treat the various considerations mentioned in Lord Hoffmann's speech as though they were a set of criteria which are set out in an enactment, but it may nevertheless be helpful to apply them to the facts of this case.

First, in the case of breach of condition notices, there has been no progressive transfer of the right to appeal away from the magistrates to the Secretary of State.

f Second, the Act provides no comprehensive avenue of appeal against a breach of condition notice leaving only residual grounds for challenge by way of judicial review.

g Third, whilst an allegation of bad faith and improper purpose, or taking into consideration irrelevant considerations, is more appropriate for challenge by way of judicial review because of the complexity and sophistication of the relevant law, that is not true of an allegation that a breach of condition notice is out of time, for the reasons that I have set out above.

Fourth, so far as timing is concerned, since there is no right of appeal to the Secretary of State, there is no reason why a prosecution for a breach of condition notice should be delayed. Interposing a challenge by way of judicial review before any prosecution takes place may well lead to delay.

h Fifth, whilst the purposes of the provisions for enforcement of enforcement notices and breach of condition notices by criminal proceedings are the same, hardship will be caused by requiring all challenges to breach of condition notices to be made by way of judicial review. One is not concerned here with 'residual grounds' which would be needed only for the 'rare case', but with basic defences to a breach of condition notice which a defendant should, in my view, be able to advance as of right and not subject to the discretion of the High Court in deciding whether or not to grant leave for judicial review. If the appellant had here wished to challenge the decision to serve the breach of condition notice on the basis that it was taken in bad faith or for improper motives, or was based on irrelevant considerations, then I would agree that such allegations are inappropriate in a criminal court, and should be raised by j



way of judicial review. But it does not follow that Parliament intended that any challenge to a breach of condition notice should be made by way of judicial review. In my judgment a breach of condition notice in s 187A means a breach of condition notice which has been served within the time limits prescribed by s 171B. The fact that the time limit is prescribed in a separate section (in s 90 of the Town and Country Planning Act 1971, relating to stop notices, which was considered by the Court of Appeal in *R v Jenner*) is of no significance. It is conceded that if the defence is raised, the onus of establishing the exception will lie upon the defendant: see s 101 of the 1980 Act.

Some might consider it unsatisfactory that some challenges to a breach of condition notice may be made before magistrates whilst other challenges must proceed by way of judicial review, but that position is no different in principle from that which obtains in the case of enforcement notices. Most grounds of challenge go to the Secretary of State, other residual grounds must be advanced by way of judicial review.

*R v Wicks* demonstrates that it may not be possible to define 'the boundary' (to use Lord Nicholls' words ([1997] 2 All ER 801 at 807–808, [1998] AC 92 at 108)) by reference to any all embracing principle. As Lord Nicholls said ([1997] 2 All ER 801 at 806, [1998] AC 92 at 107):

'But hard and fast rules should have no place when deciding questions of practical convenience. There is a place for guidelines, and for prima facie rules, or residual rules. But circumstances in individual cases vary infinitely. If convenience is the governing factor, then at some point in the system there should be space for a discretionary power, to be exercised having regard to all the circumstances. For instance, not all questions of invalidity, whether substantive or procedural, are sophisticated and complex. And sometimes a short point of disputed fact, concerning what happened when a local authority was deciding to make the impugned order, might be determined as easily, or better, in a criminal court than in judicial review proceedings in the Divisional Court.'

Thus far, I have considered the appellant's challenge to the breach of condition notice on the basis that it was out of time. What about his claim that condition 3 was so vague and imprecise as to be a nullity and hence to invalidate the notice? Such a contention could be advanced without any difficulty in judicial review proceedings, but if a defendant is charged with failing to comply with a notice alleging a breach of condition, it would require very clear words of exclusion to persuade me that he could not say to the magistrates: 'but look at the condition, it is unlawful.' No such words of exclusion are to be found in the Act. Such an argument can be advanced by simply looking at the face of the planning permission and construing the condition. It is wholly different from an allegation that service of a notice, which is valid on its face, was motivated by bad faith or improper purpose. It is also different from an allegation that a condition is undesirable on the planning merits, which is plainly not a matter for magistrates. Mr Baughan accepts that a defendant, in the position of this appellant, was entitled to challenge the lawfulness of the condition.

For the reasons that I have just given, I consider that the concession was correctly made. It follows that the appellant was entitled to raise his second

a argument before the magistrates. Whether it is a good argument, as a matter of law, is another matter, and one which this court is entitled to consider.

It is important, in my view, not to confuse a condition which it is undesirable to impose because it is imprecise, with a condition which is so ambiguous and uncertain that the court is entitled to strike it down as unlawful, on the basis that it could not have been imposed by any reasonable local planning authority: see *Miller-Mead v Minister of Housing and Local Government* [1963] 1 All ER 459 at 470, [1963] 2 QB 196 at 226 per Upjohn LJ. The fact that a condition does not comply with the Secretary of State's guidance in the annex to circular 11/95 means that he would not be minded to uphold it on appeal, if it were proposed today, but it does not mean that its imposition in 1964 was so unreasonable as to be unlawful. As the learned editors of the *Encyclopaedia of Planning Law and Practice* vol 2, para 72.11, p 3301 observe:

b

c

d 'A condition may be unreasonable in the sense of imposing an unnecessary burden when measured against the planning advantages flowing from it, without being manifestly unreasonable in the *Newbury* sense.'

Many older conditions do not comply with current guidance. They may well be unsatisfactory by modern standards and difficult to enforce, but that does not mean they are so unreasonable as to be unlawful.

e Turning to condition 3, it is true that the words 'to the satisfaction of the local planning authority' introduce a degree of uncertainty. In some circumstances an occupier might not know what would satisfy the local planning authority. But the basic obligation is to keep the yard 'clear at all times'. The additional words 'to the satisfaction of the local planning authority' have the effect of allowing a degree of latitude, but on the facts here, the yard was not being kept clear at all. Ice cream vans were being parked and stored upon it. Whatever latitude was allowed by the additional words, the condition was being broken. Even if there had been any doubt about that matter, it was resolved by the local planning authority's letter in September 1994: plainly they were not satisfied.

f

g I do not therefore accept, Mr Hansen's submission that condition 3 was so uncertain as to be unlawful. It would not be imposed today in the light of the advice in circular 11/95, but that is a different matter.

The proposition that the council was *Wednesbury* unreasonable to serve the notice would not have been appropriate for consideration by the magistrates if it had been raised as a free standing ground in its own right. Allegations of *Wednesbury* unreasonableness are pre-eminently appropriate for examination in judicial review proceedings. But in this case the *Wednesbury* allegation added nothing to the specific grounds that I have identified. It was being argued that it was unreasonable for the council to serve the notice because (i) it was out of time and (ii) it was founded on an unlawful condition.

h

j In my view, the appellant was entitled to raise both of those points before the magistrates and he did not have to pursue them by way of judicial review. Whilst the latter argument was not well founded, the case should be remitted to magistrates so they can consider the former argument having heard all the evidence. My answers to the questions posed would be in the case of questions 1, 2, 3, 4 and 6 No and, in the case of question five, Yes.

**ROSE LJ.** I agree. The appeal will therefore be allowed and the conviction, fine and the order for costs quashed. The case will be remitted to a differently constituted bench of justices at Ealing with a direction that the matter be reheard in accordance with the terms of the judgments of this court and, in particular, that the defendant's defence, challenging the validity of the breach of condition notice in relation to time, be heard.

*Appeal allowed.*

Dilys Tausz Barrister.



**Khazanchi and another v Faircharm  
Investments Ltd and others  
McLeod v Butterwick**

COURT OF APPEAL, CIVIL DIVISION  
STUART-SMITH, MORRITT AND WALLER LJJ  
17, 18, 19 FEBRUARY, 17 MARCH 1998

*Distress – Distress for rent – Bailiff in possession – ‘Walking possession’ – Tenants entering into a walking possession agreement entitling bailiff to remove goods at any time after specified date for payment – Arrears of rent not paid and bailiff attending at demised premises for purpose of removing goods – Whether bailiff entitled to use force to gain re-entry to premises.*

*Execution – Writ of fi fa – Seizure of goods – Sheriff taking walking possession – Sheriff unable to gain re-entry to debtor’s premises to take actual possession – Debtor not intending to forcibly exclude sheriff from premises – Whether sheriff entitled to use force to gain re-entry to premises.*

In the first case, the bailiff, seeking to distrain on behalf of the landlord in respect of arrears of rent, had entered premises with the consent of the tenants. At his request, the tenants entered into a walking possession agreement which entitled him to remove the goods at any time after the specified date for payment of the rent arrears. The arrears were not paid by the due date and the bailiff attended the premises for the purpose of removing the goods. Since the premises were locked and no one was inside, the bailiff, with assistance from a locksmith and removal men, gained entry and removed the goods. The premises were resecured on their departure with a new lock, the key to which was left with a caretaker. In proceedings brought by the tenants, the judge decided that the bailiff was entitled to act as he had and dismissed their claim for damages. The tenants appealed.

In the second case, the sheriff attended the plaintiff’s home with her consent for the purpose of executing a writ of fieri facias. He did not then remove any goods. The plaintiff refused to enter into a walking possession agreement and interpleader proceedings followed. Shortly after they were concluded, the sheriff, without prior notice, returned to the plaintiff’s home for the purpose of removing the goods for sale. The plaintiff, however, was at work and the house was locked. The sheriff, with the assistance of a locksmith and removal men, removed the lock and goods and resecured the premises, leaving a key to the new lock for the plaintiff. Thereafter, the plaintiff sued the sheriff for damages and sought an interlocutory injunction to restrain him from selling her goods or entering her home without her consent. Her application for an injunction was refused on the ground, *inter alia*, that the sheriff was entitled to act as he had. The plaintiff appealed.

**Held** – A bailiff distraining for rent or a sheriff executing a writ of fi fa was not entitled to re-enter a dwelling house by force except where, having gained entry peaceably, he was expelled by force or he had been deliberately excluded by the tenant; since neither the common law nor the Distress for Rent Act 1737

conferred on a bailiff any such power, and there was no express or implied power either under s 138 of the Supreme Court Act 1981<sup>a</sup> or at common law which would enable a sheriff to make a forced re-entry. What would amount to deliberate exclusion was to be considered in the light of the individual circumstances. In the first case, there was no evidence to suggest that the tenants had deliberately locked the premises with a view to preventing the bailiff from re-entering the premises to remove the goods and therefore his re-entry had been unlawful. However, as no recoverable damage had been made out, the action failed. In the second case, although the sheriff's re-entry was unlawful and a trespass, there was no basis on which to grant an interlocutory injunction, because there was no reason to think that the re-entry would be repeated unless restrained by injunction. It followed that the appeals would be dismissed (see p 910 *h* to p 911 *b*, p 912 *b*, p 913 *f* to p 914 *a*, p 917 *a* to *e*, p 923 *a b* and p 925 *fj* to p 926 *f*, post).

*Aga Kurboolie Mahomed v R* (1843) 4 Moo PCC 239 and *Pugh v Griffith* (1838) 7 Ad & El 827 considered.

Decision of Judge Roger Cooke in *McLeod v Butterwick* [1996] 3 All ER 236 affirmed.

### Notes

For the nature and effect of the writ of *fi fa*, see 17 *Halsbury's Laws* (4th edn) paras 462–470.

For seizure and 'walking possession', see *ibid* paras 489–491, and for cases on the subject, see 21(2) *Digest* (2nd reissue) 420–422, 464–467, 2366–2384, 2789–2817.

For the Distress for Rent Act 1737, see 13 *Halsbury's Statutes* (4th edn) (1996 reissue) 673.

For the Supreme Court Act 1981, s 138, see 11 *Halsbury's Statutes* (4th edn) (1991 reissue) 1067.

### Cases referred to in judgments

*Abingdon RDC v O'Gorman* [1968] 3 All ER 79, [1968] 2 QB 811, [1968] 3 WLR 240, CA.

*Aga Kurboolie Mahomed v R* (1843) 4 Moo PCC 239, 13 ER 293.

*American Concentrated Must Corp v Hendry* (1893) 68 LT 742.

*Bannister v Hyde* (1860) 2 E & E 627, 121 ER 235.

*Brown v Glenn* (1851) 16 QB 254, 117 ER 876.

*Dawson v Dyer* (1833) 5 B & Ad 584, 110 ER 906.

*Eagleton v Gutteridge* (1843) 11 M & W 465, 152 ER 888.

*Eldridge v Stacey* (1863) 15 CBNS 458, 143 ER 863.

*Francome v Pinche* (1766) Esp NP (3rd edn) 382.

*Grove v Eastern Gas Board* [1951] 2 All ER 1051, [1952] 1 KB 77, CA.

*Hodder v Williams* [1895] 2 QB 663, [1895–9] All ER Rep 1028, CA.

*Lavell & Co v A & E O'Leary (a firm)* [1933] 2 KB 200, [1933] All ER Rep 423.

*Lee v Gansel* (1774) 1 Cowp 1, [1558–1774] All ER Rep 465, 98 ER 935.

*Lucas v Tarleton* (1858) 3 H & N 116, 157 ER 409.

*Pugh v Griffith* (1838) 7 Ad & El 827, 112 ER 681.

*Rodgers v Parker* (1856) 18 CB 112, 139 ER 1308.

*Russell v Rider* (1834) 6 C & P 416, 172 ER 1301, NP.

<sup>a</sup> Section 138, so far as material, is set out at p 914 *c* to *j*, post

- Semayne's Case* (1604) 5 Co Rep 91a, [1558–1774] All ER Rep 62, 77 ER 194.
- Watson v Murray & Co* [1955] 1 All ER 350, [1955] 2 QB 1, [1955] 2 WLR 349.
- Cases also cited or referred to in skeleton arguments**
- Attack v Bramwell* (1863) 3 B & S 520, 122 ER 196.
- Boyd v Profaze* (1867) 16 LT 431, NP.
- Chubb Cash Ltd v John Crilley & Son (a firm)* [1983] 2 All ER 294, [1983] 1 WLR 599, CA.
- Clissold v Cratchley* [1910] 2 KB 244, [1908–10] All ER Rep 739.
- Consett UDC v Crawford* [1903] 2 KB 183, DC.
- Evans v South Ribble BC* [1992] 2 All ER 695, [1992] QB 757.
- Foakes v Beer* (1884) 9 App Cas 605, [1881–5] All ER Rep 106, HL.
- Gregory v Cotterell* (1855) 5 E & B 571, 119 ER 593, Ex Ch.
- Knotts v Curtis* (1832) 5 C & P 322, 172 ER 995.
- Long v Clarke* [1894] 1 QB 119, [1891–4] All ER Rep 1145, CA.
- National Commercial Bank of Scotland Ltd v Arcam Demolition and Construction Ltd (Hatherley Hall Ltd, claimants)* [1966] 3 All ER 113, [1966] 2 QB 593, CA.
- Rapley v Taylor and Smith* (1883) Cab & El 150, NP.
- Selectmove Ltd, Re* [1995] 2 All ER 531, [1995] 1 WLR 474, CA.
- Smith v Ashforth* (1860) 29 LJ Ex 259.
- Southam v Smout* [1963] 2 All ER 104, [1964] 1 QB 308, CA.
- Vanbergen v St Edmunds Properties Ltd* [1933] 2 KB 223, CA.
- Vaughan v McKenzie* [1968] 1 All ER 1154, [1969] 1 QB 557, DC.
- Wells v Moody* (1835) 7 C & P 59, 173 ER 26, NP.
- White v Wiltshire* (1619) Cro Jac 555, 79 ER 476.

## Appeals

### *Khazanchi and anor v Faircharm Investments Ltd and ors*

- f* The plaintiff tenants, Deepak Kulmar Khazanchi and Manjit Singh Rattu, appealed from the decision of Judge Cox sitting in the Lambeth County Court on 24 March 1997, whereby he dismissed their claim for damages against the defendants, Faircharm Investments Ltd (the tenants' landlord), Penway Ltd (the landlord's letting agents) and Cuthbert & Kingsley (a firm), a certified bailiff employed to levy distress at the premises in respect of arrears of rent.
- g* The facts are set out in the judgment of Morritt LJ.

### *McLeod v Butterwick*

- The plaintiff, Sally McLeod, appealed from the decision of Judge Roger Cooke ([1996] 3 All ER 236, [1996] 1 WLR 995) sitting as a judge of the High Court, given on 13 February 1996, whereby he dismissed her claim for damages and application for an interlocutory injunction to restrain the sheriff, Anthony James Butterwick, from selling her goods or entering her home without her consent. The facts are set out in the judgment of Morritt LJ.
- j* *Kenneth Hamer* (instructed by *Desor & Co*, Hayes) for the tenants.  
*Andrew Westwood* (instructed by *Bude Nathan Iwanier*) for the first and second respondents.  
 The bailiffs were not represented.  
 Mrs McLeod appeared in person.  
*Michael Tillett QC* (instructed by *Burchell & Ruston*) for the sheriff.



17 March 1998. The following judgments were delivered.

**MORRITT LJ** (giving the first judgment at the invitation of Stuart-Smith LJ).

1. These appeals raise a common question of some general importance as to the powers of a bailiff distraining for rent or a sheriff executing a writ of fieri facias forcibly to re-enter the premises in which the relevant goods are kept for the purpose of removing them. It is not in dispute that entry for the purpose of effecting the initial seizure may only be made with the consent of the occupant or other person in possession of the premises. The question is whether in any and, if so, what circumstances the bailiff or the sheriff in walking possession of the goods is entitled forcibly and without the consent of the occupant or other person in possession of the premises to re-enter in order to remove the goods for the purposes of sale.

2. In *Khazanchi v Faircharm Investments Ltd* the premises were occupied by the tenants for the purposes of their business. The bailiff, seeking to distrain on behalf of the landlord in respect of arrears of rent, had entered the demised premises with the consent of the tenants. At his request the tenants entered into a walking possession agreement which entitled the bailiff to remove the goods at any time after the specified date for payment. The arrears of rent were not paid by the due date and the bailiff attended at the demised premises for the purpose of removing the goods. The premises were locked and there was no one inside. The bailiff, with the assistance of a locksmith and removal men, removed the lock, removed the goods and resecured the premises on his departure with a new lock leaving a key to the new lock with a caretaker. In proceedings brought by the tenants, Judge Cox decided that the bailiff was entitled to act as he had and dismissed the tenants claim for damages.

3. In *McLeod v Butterwick* the sheriff entered the home of Mrs McLeod with her consent for the purpose of executing a writ of fi fa. He did not then remove any goods. Mrs McLeod refused to enter into a walking possession agreement. Interpleader proceedings followed. Very shortly after they were concluded the sheriff, without prior notice, returned to Mrs McLeod's home for the purpose of removing the goods for sale. Mrs McLeod was out at work and there was no one in her home. The sheriff, with the assistance of a locksmith and removal men, removed the lock and the goods and resecured the premises on his departure leaving a key to the new lock for Mrs McLeod to collect on her return. Mrs McLeod sued the sheriff for damages and an injunction. Her application for an interlocutory injunction to restrain the sheriff from selling her goods or entering her home without her consent was refused by Judge Cooke on the ground, amongst others, that the sheriff was entitled to act as he had.

4. Though there are similarities between the position of a bailiff and a sheriff their respective legal rights and obligations are not the same. Thus it is necessary to consider the two cases separately. Equally it is helpful to test the apparent position of the one against that of the other. For that reason I propose to consider the position of the bailiff and the sheriff separately, but in respect of the common question I have identified, before considering the other questions which arise in and the outcome of each appeal.

*Distress for rent*

a 5. Though the remedy of distress is available for liabilities other than rent I confine my comments to the remedy as incident to a demise of land for the recovery of rent. The process consists of three stages, namely entry into the premises, seizure of the goods and securing or impounding the goods. Originally goods so seized might only be impounded in the local pound to which the distrainer was obliged to take them. Further, the goods there

b impounded might only be detained until the outstanding rent was paid.

6. Section 1 of the Distress for Rent Act 1689 amended the law so as to entitle the distrainer to sell the goods so impounded and to recoup the arrears of rent out of the proceeds of sale. Originally the goods had to be appraised before sale but this requirement was abolished by s 5 of the Law of Distress

c Amendment Act 1888.

7. Section 10 of the Distress for Rent Act 1737 amended the law by enabling goods to be impounded and indeed sold in the premises where they were at the time of seizure. The earlier part of the section provides:

d '... it shall and may be lawful to and for any person or persons lawfully taking any distress for any kind of rent, to impound or otherwise secure the distress so made, of what nature or kind soever it may be, in such place or in such part of the premises chargeable with the rent as shall be most fit and convenient for the impounding and securing such distress, and to appraise, sell, and dispose of the same upon the premises in like manner

e and under the like directions and restraints to all intents and purposes as any person taking a distress for rent may now do off the premises ...'

8. The section contains no express provision as to the right of the distrainer to return to those premises for the purpose of removing the goods for sale elsewhere, but provides, in a later passage, that—

f 'it shall and may be lawful to and for any person or persons whatsoever to come and go to and from such place or part of the said premises where any distress for rent shall be impounded and secured as aforesaid, in order to view, appraise, and buy, and also in order to carry off or remove the same on account of the purchaser thereof ...'

g That section may be contrasted with s 7, which authorises a landlord seeking to levy a distress and those authorised by him in the daytime to break open and enter a house or other building in which he suspects that there are goods on which he is entitled to distrain but which have been fraudulently concealed from him. In the case of a dwelling house the power might only be exercised

h after the landlord had sworn before a justice as to the reasonable ground for his suspicion.

9. It is also necessary to notice s 19 of the 1737 Act. The purpose of the section was to prevent an irregularity during the course of the distress giving rise to a trespass ab initio, with the consequence that the distrainer was liable

j for the value of the goods without a set-off on account of the arrears of rent. The section is convoluted but the material parts provide:

'And whereas it hath sometimes happened that upon a distress for rent justly due, the directions of the [Distress for Rent Act 1689], have not been strictly pursued, but through the mistake or inadvertency of the landlord ... or bailiff ... some irregularity or tortious act hath been afterwards done

in the disposition of the distress so seized ... for which irregularity or tortious act the party distraining hath been deemed a trespasser ab initio, and in an action brought against him as such, the plaintiff hath been intitled to recover, and has actually recovered the full value of the rent for which such distress was taken ... Be it enacted ... that ... where any distress shall be made ... and any irregularity or unlawful act shall be afterwards done by the party ... distraining ... the distress itself shall not be therefore deemed to be unlawful, nor the party ... making it be deemed a trespasser ... ab initio; but the party ... aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he ... shall have sustained thereby, and no more, in an action for trespass or on the case, at the election of the plaintiff ... [and his full costs of suit].'

10. The 1888 Act abolished the need for appraisement before sale of the goods distrained and provided that a bailiff levying a distress must be certified by a county court judge. By s 8 the Lord Chancellor was given power to make rules for regulating the security to be required of bailiffs, the fees etc incidental to a distress and for carrying into effect the objects of the Act. Further amendments dealing with the certification of bailiffs, the position of lodgers and subtenants were made by Law of Distress Amendment Acts 1895 and 1908.

11. At some time following the enactment of the 1737 Act a practice grew up of an agreement, commonly called a walking possession agreement, being entered into between the landlord or bailiff on the one hand and the tenant on the other to regulate their relations after the initial entry and impounding of the goods. It is apparent from the decision in *Lavell & Co v A & E O'Leary (a firm)* [1933] 2 KB 200, [1933] All ER Rep 423 at 425 that at that period the form of agreement authorised the bailiff to 're-enter the premises peaceably or by force, if required, at any time'. Likewise in *Watson v Murray & Co* [1955] 1 All ER 350 at 354, [1955] 2 QB 1 at 9 the walking possession agreement in use in January 1952 by the sheriff executing a writ of fi fa authorised the sheriff 'to re-enter my house and premises ... at any time you may think proper ... and if necessary to use force for that purpose'. In January 1954 the Distress for Rent Rules 1953, SI 1953/1702, made by the Lord Chancellor under s 8 of the 1888 Act prescribed, for the first time, a form of walking possession agreement which might be 'used with such variations as circumstances may require' (r 1(2)). The form so prescribed provided simply that 'you [the bailiff and the man in walking possession] may re-enter the premises at any time while the distraint is in force'. Though the rules and other parts of the walking possession agreement have been amended from time to time, no change has been made to the provision entitling the bailiff to re-enter.

12. For completeness I should record that statutory restrictions on the exercise of the remedy of distress exist in the case of premises let on a protected or assured tenancy or subject to a statutory tenancy or if the tenant is a member of the armed forces or insolvent or subject to an administration order. There was no such restriction in this case because the premises were let for the purposes of the tenants business and not as a dwelling house.

13. It is in these circumstances that the tenants contend that the bailiff had no right to re-enter their premises without their consent. They submit that the walking possession agreement gave no such authority and no right to act



a as he did was conferred on the bailiff by the common law. Judge Cox disagreed. He said:

b 'Was the bailiff entitled to break in on 17 February 1992? If it was illegal, he was not. I have resolved that point and it was not an illegal distress. Granted that the original distress was not itself illegal, it is well settled that a bailiff may enter and, having levied distress, subsequently return and remove the goods and on the second occasion can in certain circumstances force entry, particularly if the premises have been barred against him. That goes back a long way. The problem is where the premises are simply locked, can they be said to be barred against the bailiff when he returns? There is a problem in that the occupiers may have gone out and locked the doors. I accept that times have changed since the nineteenth century when these rules were first laid down and it is now usual for people to lock the doors when they leave premises unattended. This is a matter that was considered at some length by Judge Cooke sitting in the Chancery Division of the High Court in *McLeod v Butterwick* [1996] 3 All ER 236, [1996] 1 WLR 995. That decision, if it is a decision which I should follow, resolves the point against the plaintiffs. It is persuasive upon me but not binding. Mr. Hamer says it is plainly wrong and pointed me to an analogy against forced entry in aid of an Anton Piller order. It seems to me that an Anton Piller is a very different situation indeed, just as other forms of distress are different. In *McLeod v Butterwick* the court was dealing with a writ of *fi fa*, and there was no need for Form 7. I have read Judge Cooke's judgment with great care. Whilst he feels driven to the conclusion he reaches that where the door is locked the bailiff is entitled to assume that it is locked against him I find these reasons compelling: but I do note that it may be thought to produce an anomalous position in this day and age. I share Judge Cooke's reservations but I feel compelled to come to the same conclusion. The bailiff was entitled to force entry.'

14. The tenants have renewed their submissions to this court. They submit that the judge was wrong because, on its true construction, the walking possession agreement did not authorise the bailiff to use force at any time and the common law did not entitle him to do so in the circumstances of this case. In my view it is convenient to consider the position at common law before seeking to construe the walking possession agreement. As I have already indicated, it is not disputed that in the case of distress for rent, whatever the nature of the premises, the initial entry must be peaceable and with the consent of the tenant. Once the initial entry has been achieved and the goods impounded then they are in what is called 'the custody of the law' (see *Abingdon RDC v O'Gorman* [1968] 3 All ER 79 at 81-82, [1968] 2 QB 811 at 819). If thereafter the distrainer were forcibly ejected or having left the premises for a temporary purpose his return is deliberately barred by the tenant then he may re-enter by force. This proposition is amply established by a number of cases to which we were referred. In view of the submissions made to us it is convenient at this stage to refer to them shortly in chronological order.

15. The first is *Francome v Pinche* (1766) Esp 382. In that case the bailiff distraining the goods of a tenant was forcibly ejected when preparing the inventory. After about an hour the bailiff, having obtained reinforcements,

returned and, having been refused admittance, broke open the door. Wilmot J held that he was entitled to do so because 'this was a recontinuance of the first taking and so was lawful'.

16. In *Russell v Rider* (1834) 6 C & P 416, 172 ER 1301 the landlord put in a bailiff on 27 December. He left in an agitated state on 29 December because, as the landlord supposed, his liquor had been drugged. On 4 January agents of the landlords broke into the premises under the same authority as previously held by the bailiff and removed goods. Bosanquet J decided that they were not entitled to do so because 'possession had been left so far back'.

17. In *Eagleton v Gutteridge* (1843) 11 M & W 465, 152 ER 888 the defendant bailiff had entered the dwelling house of the plaintiff under a warrant for distress for rent and was forcibly ejected by the plaintiff. The defendant thereupon forcibly re-entered and was sued for trespass. Parke B held that the forcible re-entry was justifiable at common law.

18. In *Brown v Glenn* (1851) 16 QB 254 at 257, 117 ER 876 the defendant bailiff distrained horses of the plaintiff in the stable by breaking open the locked door. Lord Campbell CJ, distinguishing the case of the bailiff from that of the sheriff, held that the forcible entry was not justified 'for the fact of the stable door being locked does of itself render this distress unlawful'.

19. In *Bannister v Hyde* (1860) 2 E & E 627 at 632, 121 ER 235 at 237 a bailiff in close possession of a shop and dwelling house by way of distraint for rent left for a short time to get himself some beer. During his absence the plaintiff locked him out and refused his requests to be let in again. Thereupon the bailiff broke down the back door and re-entered. It was held, following *Eagleton v Gutteridge*, that the bailiff was entitled to use force to effect his re-entry for 'being forcibly kept out ... amounted to the same thing as ... being forcibly turned out'.

20. In *Eldridge v Stacey* (1863) 15 CBNS 458 at 459, 143 ER 863 at 864 a bailiff distraining goods in a dwelling house for unpaid rent was forcibly evicted. Three weeks later he re-entered by force. Erle CJ considered that as he 'was put out by force, he was justified in resorting to force in order to regain possession'.

21. Finally in *American Concentrated Must Corp v Hendry* (1893) 68 LT 742 a landlord, by a bailiff, had sought to distrain goods in a warehouse. The bailiff had entered by breaking down the door. This was held by Bowen LJ to be unlawful. The bailiff's appeal was dismissed.

22. The legal position is summarised in 13 *Halsbury's Laws* (4th edn) para 306 in the following terms:

'Forcible re-entry. After an entry has been made and not abandoned, but the distrainor has been forcibly expelled or driven away by the tenant's violence, he may obtain the assistance of a peace officer and break open the outer door, even after a considerable interval. On the same principle a forcible re-entry may be made where the man in possession voluntarily goes away for a short period, and not with the intention of abandoning the distress, and on his return finds the door locked. In such a case he may break open the door. It is a question of fact in each case whether there has been an abandonment.'

a To the like effect are the passages in *Eddy on the Law of Distress* (3rd edn, 1961) p 47, *Hill and Redman's Law of Landlord and Tenant* (18th edn) vol 1 at A[1874] and *Woodfall's Law of Landlord and Tenant* (1994 edn) vol 1, para 9.128.

b 23. The tenants relied on all these cases and textbook references for the proposition that except in the limited circumstances of forcible ejection or exclusion which would justify the use of force on the part of the bailiff in  
c retaking the goods he had already impounded there was no right of forcible entry. They relied particularly on *Brown v Glenn* and *American Concentrated Must Corp v Hendry*. This was disputed by Mr Westwood in his excellent argument on behalf of the bailiff. He contended that once the goods had been impounded following the initial entry, so that they were in the custody of the  
d law, then, so long as the distress had not been abandoned, the bailiff on his return finding the door to be locked was entitled, without more, to force an entry. He submitted that the authorities dealing with forcible expulsion or exclusion, when properly understood, are only considering the impact of those circumstances on the question of abandonment. He took us through the authorities relied on by counsel for the tenants to indicate the way in which, in his submission, they should be read as supporting his proposition as opposed to that of the tenants. Both counsel accepted that, ultimately, this point depended on how one should read the judgments in *Bannister v Hyde*.

e 24. As I have already indicated the facts in that case were that a bailiff in close possession of a shop and dwelling house by way of distraint for rent left for a short time to get himself some beer. During his absence the plaintiff locked him out and refused the bailiff's requests to let him in again. Thereupon the bailiff broke down the back door and re-entered. At trial the judge had considered that the forcible re-entry was justified. During the course of the argument counsel, seeking to uphold the judge's order, conceded  
f that the distress had not been abandoned. He relied on the fact that the bailiff had not been forcibly ejected but had gone of his own accord and for his own purposes. The report indicates that during the course of argument Crompton J intervened when shown the report of *Russell v Rider* to the effect that, if there had been no abandonment, there would have been a right to re-enter. It is true that this intervention suggests that Crompton J considered  
g that in *Russell v Rider* if the distress had not been abandoned then the bailiff would have been entitled to re-enter by force, but it is not apparent whether that view depended on treating the drugging of the bailiff's liquor as equivalent to a forcible exclusion or indeed remained his view at the conclusion of the argument.

h 25. In his judgment Wightman J said ((1860) 2 E & E 627 at 631, 121 ER 235 at 237):

i 'In the present case there was no evidence of an abandonment, but the contrary. The man quitted, for a short time, the house in which the goods were, but clearly had no intention of abandoning them. On his return, he found the door locked against him; that placed him in the same position as if he had been forcibly ejected from the house, and therefore, as was held in *Eagleton v. Gutteridge* ((1843) 11 M & W 465, 152, ER 888), gave him the right to break open the outer door, if necessary, to regain possession.'



The use of the word 'therefore' in the last sentence is inconsistent with the submission for the bailiff. The other members of the court agreed with Wightman J. Thus Crompton J said (2 E & E 627 at 632, 121 ER 235 at 237):

'... when it was once admitted that there was no evidence of abandonment, the plaintiff's case was at an end. During the temporary absence of the man in possession, the goods remained in the custody of the law; and, on his being forcibly kept out, which amounted to the same thing as his being forcibly turned out, he was justified, as was laid down in *Eagleton v. Gutteridge*, in breaking open the door in the exercise of his right, not to retake (for he had not abandoned), but to retain possession of the goods distrained.'

Blackburn J, who had been the trial judge, added:

'I directed the jury, first, that, if he went out with the intention of returning, the distress had not been abandoned in point of law; and I directed them, secondly, that, in such case, he was justified in using force, if necessary, for the purpose of re-entering. The counsel for the plaintiff, upon this, elected to be nonsuited. *Eagleton v. Gutteridge*, is a conclusive authority that the person in possession, if kept by force from the actual possession of goods distrained and in his constructive possession, has a right to use force for the purpose of re-entering upon such actual possession.'

26. In my view that case does not support the proposition for which counsel for the bailiff contends. As counsel for the tenants submitted if there was a right to re-enter by force in any circumstances so long only as the distress had not been abandoned then the passages from the judgments I have quoted referring to the justification for the use of force were wholly irrelevant. The same is true of *Francome v Pinche* (1766) Esp 382, *Eagleton v Gutteridge* and *Eldridge v Stacey*. In each case the references to the forcible ejection of the bailiff would have been otiose if there were an unconditional right to re-enter by force. In particular, the direction of the Lord Denman CJ to the jury in *Eagleton v Gutteridge* that if the jury were satisfied that the bailiff was forcibly turned out the subsequent re-entry by force was justified would have been wrong. Likewise the conclusion of Erle CJ in *Eldridge v Stacey* (1863) 15 CBNS 458, 143 ER 863 that if the bailiff were put out by force he was justified in resorting to force to regain possession would have been unnecessary. It would have been sufficient for him to have said 'unless indeed he had abandoned the original distress' without the reference to the circumstances of being put out by force.

27. Accordingly I reject the principal submission for the bailiff to the effect that after impounding he has at common law an unconditional right to re-enter by force the premises where the goods are impounded. There is in my view no authority to support it. Such a right would be inconsistent with the view that those premises constitute the pound for there has never been any suggestion that a landlord or his bailiff was entitled to break into the pound. Moreover to recognise a right of forcible re-entry in all circumstances would be inconsistent with the provisions of the Distress for Rent Act 1737. As I have already indicated s 7 conferred a right of forcible entry in the case of goods fraudulently concealed but s 10 made no similar provision when providing for

a the first time that goods might be impounded on the tenant's premises. If it  
had been clearly established before that Act was passed that there was a right  
of forcible re-entry in all cases the omission might have been explicable, but it  
was not, and, indeed, could not have been, for previously the goods could not  
b be impounded on private property. I do not doubt that, subject to any  
question of duress, a tenant might lawfully agree that the bailiff might re-enter  
by force. *Lavell & Co v A & E O'Leary (a firm)* [1933] 2 KB 200, [1933] All ER  
Rep 423 is such a case. But in my view it is not a right conferred by the  
common law in the absence of such an agreement.

c 28. In *McLeod v Butterwick* Judge Cooke was dealing with the case of a  
sheriff executing a writ of *fi fa* not a bailiff levying a distress. But his decision  
and the reasoning behind it was adopted by Judge Cox and applied to the case  
of the bailiff levying a distress. Thus it is appropriate to consider in this context  
what Judge Cooke held. He too considered *Bannister v Hyde* (1860) 2 E & E  
627, 121 ER 235 and the conclusions which might be drawn from it. He said  
([1996] 3 All ER 236 at 242–243, [1996] 1 WLR 995 at 1002):

d '... it seems to me that the authorities, particularly when one looks at  
*Bannister v Hyde*, go a good deal further than actual expulsion, that is  
removing from the premises the person who is already there. They must,  
I think, extend to any forcible prevention from the continuing of the  
e execution. There is an indication in some of the books that notice ought  
to be given first, and, as a matter of practice, I am bound to think it ought  
to; but there is also an indication on other authority that there is no point  
in giving notice if there is nobody there to give it to. The real question is:  
does the principle extend—and there is no clear authority on this—to  
cases where, in fact, the premises are locked, not because the house owner  
is deliberately trying to exclude the bailiff or the sheriff, but simply where,  
f put neutrally, the householder has locked the house, and in this particular  
case, as Mrs McLeod tells me and I have no reason to doubt her, she had  
locked it because she had gone to work. The difficulty with qualifying the  
principle in such a case is this. From the point of view of the sheriff's  
g officer, who is coming to execute his writ and coming to take, physically,  
possession of that which he already has by operation of law, he does not  
know why he is being kept out. All he knows, and can know, and possibly  
can ever know, unless the circumstances are such as they were in *Bannister*  
*v Hyde*, is that he is being kept out. It seems to me to follow, as a matter  
of strict reasoning, that whatever is the case, if he comes back to continue  
the possession which started as walking possession by taking possession  
h and the door is barred against him, he can break through it. That being  
so, he was right to do it in this case too. It seems to me that the  
intellectual purity of the argument is convincing and I think I am bound  
to go down that road. I observe that it represents on evidence what has  
been the accepted practice of sheriffs, at least in Greater London, for a  
long period. I view it in modern conditions, however, with some degree  
j of disquiet. It is all very well in an earlier world where, perhaps in the  
class of society where people had enough money for anybody to bother  
with an execution, it was most unusual to find a house to be locked, bolted  
and barred, unless exclusion was the intention. Not so today. People are  
frequently out and about their lawful business, both sexes working,  
mothers out with their children, in circumstances that in nineteenth

century would have seemed odd and unusual; today we take for granted. I cannot help feeling that this practice is due for review, and I hope it will be by somebody. But there it is.' (Judge Cooke's emphasis.) a

29. In my view, this conclusion involves an extension of the principle and of the existing authorities on the circumstances in which a bailiff may re-enter by force which I am unable to accept. If no notice has been given by the bailiff of his intention to re-enter and the only circumstance is that the outer door is locked that is in my view insufficient to justify a forcible re-entry. The justification for permitting force in response to cases of forcible expulsion or forcible exclusion is that given by the Privy Council in *Aga Kurboolie Mahomed v R* (1843) 4 Moo PCC 239, 13 ER 293. In that case a sheriff executing a writ in Calcutta sought to arrest the appellant in his house. He entered through an open door but was then expelled by force and the door shut and locked behind him. Having obtained reinforcements the sheriff then, though under fire from within, re-entered by force. On appeal to the Privy Council Lord Campbell giving their advice held that the original entry through the open door was lawful, that the appellant was guilty of trespass in expelling the sheriff and could not rely on his own wrong to object to the subsequent forcible re-entry. The Privy Council also concluded that in the circumstances a demand for re-entry was not required as the appellant knew the purpose of the sheriff's call. Lord Campbell said (4 Moo PCC 239 at 246–247, 13 ER 293 at 296): b

'... their lordships think that as they had once been lawfully in the house, and he knew they were lawfully about to arrest him, and he unlawfully caused them to be expelled for the purpose of preventing them from so doing, he cannot be permitted to take advantage of his own wrong, by thus defeating the process of the law; and that they had a right to place themselves in the position which they occupied when his unlawful act began. Without an actual arrest, there was no rescous or escape; but the proposition, that till an actual arrest had taken place, the prosecutor might forcibly expel the officer and those acting in his aid, and lock the outer door, so as to entitle himself to the protection of his castle, cannot be supported. The outer door being open, they were entitled to enter the house under civil process; and then being lawfully in the house, to arrest him, he was guilty of a trespass by expelling them. The act of locking the outer door was unlawful, and he could confer no privilege upon himself by that unlawful act. Again, there is no doubt that, generally speaking, before an outer door can be broken open, even to execute criminal process, there must be a demand of entry, and a refusal. But to what extent? To inform the owners of the house of the purpose for which entry is to be made, and to afford him the opportunity of opening the door and personally admitting the parties who are to execute the process of the law. Here the prosecutor, who had just expelled the Defendants from his house, that they might not arrest him, full well knew the purpose for which they returned, and he showed a determined resolution to oppose their admission.' c

30. If that case truly expresses the rationale for the circumstances in which a forcible re-entry is justified then the mere fact that the door is locked cannot suffice. It is not wrong for a tenant, without more, to lock the door to the demised premises whether they be domestic or commercial. If he knows that d



a the bailiff is seeking to re-enter but locks or leaves the door locked to exclude him then the tenant commits a wrong for he is wilfully obstructing the right of the bailiff to possession of the goods. But if he does not know of the bailiff's intended re-entry at any particular time then to leave his door locked and to absent himself about his normal affairs is his right. As the Privy Council indicated if the person in possession knows the purpose of the bailiff's visit b then there is no need to give further notice of it. But that is no reason for concluding that where the tenant does not know of the bailiff's intention to re-enter at a particular time and leaves his door locked the bailiff may break in.

c 31. It is objected that if notice is required then by giving it the bailiff will provide the opportunity to the tenant to conceal his goods, thereby frustrating the object of the re-entry. This is true but insufficient reason to reach a different conclusion. It is common ground that the initial entry must be effected peaceably, usually by consent. The tenant then has five days to pay off the arrears. If the tenant has not used that opportunity to conceal his goods then I see no compelling reason on that ground why the bailiff should not be required to give notice of his re-entry.

d 32. Then it is suggested by reference to *Semayne's Case* (1604) 5 Co Rep 91a, [1558–1774] All ER Rep 62 and *Lee v Gansel* (1774) 1 Cowp 1, [1558–1774] All ER Rep 465, to which I shall refer in more detail in connection with the execution of a writ of *fi fa*, that the reason for not permitting forcible re-entry is the risk of civil disturbance and the possibility of letting in robbers. It is suggested that the latter reason is not a good one because of the practice of the e bailiffs to secure the premises with a new lock on leaving. Whilst this may remove much of the force from the second reason it does not affect the first, nor in my view can it provide a justification for a forcible entry on the premises of another.

f 33. For all these reasons I would conclude that a bailiff is not entitled to re-enter by force except where, having gained entry peaceably, he was expelled by force or he has been deliberately excluded by the tenant. What amounts to deliberate exclusion must be recognised on a case by case basis. It will include cases where the tenant knowing of the intended visit deliberately locks the door and goes away or when invited to admit the bailiff refuses to do so. But in my view it does not include the case of a tenant who has no knowledge of an intended visit by the bailiff at any particular time and locks g his premises in the ordinary way and goes about his business as normal.

h 34. It is necessary to construe the walking possession agreement against that background of the common law. It is in the prescribed form and embodies an agreement between the bailiff and the tenant that the former 'may re-enter the premises at any time while the distress is in force'. The bailiff relies on the use of the unqualified words 'at any time'. He submits that they mean just that so that the right is not dependent on the consent of the tenant or the presence of other circumstances sufficient to justify a forcible re-entry. I do not accept that submission. It cannot have been intended by the j parties that the bailiff should be entitled, without notice, to break in at any time of day or night. If such a power were intended then it would require to be expressed in plain terms. That is certainly the case if the power were conferred by a statute (see *Grove v Eastern Gas Board* [1951] 2 All ER 1051 at 1053, [1952] 1 KB 77 at 82). In my view it would not be right to attribute an intention on the part of the tenant to confer such wide-ranging rights on the

bailiff without clear expression. I do not think that the use of the words 'at any time' is sufficient for they deal with time not method and must be read against the background of being a prescribed form which superseded the form previously in common use which expressly referred to the use of force. a

*Execution of a writ of fieri facias*

35. A writ of *fi fa* is a command to the sheriff 'that of the goods and chattels and other property of [the judgment debtor] in your county authorised by law to be seized in execution you cause to be made the sum of [the amount of the judgment] ... and that immediately after execution of this writ you pay [the judgment creditor] in pursuance of [the judgment] the amount levied in respect of the said sum'. The statutory authority of the sheriff to perform the command is now contained in s 138 of the Supreme Court Act 1981. That section, so far as material, provides as follows: b  
c

'(1) Subject to subsection (2), a writ of *fi fieri facias* or other writ of execution against goods issued from the High Court shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed. d

(2) Such a writ shall not prejudice the title to any goods of the execution debtor acquired by a person in good faith and for valuable consideration unless he had, at the time when he acquired his title—(a) notice that that writ or any other such writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff; or (b) notice that an application for the issue of a warrant of execution against the goods of the execution debtor had been made to the registrar of a county court and that the warrant issued on the application either—(i) remained unexecuted in the hands of the registrar of the court from which it was issued; or (ii) had been sent for execution to, and received by, the registrar of another county court, and remained unexecuted in the hands of the registrar of that court. e  
f

(3) For the better manifestation of the time mentioned in subsection (1), it shall be the duty of the sheriff (without fee) on receipt of any such writ as is there mentioned to endorse on its back the hour, day, month and year when he received it. g

(3A) Every sheriff or officer executing any writ of execution issued from the High Court against the goods of any person may by virtue of it seize—(a) any of that person's goods except—(i) such tools, books, vehicles and other items of equipment as are necessary to that person for use personally by him in his employment, business or vocation; (ii) such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of that person and his family; and (b) any money, banknotes, bills of exchange, promissory notes, bonds, specialties or securities for money belonging to that person. h  
j

(4) For the purposes of this section—(a) "property" means the general property in goods, and not merely a special property ...'

Sections 138A and 138B provide for the sale of the goods so taken in execution. They throw no light on the manner of entry permitted to the sheriff by law.

a 36. It is not disputed that the sheriff in execution of a writ of *fi fa* may not make a forcible entry into a dwelling house unless and until he has completed his seizure of the goods in consequence of the first entry (see 17 *Halsbury's Laws* (4th edn) paras 465 and 466). The rule is otherwise in the case of commercial or business premises (*Hodder v Williams* [1895] 2 QB 663, [1895–9] All ER Rep 1028). The origin of the rule may be traced at least as far back as  
b *Semayne's Case* (1604) 5 Co Rep 91a, [1558–1774] All ER Rep 62 at 63. The report is in the form of a number of resolutions which, so far as material, are sufficiently recorded in the sidenote in these terms:

c '1. The house of every one is his castle, and if thieves come to a man's house to rob or murder, and the owner or his servants kill any of the thieves in defence of himself and his house, it is no felony and he shall lose nothing ... 4. Where the door is open the sheriff may enter, and do  
d execution at the suit of a subject, and so also in such case may the lord, and distrain for his rent or service. It is not lawful for the sheriff, on request made and denial, at the suit of a common person, to break the defendant's house, *scil.* to execute any process at the suit of a subject ...  
6. If the sheriff might break open the door to execute civil process, yet it must be after request made.'

e 37. Following the initial entry and seizure the rights of the sheriff are very similar to those of the bailiff. He may remain in possession of them without any physical presence. This is normally, but not necessarily, evidenced by a walking possession agreement. Thus, unless he has abandoned the goods, which is a question of fact, he may re-enter in order to remove the goods for the purposes of sale (see 17 *Halsbury's Laws* (4th edn) para 491). As in the case of the bailiff distraining for rent the question is whether the sheriff may forcibly re-enter and, if so, in what circumstances.

f 38. We were referred to a number of cases on this issue too. It is convenient to refer to them shortly and in chronological order before turning to the submissions of the parties. The first after *Semayne's Case* was *Lee v Gansel*. In that case an officer seeking to arrest General Gansel peacefully entered the house from the street but then broke through an inner door. It was held that he was entitled so to do. Lord Mansfield CJ ((1774) 1 Cowp 1 at  
g 6, [1558–1774] All ER Rep 465 at 468) explained that the special position or privilege of a dwelling house, not to be extended by any equitable analogous interpretation, rested on policy for the protection of a man and his family for—

h 'otherwise the consequences would be fatal, for it would leave the family within naked and exposed to thieves and robbers. It is much better, therefore, says the law, that you should wait for another opportunity than do an act of violence which may probably be attended with such dangerous consequences.'

i Lord Mansfield CJ reiterated a passage in *Semayne's Case* that 'the same strict doctrine ... that breaking open the outer door was a trespass, but that taking away the goods was lawful'.

39. In *Pugh v Griffith* (1838) 7 Ad & El 827, 112 ER 681 the sheriff seeking to execute a writ of *fi fa* entered lawfully into a room occupied by a tenant from year to year and thence obtained access to the part of the house occupied by the plaintiff. There he seized certain goods. On seeking to remove the goods



he found that the only exit available for that purpose was locked. He thereupon broke the lock and left. Lord Denman CJ held that he was entitled to do so for there was 'nothing else to be done but to open it [sc the door] himself'. a

40. I have already referred to *Aga Kurboolie Mahomed v R* (1843) 4 Moo PCC 239, 13 ER 293. In *Hodder v Williams* [1895] 2 QB 663, [1895-9] All ER Rep 1028 the sheriff sought to execute a writ of fi fa over goods in a workshop. He requested entry and was refused. He then entered by force and was sued for trespass by the judgment debtor. The Court of Appeal considered that the forcible entry was justified. Kay LJ drew a distinction between that case and one of distress for rent over goods in a dwelling-house. b

41. In her very cogent submissions Mrs McLeod pointed out that she had refused to sign a walking possession agreement. She asked where is the authority entitling the sheriff forcibly to re-enter her home? The response of Mr Tillet QC for the sheriff was to refer to *Mather on Sheriff & Execution Law* (3rd edn, 1935) p 88. The passage relied on states: c

'If after having obtained peaceable possession of a dwelling-house the Sheriff's officers be forcibly ejected, or be obliged to fly under threat of bodily injury, they may forcibly re-enter, and in such cases the Sheriff can send as many additional officers as he may deem necessary ... Again, where the Sheriff, having obtained peaceable possession, cannot carry away the seized effects or execute the writ without breaking the lock, &c. of the outer door because of its being locked, &c., and neither the execution debtor nor anyone on his behalf are on the premises to enable the Sheriff to request them to open such door, he is justified in breaking it open.' d e

The authorities cited as support for the statement in the last sentence are *Pugh v Griffith* (1838) 7 Ad & El 827, 112 ER 681, *Eagleton v Gutteridge* (1843) 11 M & W 465, 152 ER 888, *Aga Kurboolie Mahomed v R* and *Bannister v Hyde* (1860) 2 E & E 627, 121 ER 235. Mr Tillet did not submit that any of those authorities directly justified the proposition stated in the text. The most he felt able to submit was that if a sheriff might use force to get the goods out, as indicated in *Pugh v Griffith*, why should he not do so for the purpose of getting in. f g

42. I am unable to accept that submission. In *Pugh v Griffith* the decision of Lord Denman CJ is all dependent on the fact that the sheriff had achieved a lawful entry and seizure. Lord Denman CJ said (7 Ad & El 827 at 839-840, 112 ER 681 at 686): h

'The sheriff shews a lawful entry into the house, and a lawful seizure of the goods ... so that it cannot be said that there were any other doors, or any other mode of getting the goods out. Then what was the sheriff to do? The goods could not be kept for ever in the house; and neither the plaintiff, nor anybody else, was there so that he could request them to open the door, and there was nothing else to be done but to open it himself ... he appears to be justified as a matter of necessity in order to get the goods out to execute the writ.' j

There is no authority to the effect that as a matter of necessity the sheriff is entitled forcibly to re-enter. He may be justified in doing so where he has been

a forcibly ejected or excluded, as indicated by the other cases cited in the footnote, but that is not what is suggested.

43. The statutory power conferred by s 138 of the 1981 Act authorises the sheriff to seize the goods. It contains no express power to make a forcible entry for that purpose and I see no grounds for implying one. Nor does the common law recognise such a power in respect of a dwelling house.

b Accordingly in my view and for substantially the same reasons a sheriff is entitled forcibly to re-enter a dwelling house in the same circumstances as a bailiff, disregarding the statutory restrictions I referred to earlier, but not otherwise. I should reiterate, in case it is not clear already, that this conclusion is confined to re-entry to a dwelling house. If and in so far as a sheriff may forcibly enter premises other than a dwelling house I see no reason why he c may not re-enter such premises in a similar fashion.

44. It follows that in both appeals, because that concerning the sheriff also concerns a dwelling house and there is no question in either of them of the bailiff or sheriff being expelled by force, the question is whether the bailiff or sheriff on seeking to re-enter had been deliberately excluded by the tenants or

d Mrs McLeod respectively. In each case that is a question of fact to be considered in the light of the individual circumstances. But in neither case if they had no knowledge of an intended visit by the bailiff at any particular time will it be enough that they had locked their premises in the ordinary way and gone about their business as normal. I turn then to the facts of each appeal and the other points which arise in respect of each of them.

e *Khazanchi v Faircharm Investments Ltd*

45. By a lease dated 13 March 1990 the first defendant, Faircharm Investments Ltd (the landlord), let to the plaintiffs, Mr Khazanchi and Mr Rattu (the tenants), premises at Suite B9, Hatton Square, 16/16A Baldwin f Gardens, London, EC1 for a term of five years from 1 February 1990 in consideration of a annual rent of £13,000 and further rents in respect of service charges and insurance. The premises were occupied by the tenants for the purposes of their business as a music recording studio.

46. By January 1992 the tenants owed the landlords £8,914.54 consisting of g £6,500 for rent, £1,593.75 by way of service charge, £318.39 in respect of insurance and £502.40 for interest. On 10 January 1992 the landlord instructed the third defendant, Cuthbert & Kingsley, the business name of Mr Amey, a certified bailiff, to distrain the goods, chattels and effects of the tenants in the premises for the sum of £8,914.54 as rent due. On 17 January 1992 the bailiff h attended at the premises, was admitted by the tenants, seized goods specified in the inventory he made at the time and entered into a walking possession agreement with the tenants.

47. The notice of seizure of goods and inventory duly completed by the bailiff gave formal notice to the tenants that the bailiff had seized the goods specified in the inventory and that such goods would be sold if the rent of i £8,914.54 and the expenses of the seizure were not paid to the bailiff at his office within five days. The inventory specifying the goods included as a single item 'all recording equipment'. The walking possession agreement signed by Mr Rattu on behalf of the tenants was expressed to be made for the convenience of the tenants and in consideration of the bailiff not removing the goods from the premises, delaying the sale of such goods and not leaving a

man in close possession of such goods. In return the tenants agreed, (inter alia), that the bailiff might 're-enter the premises at any time while the distress is in force', that the goods in respect of which the distress was levied 'are impounded on the premises' and that the bailiff might 'remove and sell the goods at any time after 22nd January 1992' if the amounts due had not by then been paid. a

48. The sums due not having been paid, on 12 February 1992 at about 4.45 p.m., having, as he claimed, tried unsuccessfully to contact the tenants, the bailiff accompanied by a police officer and a locksmith attended at the premises. The door was locked. The premises were unoccupied as Mr Khazanchi was in Birmingham and Mr Rattu was in Southall, in each case in the ordinary course of their business. The bailiff forced entry, removed the goods, changed the lock and left the key to the new lock with the caretaker. b  
The whole operation took about 4 hours. On 26 February 1992 the goods so removed were sold at auction for the total sum (net of value added tax (VAT)) of £12,315. On 16 March 1992 the tenants sought to surrender the lease as they were unable to continue in business, the recording equipment having been sold. This was refused and the lease was not determined until 21 July 1992 c  
when the premises were relet to another tenant. d

49. On 3 September 1992 these proceedings were commenced in the Uxbridge County Court by the tenants. They claimed that the distress was unlawful on two grounds: first, because the walking possession agreement entered into on 17 January 1992 was not in accordance with the Distress for Rent Rules and the forms prescribed by Law of Distress Amendment Act 1888; e  
second, because the bailiff was not entitled forcibly to enter the premises on 12 February 1992 to remove their goods. In addition they alleged that there had been an agreement made between themselves and Mr Sofier on behalf of the landlords on 25 February 1992 to the effect that the bailiff would release the goods, though subject to the distress until the outstanding sums had been paid in full, if the tenants, as they did, forthwith gave him a cheque for £1,800 and paid £2,000 on 5 March 1992 and every two weeks thereafter until the outstanding amount was paid in full. Further, the tenants asserted that their goods had been sold at a gross undervalue and claimed damages by reference to their true value which they put at not less than £65,498. The bailiff admitted that there had been an agreement with the tenants as alleged, save that the sum of £1,800 was to be paid in cash, not by cheque. With that exception all the material contentions were denied by both the landlords and the bailiff; in addition the landlords counterclaimed for unpaid rent, other sums alleged to be due and damages for breach of covenant. f  
g

50. The action was heard by Judge Cox on 10 to 12 March 1997. He heard oral evidence from, amongst others, both the tenants, Mr Sofier, a representative of the landlords, and from the bailiff. In his judgment given on 24 March 1997 the judge concluded that the walking possession agreement was valid. There is no appeal against that conclusion. He also decided, following the judgment of Judge Cooke in the associated appeal *McLeod v Butterwick*, that the bailiff was entitled to make a forcible entry to the premises on his return on 12 February 1992. On the issue whether there had been an agreement between the tenants and Mr Sofier made on 25 February 1992 the judge concluded that there had not. On this question of fact, though he acquitted any witness of deliberately telling lies, he found the evidence of the h  
i



a tenants entirely unconvincing when tested against other factors and decided, on a balance of probability, that there had been no such agreement as the tenants alleged. With regard to the value of the goods seized the judge concluded that he could not rely on the evidence of the tenants for their estimate of value was the price if new in 1992 of goods and equipment in fact acquired in 1985. In those circumstances he accepted the value of the goods as being the price paid for them at the auction on 26 February 1992.

b 51. On this appeal the tenants claimed that the judge was wrong in three respects. First, it was contended that the judge was wrong in law to have concluded that the bailiff was entitled to make a forcible entry to the premises on 12 February 1992. Secondly, the tenants submitted that the judge was wrong not to find that the agreement they alleged had been concluded c between the tenants and the landlords, acting through Mr Sofier, on 25 February 1992. Third they suggest that the judge was wrong to conclude that the value of the goods was that realised at auction or, in the absence of any secondhand market, other than the price as new discounted for any element of betterment.

d 52. I have already quoted the judge's conclusion in respect of the first issue and decided that as a matter of law where the premises are merely locked and unattended that is insufficient to justify a forcible re-entry. But counsel for the bailiff pointed out that at the trial it was never suggested that the bailiff should have given notice of his proposed re-entry so that the question of whether the bailiff had been deliberately kept out was never examined. He relied on the e facts that Mr Amey had telephoned the premises and left a message on the answering machine on 29 January and 7, 10 and 12 February. But there was no evidence what those messages were, nor whether any of them was received by either tenant. Counsel for the bailiff did not ask for a new trial or for leave to adduce fresh evidence. In those circumstances, in my view, the proper f decision for this court to arrive at is that the forcible re-entry was unjustified as a matter of law. The tenants clearly alleged that the original entry was forcible and wrongful. By the various defences the defendants relied on the fact that the bailiff was executing a warrant for distress. As a matter of law that defence was insufficient. In my view it was for the bailiff to plead and prove sufficient justification in law. Accordingly the absence of any investigation at the trial of what the messages were, whether either tenant received any of g them or why the premises were wholly unoccupied when the bailiff called is no reason for refusing to conclude that the re-entry was unjustified and so a trespass at law.

h 53. The tenants did not, in my view sensibly, pursue their contention that the judge should have found that there was on 25 February an agreement between them and the landlords during the course of the hearing. Accordingly the only remaining issue is that of damage. In view of the judge's findings this was not an issue which arose before him. But he dealt with it in conjunction with an allegation that the distress had been excessive in that the bailiff had j seized goods to a value substantially greater than that which was required to pay the rent in arrears. In this connection he had to consider the allegations of the tenants that the auction sale had not realised the true value of the goods.

54. The evidence for the tenants on this issue was that of Mr Khazanchi to the effect that he had used the recording equipment for about five to six years. He said that some of the equipment could not be bought second hand and that

he had not intended to replace any of it in the near future. Originally he had valued the equipment at £65,000. After he heard the evidence of Mr Jackson, the expert witness for the tenants, as to value he dropped his original estimate to £50,000. The evidence of Mr Jackson was to the effect that there was little or no second hand market for goods of this sort and that his estimate of value was the product of his inquiries of others concerned in the business of sound recording. The values he used were for similar goods when new as shown in catalogues issued in 1992. He himself had not seen the goods, did not know their age or condition and had made no allowance for depreciation. The judge's conclusion was:

'... I can place little or no reliance on the valuation evidence. However when the goods were sold at auction they reached a price of £12,315. This is the only hard evidence I have so far as the value of the goods is concerned. This is evidence on which I can do no other than rely. Of course, it was a forced sale. However it was still a sale at which persons were in competition with each other, and therefore a realistic value was achieved and I must accept that that was the value. That sum as a matter of fact either only just covered the distress, or fell a little short of it. Therefore, it would be wholly wrong to suggest that the distress was excessive regarding the value of the goods, and further any claim which the plaintiffs might have based on the distress being unlawful rather than illegal fails on the basis that they have not showed they suffered any loss. Any claim for damages by the Plaintiffs fails.'

55. For the tenants it is claimed that the judge was wrong to accept the price realised at auction as the best evidence of the value of the goods. They also contend that the judge was wrong to have determined that the tenants had failed to prove that they had suffered any loss. I would reject both those submissions. The price realised at auction is not necessarily the best evidence of value at any particular date but if there is no evidence, and there was none in this case, to the effect that the auction had not been properly advertised or conducted it is evidence a judge is entitled to accept. But as the judge had rejected the evidence of value given by Mr Khazanchi and Mr Jackson for good reason in this case it was the only evidence of value before the court. In those circumstances not only was the judge entitled to accept the evidence of the prices realised at auction but, as he indicated, in practice bound to do so for it was both credible and unchallenged. I propose to consider the question of loss on the basis of the prices for the goods realised at auction.

56. The total realised was £12,315 to which was added VAT on the hammer price of £2,155.19. The auctioneer's commission and charges for advertising and portorage, before VAT, were £1,847.25 (VAT £323.27), £325 (VAT £56.88) and portorage £1,000. The cheque sent by the auctioneers to the bailiff was for £10,917.79. The cost of the new locks fitted on 12 February, inclusive of VAT, was £94.31 and was paid by the bailiff on 3 March. The bailiff deducted from the amount he had received from the auctioneer his charges of £916.74, which included VAT, and sent a cheque to the landlords for £10,001.05. The rent for which the distress had been levied amounted in all to £8,914.54.

57. It was contended by counsel for the tenants that on these figures it was shown that the tenants had sustained a loss because it was not shown that the landlords would account for the VAT on the hammer price. If that were so

- a then the gross proceeds, including VAT on the goods distrained, would have been £14,470·19 and the total charges of the auctioneer and the bailiff including VAT to be deducted therefrom was £4,469·14. It is not clear whether the price of the new lock was included in the charges of the bailiff or was extra, but it does not matter. The surplus on this basis was £10,001·05 or £9,906·74. This exceeds the amount of £8,914·54 for which the distress had been levied.
- b I do not accept this submission. There was no investigation at the trial of how the VAT element on the sums realised and the charges paid was or should have been dealt with. The onus was on the tenants to establish their loss. If the landlords were not registered for VAT then the auctioneer and the bailiff should not have accounted to them for the VAT on the hammer price; if they were I see no reason to infer that the VAT would not have been properly
- c accounted for. In my view it is clear that VAT should be left out of account in respect of both the receipts and payments. On this footing the amounts realised by the sale of the goods distrained was £12,315, the charges and expenses of the auctioneer were £3,172·25 and those of the bailiff were about £750. Thus the net realisation was £8,392·75 or some £521·79 less than the
- d outstanding rent for which the distress had been levied. Accordingly in my view the judge was right to conclude that the tenants had not established any loss arising from the sale of the goods removed on 12 February.

58. The tenants claim that, nevertheless, they are entitled to damages under a variety of heads and descriptions, namely nominal damages for trespass, damages for breach of the covenant for quiet enjoyment and/or

e wrongful exclusion from the demised premises and damages for breach of the walking possession agreement. These claims and that for damages for wrongful interference with the goods were disputed by the bailiff on the grounds that recovery under any of the suggested heads would be contrary to the requirements of s 19 of the Distress for Rent Act 1737.

f 59. That section applies 'where any distress shall be made ... and any irregularity or unlawful act shall be afterwards done by the party ... distraining ...' In my view it is plain that the section applies, at least, to the stages of the overall process of distress which follow the initial seizure and impounding. Thus the section is applicable at the stage of re-entry with which this appeal is

g concerned. In cases to which the section applies the consequences are stated to be:

'... the distress itself shall not be therefore deemed to be unlawful, nor the party ... making it be deemed a trespasser ... ab initio; but the party ... aggrieved by such unlawful act or irregularity shall or may recover full

h satisfaction for the special damage he ... shall have sustained thereby, and no more, in an action for trespass or on the case ...'

60. Thus the bailiff may not be treated as a trespasser ab initio because of some intervening irregularity. And the claimant may only recover satisfaction

j for the special damage sustained because of that irregularity. The only special damage must be that arising from the wrongful re-entry. But on the facts of this case the only damage which can be suggested, and it was not in fact claimed, is the damage (if any) to the door. But the cost of the new lock, £94·31, was not charged to the tenants because the proceeds of sale of the goods, after deduction of the other costs and expenses for which the tenants



were liable, were insufficient to cover it. Nor was there any suggestion of any damage to the door for which the tenants were liable or charged. a

61. Further it is clear that, even if it had not failed on the facts, the claim for unlawful interference with the tenants' goods would have been barred by this section. There is no doubt that the bailiff was entitled to possession of the goods for he had impounded them and had the benefit of the walking possession agreement. As pointed out in *Lee v Gansel* (1774) 1 Cowp 1, [1558–1774] All ER Rep 465 in relation to the execution of a writ, though the entry may have been wrongful the removal of the goods was not. It is only possible to avoid this consequence if the bailiff is treated as a trespasser ab initio by virtue of the unlawful re-entry. But that is precisely what the section prohibits. b

62. In any event in my view the claim would have failed on the grounds of causation. Even if, as I have held, the bailiff was not entitled to re-enter on 12 February in the way he did he was entitled to re-enter by force if he was wrongly excluded. Had he given proper notice of his intention to re-enter I have no doubt he would have been entitled to obtain the goods for the purpose of the auction on 26 February. In that event he would have sold them in precisely the same circumstances as those in which in fact he did. There is no suggestion that the goods were damaged or depreciated by the manner or timing of their removal. In my judgment no claim under this head is made out. c

63. I would also reject the claim for damages for breach of the walking possession agreement. The wrong for which damages is sought is the bailiff's forcible re-entry of the demised premises without the consent of the tenants or justification in law. The fact that the walking possession agreement did not give the requisite consent does not mean that the wrong of which complaint is made is for a breach of that contract rather than for the trespass. In my view the tenants cannot avoid the restriction in the section by pleading their claim as a breach of contract. d

64. For similar reasons I would reject the claim for breach of the covenant for quiet enjoyment. This covenant is contained in cl 3(a) of the former lease of the demised premises by force of cl 3 of the lease dated 13 March 1990. It was in the normal form whereby the landlord covenanted: e

‘That the Tenants paying the rents hereby reserved and performing and observing the covenants on their part herein contained shall peaceably hold and enjoy the demised premises during the said term without any interruption by the Landlords or any person rightfully claiming under or in trust for them.’ f

It was established in *Dawson v Dyer* (1833) 5 B & Ad 584, 110 ER 906 that the payment of the rent is not a condition precedent to the performance of the covenant. But the unlawful act or interruption complained of is still the forcible re-entry. The tenants are entitled to full satisfaction but no more for that wrong. They cannot avoid the prohibition by pleading the wrong in an alternative form. g

65. In these circumstances, in my view, the tenants have failed to make out any special damage for the purposes of s 19 of the Distress for Rent Act 1737. It is established that in those circumstances the bailiff cannot be liable for h

a nominal damages either: see *Rodgers v Parker* (1856) 18 CB 112 at 125, 139 ER 1308 at 1313 and *Lucas v Tarleton* (1858) 3 H & N 116, 157 ER 409.

b 66 The overall result is that, though the judge was wrong in respect of the lawfulness of the re-entry, on the facts of the case and applying the provisions of s 19 of the Distress for Rent Act 1737 no recoverable damage has been made out so that the action fails. In those circumstances in my view the appeal should be dismissed because there is no reason to vary the order of the judge.

### *McLeod v Butterwick*

c 67. In 1992 the plaintiff, Mrs McLeod, brought proceedings in the county court against Wolsey Hall Oxford Ltd, Middlesex University and the Common Professional Examination Board. She lost and by order made on 25 November 1993 her action was dismissed with costs on scale 1. The costs of the Common Professional Examination Board (the judgment creditor) were taxed in the sum of £7,295.43, the certificate in that amount being issued on 14 October 1994. The action was transferred to the High Court on 5 January 1995 for the purpose of enforcement after which, on 17 January 1995, the judgment d creditor issued a writ of fieri facias addressed to the Sheriff of Greater London, the defendant, Mr Butterwick (the sheriff). Though on 26 January 1995 Middlesex University issued a further writ of fieri facias in respect of their costs of the action which had been taxed at £2,609.96 the certificate of taxation was set aside by the county court on 1 August 1995. In any event this action is e based exclusively on the writ of fi fa issued by the judgment creditor.

f 68. On 24 January 1995 Mr Warby, one of the sheriff's officers, attended at the premises of Mrs McLeod at 96 Berkeley Avenue, Greenford, Middlesex. Mr Warby was admitted by Mrs McLeod and claims formally to have seized the goods then in the premises. Mrs McLeod refused to enter into a walking possession agreement in respect of any of the goods so seized. She claimed to g be entitled to some of them in the name of Sally McLeod Associates; others were claimed by third parties. The claims by third parties were admitted by the judgment creditor but interpleader proceedings were commenced by the sheriff in respect of the claims by Sally McLeod Associates. The claim of Sally McLeod Associates was barred by Master Prebble by order made on 27 November 1995 and his order was upheld on appeal by Mr Baker QC, sitting as a deputy judge of the High Court in the Queen's Bench Division, on 13 December 1995. The judgment creditor thereupon instructed the sheriff to proceed with the execution at any time after 18 December 1995.

h 69. On 19 December 1995 at about 11 am Mr Warby attended at 96 Berkeley Avenue to execute the writ of fieri facias. Mrs McLeod was out at work. Mr Warby rang the bell but there was no answer. Finding the door to be locked Mr Warby called a locksmith, forced an entry and procured the locksmith to install new locks so that the premises should be secure after his departure. At about 11.45 am Mrs McLeod, having been alerted by a neighbour, and a police constable arrived. In due course, and notwithstanding j the protests of Mrs McLeod, Mr Warby seized the goods to which, in accordance with the order in the Interpleader proceedings, he considered that he was entitled and organised their removal to the furniture van which he had arranged to be waiting outside.

70. These events gave rise to a flurry of forensic activity. At about 2.30 pm on the same day Mrs McLeod obtained an order against the judgment

creditors' solicitors from District Judge Price sitting in the Uxbridge County Court forbidding the removal of her goods or the sale of such of them as had been removed. Later that afternoon the district judge's order was countermanded by a master of the Queen's Bench Division. On 21 December 1995 Sachs J refused the application of Mrs McLeod to set aside the execution.

71. These proceedings were commenced by a writ issued by Mrs McLeod in the Chancery Division on 27 December 1995. She seeks from the sheriff damages for trespass to her goods from what she alleges to have been an unlawful entry, interference with and removal of her personal possessions. In addition she applied by motion for an injunction to restrain the sheriff from selling her goods and from entering her house except pursuant to an order of a court of competent jurisdiction. That is the application which came before Judge Cooke on 13 February 1996 and was dismissed by him. He also refused leave to appeal but on 20 February 1996 such leave was granted by Bingham MR.

72. There were three issues before Judge Cooke; first, whether the sheriff had taken possession of the goods on his first visit on 24 January 1995; second, if so was he entitled by virtue of such possession to break into Mrs McLeod's house on his second visit on 19 December 1995; and third, even if he had not been entitled to break in was he nevertheless entitled to sell the goods he removed on that occasion. With regard to the first issue the judge observed that Mr Baker QC had heard oral evidence on the appeal in the Interpleader proceedings and had decided, as between Mrs McLeod and the judgment creditor, that the sheriff had taken possession of the goods. He considered that, though the issue was not *res judicata* as between Mrs McLeod and the sheriff, he could not treat her continuing assertion that the sheriff had not taken possession as a serious one requiring determination at a trial. After an extensive review of the authorities the judge decided that the sheriff was entitled to force an entry on the occasion of his second visit and that the Sheriff was entitled to sell the goods then removed whether his entry had been lawful or unlawful.

73. By her appeal Mrs McLeod seeks from this court the interlocutory relief she sought from Judge Cooke, namely an injunction restraining the sheriff from selling the goods removed from her home on 19 December 1995 and an injunction restraining him from entering her home save pursuant to an order of a court of competent jurisdiction made after hearing both parties. There has been no trial and we are not concerned with whether she is entitled to any damages, including the aggravated and exemplary damages she has claimed. In passing I observe that we were not referred to any statutory provision applicable to a sheriff comparable to s 19 of the Distress for Rent Act 1737.

74. Before us Mrs McLeod took the same points as she raised before Judge Cooke. In addition she suggested that the writ of *fi fa* was invalid because it was for an excessive amount. This point was based on the facts that there had been costs orders in her favour, amounting to £803.04, as well as that made against her. The writ was expressed to be for the sum of £7,295.43 and costs of £41.71 and interest at the rate of 8% pa. This represented the full amount of the order for costs against her without allowing any set-off for those in her favour. But in my view those facts do not indicate that the writ of *fi fa* was invalid. The writ was in the usual form of a command to the sheriff to seize the goods of the debtor. The command is made for the purpose of realising



a out of the goods so seized the amount specified in the writ. But neither seizure nor sale pursuant to ss 138, 138A and 138B of the 1981 Act is dependent on any particular amount being owed. If the amount is overstated it does not invalidate the execution so long, at least, as there is some judgment debt. In any event an undertaking had been given by the judgment creditors solicitors to permit the set-off Mrs McLeod claimed.

b 75. Mrs McLeod criticised the judge's uncritical acceptance of the sheriff's allegations of seizure and impounding on the occasion of his first visit on 24 January 1995. In her affidavit sworn on 11 January 1996 she had stated in unambiguous terms that there had been no indication of seizure, merely a demand for payment of the judgment debt. She was not cross-examined on that affidavit at the hearing of the interpleader proceedings before Mr Baker.

c The oral evidence which Mr Baker accepted was the one-sided version of the sheriff's officer. She submits with some force that the so-called finding of Mr Baker was not made after hearing oral evidence on both sides and is open to challenge by her. But the judge only found that on the application before him he should be slow to regard this issue as a serious one to be tried. He

d proceeded on the basis that the issue was likely to be decided in all probability in the sheriff's favour. For my part I think that the judge was in the circumstances entitled to take that approach. He was not deciding the issue, merely weighing it for the purpose of exercising his discretion.

e 76. I pass then to the question whether the sheriff's re-entry on 19 December 1995 was lawful or not. I have already quoted the passage from the judge's judgment in which he concluded that point against Mrs McLeod. He did so on the footing that the door was locked and that was sufficient justification for the forcible re-entry, notwithstanding that no notice had been given to Mrs McLeod of his intention to re-enter. For the reasons I have

f already given I disagree with the judge's conclusion. In my judgment the sheriff's forcible re-entry on 19 December 1995 was unlawful and a trespass. It may be that it will be held at the trial that Mrs McLeod is entitled to damages on account of that trespass but it does not follow at this stage that she is entitled to either of the injunctions she seeks.

g 77. The judge held that in the absence of a walking possession agreement the sheriff does not have to remain in close possession to avoid abandoning possession of the goods seized. He concluded that notwithstanding the interval of 11 months between the first entry and the second there had been no abandonment because of the prosecution of the interpleader proceedings. In my view he was right in respect of both matters. Thus at the time of the

h forcible re-entry the sheriff was in possession of the goods which, by virtue of ss 138 to 138B of the 1981, he had been entitled to seize and was entitled to sell. In these circumstances I do not see how an injunction to restrain the sale of the goods so seized and now stored in a warehouse off Mrs McLeod's premises could be justified. Mrs McLeod has not paid the judgment debt and, apparently, has no intention of doing so. As pointed out in *Lee v Gansel* (1774)

j 1 Cowp 1, [1558-1774] All ER Rep 465, though the re-entry may have been wrongful the removal of the goods was not. The statutory right to sell continues to subsist and I see no reason to inhibit its exercise.

78. The same point may be made with regard to the injunction sought to restrain entry except pursuant to an order of the court. The sheriff does have a right to re-enter otherwise than pursuant to an order of the court, namely if

removed or excluded by force. But I have no reason to think that he threatens and intends to re-enter the home of Mrs McLeod otherwise than as permitted by law as established by the decision of this court on these appeals. Though his re-entry on 19 December 1995 was unlawful and a trespass there is no reason to think that it will be repeated unless an interlocutory injunction is granted. It may well be that at the trial it will be appropriate, if the judge thinks fit, to make a declaration as to the unlawfulness of the re-entry as well as giving judgment for such damages as Mrs McLeod may establish. But in my judgment there is no good reason for granting the injunction sought at this stage. a  
b

79. It follows that, as in *Khazanchi v Faircharm Investments Ltd*, though for different reasons, I see no reason to interfere with the order the judge actually made. Accordingly, though I disagree with the judge's conclusion on the lawfulness of the re-entry, I would dismiss this appeal. c

### Conclusion

80. In the event I would dismiss both appeals though, in each case, I have concluded that the judge was wrong on the important point of principle. This may appear to be an unsatisfactory result for in one sense it means that an illegal act has been inflicted on the plaintiffs without any immediate means of redress being afforded to them by the law. But this is the consequence of the application to the facts of the provisions of s 19 of the 1737 Act in the one case and the circumstances including the fact that there has not yet been a trial in the other. However it should be noted that in cases such as these there may be a sanction pursuant to s 1 of the Criminal Damage Act 1971. In other cases the provisions of s 6 of the 1971 Act may apply also. d  
e

**WALLER LJ.** I agree.

**STUART-SMITH LJ.** I also agree. f

*Appeals dismissed. Leave to appeal to the House of Lords in Khazanchi refused.*

Dilys Tausz Barrister.

## Practice Direction

### FAMILY DIVISION

*Injunction – Husband and wife – Domestic violence – Attachment of power of arrest to occupation or non-molestation order – Procedure – Announcement of terms of order in open court – Arrest for breach of order – Procedure following arrest – Family Law Act 1996, Pt IV.*

The procedure formulated in the President's directions of 23 January 1980 and 7 March 1991 ([1991] 2 All ER 9, [1991] 1 WLR 278) in relation to orders made under the Domestic Violence and Matrimonial Proceedings Act 1976, shall apply in respect of orders made under Pt IV of the Family Law Act 1996, as follows.

(1) Where at a hearing which has been held in private, an occupation or non-molestation order is made to which a power of arrest is attached and the person to whom it is addressed was not given notice of the hearing and was not present at the hearing, the terms of the order and the name of the person to whom it is addressed shall be announced in open court at the earliest opportunity. This may be either on the same day when the court proceeds to hear cases in open court or where there is no further business in open court on that day at the next listed sitting of the court. (2) When a person arrested under a power of arrest cannot conveniently be brought before the relevant judicial authority sitting in a place normally used as a courtroom within 24 hours after the arrest, he may be brought before the relevant judicial authority at any convenient place but, as the liberty of the subject is involved, the press and public should be permitted to be present, unless security needs to make this impracticable. (3) Any order of committal made otherwise than in public or in a courtroom open to the public, shall be announced in open court at the earliest opportunity. This may be either on the same day when the court proceeds to hear cases in open court or where there is no further business in open court on that day at the next listed sitting of the court. The announcement shall state (a) the name of the person committed, (b) in general terms the nature of the contempt of the court in respect of which the order of committal has been made and (c) the length of the period of committal.

Issued with the concurrence of the Lord Chancellor.

17 December 1997

SIR STEPHEN BROWN P.



## Practice Direction

a

### FAMILY DIVISION

*Injunction – Family proceedings – Interim care order or emergency protection order – Attachment of power of arrest to exclusion requirement – Procedure – Announcement of terms of order in open court – Arrest for breach of order – Procedure following arrest – Children Act 1989, ss 38A(5), 44A(5).*

b

Under ss 38A(5) and 44A(5) of the Children Act 1989 the court may attach a power of arrest to an exclusion requirement included in an interim care order or an emergency protection order. In cases where an order is made which includes an exclusion requirement, the following shall apply. (1) If a power of arrest is attached to the order then unless the person to whom the exclusion requirement refers was given notice of the hearing and attended the hearing, the name of that person and that an order has been made including an exclusion requirement to which a power of arrest has been attached shall be announced in open court at the earliest opportunity. This may be either on the same day when the court proceeds to hear cases in open court or where there is no further business in open court on that day at the next listed sitting of the court. (2) When a person arrested under a power of arrest cannot conveniently be brought before the relevant judicial authority sitting in a place normally used as a courtroom within 24 hours after the arrest, he may be brought before the relevant judicial authority at any convenient place but, as the liberty of the subject is involved, the press and the public should be permitted to be present, unless security needs made this impracticable. (3) Any order of committal made otherwise than in public or in a courtroom open to the public, shall be announced in open court at the earliest opportunity. This may be either on the same day when the court proceeds to hear cases in open court or where there is no further business in open court on that day at the next listed sitting of the court. The announcement shall state (a) the name of the person committed, (b) in general terms the nature of the contempt of the court in respect of which the order of committal has been made and (c) the length of the period of committal.

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Issued with the concurrence of the Lord Chancellor.

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17 December 1997

SIR STEPHEN BROWN P.

## AIB Finance Ltd v Debtors

COURT OF APPEAL, CIVIL DIVISION  
NOURSE, POTTER AND MUMMERY LJJ  
2, 3 MARCH 1998

*Mortgage – Sale – Duty of mortgagee – Standard of duty in exercising power of sale – Security including business – Whether duty to preserve business pending realisation of security.*

The appellants were the registered proprietors of premises which they ran as a post office, newsagent and off-licence. The business was purchased with the assistance of a loan of £160,000 from the respondent bank, secured by a first legal mortgage on both the freehold and the goodwill. By 1994 the appellants had fallen into arrears with payments of the principal and interest. In September 1995 the bank obtained an order for possession of the premises on 8 November 1995 and judgment for arrears amounting to £212,806.72. The bank in fact repossessed the property on 14 December 1995 and it was sold in April 1996 for £43,500 and statutory demands were served by the bank for the balance of the judgment debt of £143,952.42. The appellants applied under r 6.5(4)(a) of the Insolvency Rules 1986 to set aside the statutory demands on the ground that they had a counterclaim which equalled or exceeded the amount specified therein, alleging, *inter alia*, that the bank had been negligent in failing to ensure that the business was preserved as a going concern pending realisation of the security. The district judge granted the application, but the judge allowed the bank's appeal on the ground that, while the appellants did have an arguable counterclaim, the value of it did not equal or exceed the amount of the statutory demands. The appellants appealed.

**Held** – A mortgagee was under no duty to preserve his security unless and until he took possession of it. Thus, a mortgagee whose security included a business carried on on the property charged was under no duty to take any steps to preserve the business before entering into possession. In the instant case, on the date the bank repossessed the property, and even on 8 November 1995, the business had already been disposed of by the appellants and ceased to exist, so that there was no goodwill to preserve. Furthermore, there was no evidence that prior to 8 November 1995 the bank had acted in breach of any duty as a mortgagee to act fairly towards the appellants in respect of the realisation of the security or that the appellants had been unfairly prejudiced by any actions on the part of the bank. It followed that there had been no arguable breach of duty by the bank and the appellants had no arguable counterclaim against it. Accordingly, the appeal would be dismissed (see p 936 *d* to p 937 *a c d* and p 938 *a* to *e*, post).

Decision of Carnwath J [1997] 4 All ER 677 affirmed on other grounds.

### Notes

For duty of mortgagee exercising power of sale, see 32 *Halsbury's Laws* (4th edn) para 726.

For the Insolvency Rules 1986, r 6.5, see 3 *Halsbury's Statutory Instruments* (1995 reissue) 385.

**Cases referred to in judgments**

*Cuckmere Brick Co Ltd v Mutual Finance Ltd, Mutual Finance Ltd v Cuckmere Brick Co Ltd* [1971] 2 All ER 633, [1971] Ch 949, [1971] 2 WLR 1207, CA. a

*Palk v Mortgage Services Funding plc* [1993] 2 All ER 481, [1993] 2 WLR 415, CA.

*Palmer v Barclays Bank Ltd* (1972) 23 P & CR 32.

*Parker-Tweedale v Dunbar Bank plc (No 1)* [1990] 2 All ER 577, [1991] Ch 12, [1990] 3 WLR 767, CA. b

*Whitley v Challis* [1892] 1 Ch 64, CA.

**Cases also cited or referred to in skeleton arguments**

*Debtor, Re a (No 2389 of 1989), ex p Travel and General Insurance Co plc v The debtor* [1990] 3 All ER 984, [1991] Ch 326.

*Debtor, Re a (No 59 of 1987, Newcastle-upon-Tyne)* (1988) Independent, 1 February. c

*Debtor, Re a, (No 415/SD/93), ex p the debtor v IRC* [1994] 2 All ER 168, [1994] 1 WLR 917.

*Downsview Nominees Ltd v First City Corp Ltd* [1993] 3 All ER 626, [1993] AC 295, PC. d

*Gilmartin (a bankrupt), Re, ex p the bankrupt v International Agency and Supply Ltd* [1989] 2 All ER 835, [1989] 1 WLR 513.

*Henderson v Henderson* (1843) 3 Hare 100, [1843–60] All ER Rep 378, 67 ER 313, V.C.

*Industrial and Commercial Securities plc, Re* (1989) 5 BCC 320.

*Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489, CA.

*Langdale v Danby* [1982] 3 All ER 129, [1982] 1 WLR 1123, HL. e

*Royal Bank of Scotland v O'Shea* [1998] CA Transcript 56.

*Standard Chartered Bank Ltd v Walker* [1982] 3 All ER 938, [1982] 1 WLR 1410, CA.

*Talbot v Berkshire CC* [1993] 4 All ER 9, [1994] QB 290, CA.

*Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54, [1983] 1 WLR 1349, PC. f

**Appeal**

The debtors appealed with leave from the decision of Carnwath J ([1997] 4 All ER 677) on 18 March 1997 allowing the appeal of the respondent bank, AIB Finance Ltd (AIB), from the order of District Judge Fawcett on 6 September 1996 sitting at Brighton County Court setting aside the statutory demands dated 22 February 1996 served by AIB on the debtors. The facts are set out in the judgment of *Mummery LJ*. g

*Peter Leighton* (instructed by *R G F Vickery & Co*, Bexleyheath) for the appellants.

*David Iwi* (instructed by *Moran & Co*, Tamworth) for AIB. h

**MUMMERY LJ** (delivering the first judgment at the invitation of Nourse LJ).

**Introduction**

On 6 September 1996 District Judge Fawcett, sitting at the Brighton County Court, set aside two statutory demands dated 22 February 1996 served by AIB Finance Ltd (AIB) on the appellants. Each demand was based on a judgment obtained by AIB in the Eastbourne County Court on 14 September 1995 in the sum of £212,806.72. j

On 2 October 1996 AIB appealed. The hearing of the appeal was adjourned on 14 November 1996 and, in due course, heard by Carnwath J on 18 March 1997. He allowed the appeal (see [1997] 4 All ER 677), discharged the order of the district judge and authorised AIB to present bankruptcy petitions against the



a appellants forthwith pursuant to r 6.5(6) of the Insolvency Rules 1986, SI 1986/1925. On 14 April 1997 he gave leave to appeal.

### *The issue*

b The principal issue before the district judge and Carnwath J, and, as things have turned out, the decisive issue on this appeal, is whether the appellants appear to have a counterclaim against AIB which equals or exceeds the amount of the debt specified in the statutory demands. That is a ground on which a court may grant an application to set aside a statutory demand: r 6.5(4)(a) of the 1986 rules.

c The first part of that question in this case is: does it appear to the court that AIB, as mortgagees, acted in breach of duty in relation to the realisation of the appellants' assets subject to a mortgage in AIB's favour? Both the district judge and Carnwath J answered that question in the affirmative. But they differed on the second part of the question, which is: does the value of the counterclaim for breach of duty appear to be equal or in excess of the amount of the statutory demand? The district judge decided that it did and set aside the statutory demand. d Carnwath J decided that it did not and allowed AIB's appeal.

### *The facts*

e The appellants bought the Post Office Stores at Cross-in-Hand, Heathfield, East Sussex, from Mr and Mrs Ainsley in October 1988 with the assistance of a loan of £160,000 from AIB. The Post Office Stores consisted of a general stores with a newspaper round, an off-licence and a Post Office concession from Post Office Counters Ltd. The first appellant held the Post Office appointment at an initial annual salary of £7,600, later increased to £10,000. The purchase by the appellants was of both the freehold premises, which contained residential property as well as the stores, and the goodwill of the business carried on there. f The loan by AIB was secured by a first legal mortgage dated 10 October 1988 on both the freehold and the goodwill. Goodwill was defined as including the goodwill in connection with the Post Office Stores carried on at those premises, as well as the benefit of all licences held in connection therewith. The mortgage was in common form, securing both principal and interest on the property.

g In February 1994 the appellants were in arrears with payments of principal and interest. AIB sent a letter to the appellants dated 15 February 1994 stating that the balance due was £191,521.46 and that the arrears were £17,775. The letter from the recoveries division of AIB said:

h 'Clearly it would appear, particularly since September that your business is not self financing, and requires immediate assistance. To this end I would wish to instruct our retail consultants to visit you and report back on the business. It is vital that this exercise is carried out as soon as possible and your full co-operation is requested. I must also advise that it will be necessary to carry out a valuation on the Abbey Wood property. This will j necessitate our valuers accessing the property. Please advise how entry can be gained to this property. [That is property in London owned by the appellants and mortgaged to AIB.] Again I would stress the importance of your full co-operation in the above matters. Should you choose to resist our instructions, it will leave me with no option but to call in the debt and commence Possession Proceedings.'

The background to that letter was that there had been a dramatic decrease in the weekly takings of the business, attributed by the appellants in part to the opening of a superstore in the neighbourhood.

On 27 April 1994 Asset Management and Recovery Services Ltd (AMR) made an appraisal report on behalf of AIB in respect of the premises and the business. AMR was instructed by AIB to visit the property and report on the estimated value and the feasibility of AMR running the business on AIB's behalf. They met the appellants. The detailed report contained a section on valuations. Under the heading 'Valuations', it is stated:

'Assuming the property to be offered in the present market conditions, with no major structural defects or onerous covenants, and to include fixtures, fittings and trade chattels, in our opinion the valuations are: (a) The property and the business, as a going concern, assuming a bricks and mortar and contents value of £95,000: £130,000 (b) As in (a) above, closed for trading, but caretaken: £85,000 (c) As (b) above, under forced sale conditions and assuming 90 day disposal is sought: £75,000. We would recommend an asking price of £150,000 assuming the business as a going concern, as in (a) above, were offered to the market, to allow room for negotiation and to test the market. In each of the above cases where appropriate stock will be in addition at valuation.'

The report concludes with these recommendations:

'In our view the best course of action would be to repossess and appoint AMR as Managers. Every effort should be made to maintain the co-operation of the borrowers, perhaps by freezing the interest, as significant goodwill could be lost if the borrowers become alienated. However there is little doubt, at this time at least, that the borrowers would be extremely reluctant to voluntarily surrender their occupation of the property and this could quite easily turn out to be an extremely messy repossession. We do not know if the Bank have a charge over the fixtures and fittings but clearly one is called for in any event to increase the Bank's security. Because the borrowers live on the premises, a Possession Order would be necessary before repossession (and management) could take place. The threat of this might induce the borrowers to recommencing repayments and grant a Bill of Sale, but failing that we see no alternative to obtaining such an Order and subsequent enforcement of it.'

Possession proceedings were started by AIB. Following service of the proceedings, the first appellant wrote to AIB on 20 June 1995. The letter suggested that a meeting would be beneficial so that they could agree the best way forward. That letter referred to an earlier letter written by the first appellant on 4 April 1995. In the concluding page of that letter the first appellant wrote:

'I do not want us to get into any nasty dialogue and believe that we should see if there is anything we can do together to protect both of our interests. I should be grateful therefore if you would arrange to meet us as soon as possible. In view of my comments above we are not in a position to pay increased mortgage charges from the April payment but suggest this is covered when we meet. I look forward to hearing from you.'

No meeting took place. The possession proceedings were heard in the county court. The appellants were not represented. An order was made on 14

a September 1995 for possession of the premises on 8 November 1995. Judgment was also given for £212,806.72 principal and interest.

On 18 September 1995 the second appellant wrote to AIB in these terms:

‘I am writing to ask that you send me a copy of the following documents.

b 1. The retail consultants’ report for April 1994 on the above premises. 2. The valuation for August 1994 on 321 Wickham Lane [the Abbey Wood property]. 3. The Bill of Sale from September 1994 with items of included fixtures and fittings. With regard to the pending repossession and your apparent “anxiety to realise your security” I am sure you will agree that if this is to happen there are other parties involved with the business concerned, as stated in the original mortgage conditions of 15th August 1988, with whom  
c business arrangements need to be sorted out. It will presumably be in the interest of all parties concerned if you inform me of your future intentions regarding such matters.’

There was no reply from AIB.

d With effect from 17 October 1995 the Post Office appointment, which was personal to the first appellant, was revoked. The newspaper round was sold to another local newsagent. On 1 November 1995 the appellants ceased to trade at the stores. The shop was closed down and they moved out.

e On 14 December 1995 the bank repossessed the premises and then instructed two local firms to provide valuations. The first valuation from an Eastbourne firm, Brian Kingston Associates, chartered surveyors, was dated 18 January 1996. They valued the freehold title as having a current open market value in the region of £35,000 to £40,000. A second valuation from a Brighton firm of chartered surveyors, Crickmay & Partners, was dated 22 January 1996. That report stated that the figure of £50,000 might be achievable for the freehold property. Both  
f valuations were put in evidence by AIB before the district judge in support of their contention that they had sold the property for the best price reasonably obtainable at the time of the sale. The sale took place on 19 April 1996. A sum of £43,500 for the freehold was obtained.

g No expert valuation report was put before the district judge on behalf of the appellants. But on the hearing of the appeal, Carnwath J, despite the objections of AIB, gave leave to adduce in evidence a report dated 4 December 1996 by Mr K Mustafa, a chartered surveyor. The relevant parts of his report contain these valuations: ‘Goodwill: £70,000. Fixtures and Fittings: £15,000. Total valuation of the business: £85,000’

h He valued the shop premises and first floor accommodation of the freehold property in the region of £100,000. That produced a total valuation of the freehold and goodwill of £185,000.

j The property was sold on 19 April 1996, following an advertisement placed in Property Express on 16 February 1996. In March 1996 the statutory demands were served on the appellants. In the demands, based on the money judgment, credit was given for the value of the security, the Post Office Stores at Cross-in-Hand, in the sum of £43,500, and the Wickham Lane property, Abbey Wood, in the sum of £32,299.62, reducing the amount owing at the date of the demands to £143,951.42.

### *The judgment*

Carnwath J was satisfied that there was a serious issue on the extent of AIB’s obligations and whether they had fallen short of them on the facts. He concluded



that there was an arguable counterclaim. He said in his judgment ([1997] 4 All ER 677 at 690):

*'Conclusion* In conclusion, I am satisfied that there is a serious issue as to the extent of a mortgagee's obligations in circumstances such as this, and as to whether the bank fell short of them on the facts. There is an arguable counterclaim.'

He held, however, that there were serious weaknesses in Mr Mustafa's report. He dealt with the report in detail in the earlier section of his judgment headed 'Value of the counterclaim'. He said (at 690):

'In summary, there is an arguable counterclaim, but not one which has any prospect of being found to "equal or exceed" the amount of the statutory demand. In these circumstances the requirements of ground (a) are not met, and I cannot uphold the district judge's order. The appeal is allowed.'

In his judgment, Carnwath J dealt first with AIB's duties as mortgagees and, secondly, with the value of the counterclaim. On the duties point, the judge reviewed the decided cases, commenting that there appeared to be little authority on the point taken on behalf of the appellants that AIB had been negligent in failing to ensure that the business was preserved pending realisation of the security.

The judge identified the relevant duties of AIB in the following passages. He said (at 686): 'In principle, where, as here, the goodwill of a business forms part of the mortgagee's security, the same approach should apply.' The approach is that stated by Nicholls V-C in *Palk v Mortgage Services Funding plc* [1993] 2 All ER 486-487, [1993] Ch 330 at 337-338, quoted immediately before this passage. He continued (at 686-687):

'It is not sufficient for the mortgagee simply to repossess the property, without regard to the effect on the value of the goodwill. If he is to take "reasonable care to maximise his return from the property", he must, in exercising his right to repossess and sell the property, take account of the effect of that on the value of the goodwill.'

Later, Carnwath J (at 687-688) said, after citing the decisions of Goulding J in *Palmer v Barclays Bank Ltd* (1972) 23 P & CR 32 and of Bowen LJ in *Whitley v Challis* [1892] 1 Ch 64:

'Although that case does not refer to the duty of the mortgagee in such circumstances, the corollary of the power there recognised is that he should act fairly to the mortgagor in the exercise of that power, to ensure that the value of the combined asset is maximised. He may have a free choice as to the timing of any sale, but once he decides to exercise his power of sale over the property, fairness requires that he should take into account the effect of that sale on the value of the goodwill. Accordingly, I reject the submission that there is no duty in law to maintain the business, merely because running a business inevitably involves taking some degree of risk. Mr Iwi [who appeared for AIB in the court below and on this appeal] says that in any event there could be no duty here, as the business had been closed down before the bank took possession. However, that may have been the inevitable consequence of the enforcement of the order for possession. If the bank had a duty to safeguard the business, it would normally involve making

a arrangements to ensure continuity before taking physical possession. Otherwise there would inevitably be a break in the business, and consequent damage to its value as a going concern. I do not find it possible to reach a conclusion that there is no arguable merit in the debtors' case without more detailed investigation of the events leading up to the possession than is appropriate at this stage. If this were the only point in the case I would regard it as being a matter properly within the discretion of the district judge, with which it would not be appropriate for me to interfere. The precise nature of the mortgagee's duty in such circumstances and its application to the facts of this case is something which would require investigation at trial. The fact that a property and business, valued by the bank's own advisers at £130,000 in 1994, realised a figure of only £43,000 in 1996 appears to me (as it did to the judge) to raise at least a *prima facie* case that the bank fell short of the duties it owed to the mortgagor.'

b

c

There is a further passage (at 688), where the judge recorded Mr Iwi's first submission on behalf of AIB in relation to Mr Mustafa's report in these terms:

d '(1) The value prior to closing is irrelevant since the business was closed before the Bank took possession, and there was no duty on the bank to re-establish the business.'

I omit the three further submissions made by Mr Iwi. The judge (at 689) comments on point (1):

e 'Mr Iwi's first point to my mind begs one of the questions which is at the heart of the negligence case. As I have said, I do not accept that it is open to a mortgagee, whose security includes both the property and the business, simply to seek possession of the property, without taking such steps as are reasonable to ensure that the value of the other part of the security is protected.'

f

Mr Leighton, on behalf of the appellants, adopted the formulations of a mortgagee's duty made by Carnwath J (which are challenged in AIB's respondent's notice) but criticised the judge's conclusion on the value of the counterclaim. In support of his criticisms on the value point he sought leave from this court to adduce yet further evidence from Mr Mustafa.

g

Mr Leighton accepted that, in order to succeed on the duty point, he had to persuade this court that there was an arguable breach of duty by AIB *both* in relation to the disposition of the freehold premises on 19 April 1996 *and* in relation to the preservation of the goodwill and the business prior to that date. A breach of duty on the disposition of the freehold property would not, on Mr Leighton's own evidence (in Mr Mustafa's reports), suffice, because it would not produce a figure which either equalled or exceeded the amount of the statutory demand.

h

Mr Leighton submitted that AIB was under a duty of care in respect of the sale of the mortgaged property; that the mortgaged property included the benefit of the goodwill, the licences and the business; that, although AIB was not under a duty to sell the security at any particular time, or indeed under a duty to sell at all, AIB should, when there was such a goodwill, include that benefit in a sale. AIB should have taken prompt steps to safeguard the assets while in their possession. They should have taken reasonable steps to market the security to best advantage. AIB had enforced the order for possession against the appellants

j

without taking any steps to safeguard and preserve the existing business. When asked at what date this duty of AIB in relation to the goodwill arose, Mr Leighton said that it arose on receipt of the letter from the second appellant dated 18 September 1995. He argued that it was a breach of duty on the part of AIB thereafter to allow the business at the stores to run down and disappear before selling the premises. AIB should have sold the premises with the business straight away or, alternatively, should have made arrangements to manage it until it was sold, so that the best price reasonably obtainable in the market would be secured both for the property and the business. The security had not been properly marketed. There was an arguable counterclaim on the basis of AIB's negligence. He said, finally, that the bankruptcy debt could have been extinguished if proper steps had been taken to market the property as a going concern, with the benefit of the Post Office concession and justices' off-licence.

### *Conclusion*

In my judgment, this appeal fails because, on a proper appreciation of the nature and extent of AIB's duty as mortgagee in the particular circumstances of this case, there is no arguable counterclaim against AIB. I have read in draft the judgment of Nourse LJ and I agree with it.

The legal position can be briefly stated as follows.

(1) AIB did not repossess the property until 14 December 1995. By that time the appellants had (a) lost the Post Office concession; (b) disposed of the newspaper round; (c) closed down the business, and (d) moved out of the premises. The going concern had ceased to exist on the appellants ceasing to trade. There was no goodwill for AIB to preserve when they went into possession. All that was left in the hands of AIB as security was the freehold property.

(2) It is accepted by Mr Leighton that AIB could not have obtained possession of the premises or of any business carried on there earlier than 8 November, the date for possession stated in the order of 14 September 1995. By that date all of the events mentioned in (1) above had occurred. In those circumstances, I find it difficult to see how there could be any duty on AIB to preserve and safeguard the goodwill of the business carried on there. Without possession and control of the property, there were no steps which AIB could reasonably have taken to preserve and dispose of the business as a going concern.

I have been unable to find in the cases cited by Carnwath J any authority for the proposition that the mortgagee is under a general duty to take steps to preserve the value of a security in the exercise of his security rights ahead of obtaining possession and control of the property subject to the mortgage.

(3) The evidence does not establish that prior to 8 November 1995 AIB had acted in breach of any duty as a mortgagee to act fairly towards the appellants in respect of the realisation of the security or that the appellants had been unfairly prejudiced by any actions on the part of AIB. The most that could be said against AIB was that they had failed to respond to the appellants' letters suggesting that meetings take place. That failure does not, in my judgment, amount to a breach of duty on the part of AIB. No suggestions were made in the letters to AIB about giving up possession or handing over the business at an earlier stage to AIB. No information was provided by the appellants to AIB in relation to prospective purchasers of the business as a going concern.

For all those reasons there was no arguable breach of duty by AIB and no arguable counterclaim against AIB. The appeal must fail, even if the appellants



a were able to show that there had been an arguable breach of duty in relation to the sale of the freehold in April 1996 by AIB on the basis of the two valuations by local firms.

*Postscript*

b As the appellants have no arguable counterclaim, it is unnecessary, for the purposes of disposing of this appeal, to express any view on the challenge to the judge's conclusions on the value of the counterclaim; or on the nature of the hearing on an application to set aside a statutory demand; or on the nature of an appeal to the High Court against a decision on such an application; or on the circumstances in which it is proper to give leave on the hearing of an appeal to adduce further evidence.

c While feeling sympathy for the appellants, I am unable to reach a conclusion in their favour. For the reasons given, I would dismiss this appeal.

POTTER LJ. I agree.

d NOURSE LJ. I also agree.

e It was established by the decisions of this court in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] 2 All ER 633, [1971] Ch 949 and *Parker-Tweedale v Dunbar Bank Plc (No 1)* [1990] 2 All ER 577, [1991] Ch 12, first, that a mortgagee, although he may exercise his power of sale at any time of his own choice, owes the mortgagor a duty to take reasonable care to obtain a proper price for the mortgaged property at that time; secondly, that the duty is not tortious in nature but one recognised by equity as arising out of the particular relationship between mortgagee and mortgagor.

f One of the claims made by the appellants is that in selling the property for £43,500 in April 1996 AIB did not take reasonable care to obtain a proper price. However, as Mummery LJ has explained, it is recognised by Mr Leighton on their behalf that a successful outcome to that claim would not by itself achieve a victory for the appellants. So everything depends on their being able successfully to contend that AIB owed them, and was in breach of, an additional and anterior duty.

g This contention has been put by Mr Leighton in two different ways. First, he submits that on receipt of the second appellant's letter of 18 September 1995 AIB came under a duty to the appellants to co-operate with them in procuring a sale of the property and the business as a going concern at a proper price; a duty which was breached by AIB's failure to answer the letter and by its subsequent enforcement of the order for possession and the sale of the property alone.

h While it may be possible to conceive of circumstances in which a mortgagee could come under a duty of that kind, they are not the circumstances of the present case. I certainly accept that the letter of 18 September should be read with the earlier letters to which Mummery LJ has referred. Nevertheless, and making every allowance for the inexperience of the second appellant in these matters, I am unable to read the letter of 18 September as anything more than a request for information as to how AIB, having obtained its judgment, intended to proceed. It cannot be read as a request that AIB should co-operate with the appellants in procuring a sale of the property and the business as a going concern. On that footing, all other considerations apart, AIB could not have come under any duty to the appellants on the receipt of that letter.

Alternatively, Mr Leighton submits that AIB was in any event under a duty to the appellants, before they effectively closed down the business and left the property on 1 November 1995, to preserve the business and thus to facilitate a sale as a going concern. This submission is simply unsustainable. A mortgagee who has the necessary powers (as AIB had here, see cl 5(a) of the mortgage) may, if he chooses to do so, appoint a receiver and manager of a business whose goodwill is comprised in the security. But he is under no *duty* to take that or any other step to preserve the business, any more than he is under a duty to preserve any other form of security, unless and until he takes possession of it. In the present case such a duty could only have arisen, at the very earliest, on 8 November 1995, that being the date on which AIB was entitled, pursuant to the order made on 14 September, to take possession of the property. By that time the appellants had, of their own volition, subtracted the goodwill of the business from the security. After 1 November AIB could never have owed a duty to the appellants in respect of the business and it did not owe them one before that date.

It follows that I respectfully disagree with the views expressed by Carnwath J in the passages which Mummery LJ has read and with his conclusion that there was an arguable counterclaim in regard to AIB's obligations to the appellants. That is enough to entitle AIB to succeed on this appeal and it becomes unnecessary to consider the different ground on which the judge decided the case in its favour. While sharing Mummery LJ's sympathy for the appellants in the predicament in which they find themselves, I too would dismiss their appeal.

*Appeal dismissed.*

Kate O'Hanlon Barrister.

## R v M

## R v L

COURT OF APPEAL, CRIMINAL DIVISION

LORD BINGHAM OF CORNHILL CJ, BRIAN SMEDLEY AND THOMAS JJ

23 MARCH, 6 APRIL 1998

*Sentence – Life imprisonment – Discretionary life sentence – Sentence of detention for life – Part of sentence to be served before case referred to Parole Board – Exercise of discretion in determining that part – Part to be served in case of young offender – Criminal Justice Act 1991, s 34 – Crime (Sentences) Act 1997, s 28.*

When imposing a discretionary life sentence or a sentence of detention for life on a young offender under the Children and Young Persons Act 1933, the judge should first decide the determinate part of the sentence which he would have imposed if the need to protect the public and the potential danger of the offender had not required him to pass a life sentence, before going on to consider the length of the specified period under s 34 of the Criminal Justice Act 1991. In the case of a young offender, save in exceptional circumstances, the specified period should be fixed at half of the notional determinate sentence as the part of the sentence to be served before the case is referred to the Parole Board for consideration of release. In the case of an adult offender, half the determinate period will also usually be appropriate, although there may well be circumstances which will justify a period of more than a half and up to two thirds (see p 944 g to p 945 c, post); *R v Secretary of State for the Home Dept, ex p Furber* [1998] 1 All ER 23 applied.

This approach remains applicable, notwithstanding that the provision enacted in s 34 of the 1991 Act has been replaced by s 28 of the Crime (Sentences) Act 1997. However, the judge is now required to consider taking into account the time spent in custody on remand when fixing the specified period for the purposes of reference to the board, although circumstances may arise where it will not be appropriate to give credit for that time (see p 945 d to j and p 947 j to p 948 d, post).

### Notes

For the Children and Young Persons Act 1933, s 53, see 6 *Halsbury's Statutes* (4th edn) (1992 reissue) 55.

For the Criminal Justice Act 1991, s 34, see 34 *Halsbury's Statutes* (4th edn) (1997 reissue) 780.

For the Crime (Sentences) Act 1997, s 28, see *ibid* 895.

### Cases referred to in judgment

*R v Carr* [1996] 1 Cr App R (S) 191, CA.

*R v O'Connor* (1993) 15 Cr App R (S) 473, CA.

*R v Parole Board, ex p Bradley* [1990] 3 All ER 828, [1991] 1 WLR 134, DC.

*R v Secretary of State for the Home Dept, ex p Furber* [1998] 1 All ER 23, DC.

*R v Secretary of State for the Home Dept, ex p Venables*, *R v Secretary of State for the Home Dept, ex p Thompson* [1997] 3 All ER 97, [1997] 3 WLR 23, HL.

*R v Vale* [1996] 1 Cr App (S) 405, CA.



## Applications

*R v M*

M, aged 16, applied for leave to appeal against a sentence of detention for life under s 53 of the Children and Young Persons Act 1933 on his plea of guilty to two counts of arson at the Crown Court at Nottingham imposed by Judge Hopkin on 11 September 1997, whereby, without stating a notional determinate period, the judge had specified a period of eight years under s 34 of the Criminal Justice Act 1991. The facts are set out in the judgment of the court.

*R v L*

L, aged 17, made a renewed application for leave to appeal against a sentence of detention for life under s 53 of the Children and Young Persons Act 1933 on his plea of guilty to five counts of arson at the Crown Court at Hull imposed by Judge Davies on 22 September 1997, whereby, having considered a determinate period of ten years as appropriate, the judge had set the specified period under s 34 of the Criminal Justice Act 1991 at six years. The facts are set out in the judgment of the court.

*P J Walmsley* (assigned by the Registrar of Criminal Appeals) for M.  
*John Thackray* (instructed by *Max Gold & Co*, Hull) for L.

*Cur adv vult*

6 April 1998. The following judgment of the court was delivered.

**THOMAS J.** There are before the court two renewed applications for leave to appeal following the refusal of leave by the single judge. They both concern applicants under the age of 18, who pleaded guilty to offences of arson and were sentenced to detention for life under the provisions of s 53(2) of the Children and Young Persons Act 1933 (as amended).

In each case it is not in issue that it was appropriate for the judge to pass discretionary life sentences, but each applicant seeks leave to appeal against the length of the period specified under s 34 of the Criminal Justice Act 1991. We are much indebted to Mr Walmsley, who has appeared for M, and Mr Thackray, who has appeared for L, for their assistance. Both counsel were content that if we granted leave to appeal, we should treat the hearing of the application as the hearing of the appeal as there were no further submissions that they wished to make.

## THE LEGISLATIVE PROVISIONS UNDER WHICH THEY WERE SENTENCED

Under s 34(1) of the Criminal Justice Act 1991, which was in force when both applicants were sentenced and remained in force until 1 October 1997, a judge was empowered when passing a discretionary sentence of life imprisonment to specify by order such part of the sentence which should be served before the discretionary life prisoner's case was referred to the Parole Board with a view to the board considering his release.

The exercise of the court's discretion in determining that specified period was governed by s 34(2) of the Act:

'A part of a sentence so specified shall be such part as the court considers appropriate taking into account—(a) the seriousness of the offence, or the combination of the offence and other offences associated with it; and (b) the

a provisions of this section as compared with those of section 33(2) above and section 35(1) below.'

Under ss 33(2) and 35(1) of the Act a prisoner who received a determinate long-term sentence would be entitled to be released after serving two-thirds of his term (s 33(2)) and might be released after serving only half his term (s 35(1)).

b When these provisions entered into force, Lord Taylor CJ issued a practice note (see [1993] 1 All ER 747, [1993] 1 WLR 223):

c '1. Section 34 of the Criminal Justice Act 1991 empowers a judge when passing a sentence of life imprisonment—where such a sentence is not fixed by law—to specify by order such part of the sentence ("the relevant part") as shall be served before the prisoner may require the Secretary of State to refer his case to the Parole Board. 2. Thus the discretionary life sentence falls into two parts: (a) the relevant part, which consists of the period of detention imposed for punishment and deterrence, taking into account the seriousness of the offence, and (b) the remaining part of the sentence, during which the prisoner's detention will be governed by considerations of risk to the public. 3. The judge is not obliged by statute to make use of the provisions of s 34 when passing a discretionary life sentence. However, the judge should do so, save in the very exceptional case where the judge considers that the offence is so serious that detention for life is justified by the seriousness of the offence alone, irrespective of the risk to the public. In such a case, the judge should state this in open court when passing sentence. 4. In cases where the judge is to specify the relevant part of the sentence under s 34, the judge should permit counsel for the defendant to address the court as to the appropriate length of the relevant part. Where no relevant part is to be specified, counsel for the defendant should be permitted to address the court as to the appropriateness of this course of action. 5. In specifying the relevant part of the sentence, the judge should have regard to the specific terms of s 34 and should indicate the reasons for reaching his decision as to the length of the relevant part. 6. Whether or not the court orders that s 34 should apply, the judge shall not, following the imposition of a discretionary life sentence, make a written report to the Secretary of State through the Lord Chief Justice as has been the practice in recent years.'

g Following that practice direction, the procedure became well established that a judge, when imposing a discretionary life sentence, should carry out the requirements set out by Lord Taylor CJ in *R v O'Connor* (1993) 15 Cr App R (S) 473 at 476:

h 'The exercise the judge must perform, therefore, is to decide, first of all, what would be the determinate sentence that he would have passed in the case if the need to protect the public, and the potential danger of the offender, had not required him to impose a life sentence. Having decided what the determinate sentence should be, he then has to take into account section 33(2) and section 35(1), and decide on such proportion of that determinate sentence as falls between a half and two-thirds of it.'

THE DISCRETION UNDER s 34(2)

There are very few cases where an issue has arisen as to the principles on which the court should determine whether the specified part should be a half or two-thirds or somewhere in between.

In *R v Vale* [1996] 1 Cr App (S) 405 the appellant, an adult, had pleaded guilty to manslaughter on the grounds of diminished responsibility and had been sentenced to life imprisonment; the judge concluded that a determinate sentence would have been 15 years and he determined that the specified period should be two-thirds of that: 10 years. This court concluded that the determinate sentence should have been 12 years. The court then considered what proportion should be specified under s 34. It was submitted on the appellant's behalf that half would be appropriate as after half a sentence had been served, it was the risk to the public which primarily justified the continued custody for a long-term prisoner. It was at the half way point that the issue of risk to the public was effectively put in the hands of the Parole Board. The court concluded (at 410):

'One sees the force of that submission, but the simple fact is that the section allows a discretion to the court to fix on a period between one-half and two-thirds of the sentence and that discretion is to be exercised having regard to all the circumstances of the case. There are undoubtedly cases, and one in particular of which we are aware is one in which my Lord, Mitchell J., was concerned, where a figure of less than two-thirds has been taken, but it must depend on the learned judge's assessment of the requirements of the case, including, as the section specifies, the seriousness of the offence. All that we propose to say is that, having considered with the greatest care the medical evidence, the learned judge's observations and the facts of this particular case, we are not persuaded that he was wrong to fix upon a period to two-thirds rather than any lesser period. Accordingly, reducing as we do the starting point from 15 to 12 years, the specified period will be reduced from 10 to eight years.'

In *R v Carr* [1996] 1 Cr App R (S) 191 the 15-year-old appellant had been sentenced to life imprisonment under s 53(2) of the Children and Young Persons Act 1933 for causing grievous bodily harm with intent. At a further hearing, the judge decided that the appropriate determinate sentence would be one of seven and a half years and the period specified under s 34 should be half of that: three and a half years. This court concluded (at 193):

'Had this been a case of an adult offender then in our view the period specified by the learned judge would have been absolutely right, but of course we are dealing here with a 15-year-old child, and we appreciate that three-and-a-half years is a very long time in the eyes and indeed in the life of a child of that age. We think that given all the circumstances, the age in particular, and the fact that a two-year minimum period was specified as the required treatment period at the first hearing, that to approach this case on the basis of a determinate sentence of seven years is to approach it in an incorrect way. In our view the appropriate determinate sentence would have been one of four years' detention, and to arrive at a specified period we take half that determinate sentence which results in a specified period of two years which was the original minimum time mentioned by the psychiatrists. Of course that does not mean, and must not be taken to mean, that at the expiration of two years this appellant will be released. It all must depend on how this young woman responds to treatment. If unhappily she does not respond within that time then treatment will have to continue. All we are saying in specifying that period is that is the period before the expiration of which parole cannot be applied for.'



a In *R v Secretary of State for the Home Dept, ex p Venables*, *R v Secretary of State for the Home Dept, ex p Thompson* [1997] 3 All ER 97, [1997] 3 WLR 23 the House of Lords was concerned with the legality of the fixing of a tariff by the Home Secretary in respect of the mandatory sentence of detention during Her Majesty's pleasure passed on two juveniles for the murder of James Bulger. The issues in that appeal are not relevant, but it is important to refer to one passage in the speech of Lord Browne-Wilkinson ([1997] 3 All ER 97 at 125, [1997] 3 WLR 23 at 52), where he referred to some of the considerations to be taken into account in determining the specified period under s 34(2):

c 'In setting the judicialised tariff period under s 34(2) of the 1991 Act, the judge is directed to specify such a period as is "appropriate" taking into account the seriousness of the offence. The section does not say that that is the only matter to be taken into account. No doubt the judge, in fixing the period, will also take into account all other normal sentencing considerations. In relation to a child sentenced to detention for life the judge is bound by s 44(1) of the 1933 Act (which was not repealed or altered in any way by the 1991 Act) to have regard to the welfare of the child. Therefore, in imposing such a tariff he must take into account the need for flexibility in the treatment of the child and, in so doing, will set the minimum tariff so as to ensure that at the earliest possible moment the matter comes under consideration of the Parole Board who will be able to balance the relevant factors including the development and progress of the child.'

e Shortly after the decision of the House of Lords, which was given on 12 June 1997, the Divisional Court considered an application where the issue of the discretion under s 34(2) was directly raised: *R v Secretary of State for the Home Dept, ex p Furber* [1998] 1 All ER 23, decided on 30 June 1997. The applicant had pleaded guilty at the age of 16 to an offence of manslaughter. She had been sentenced in f 1991 under the provisions of s 53(2) of the Children and Young Persons Act 1933 to life imprisonment; at that time the provisions of the Criminal Justice Act 1991 had not come into force. Under the transitional provisions of the Act, the Home Secretary subsequently had certified seven years as the specified period for the purposes of s 34; in certifying this period the Home Secretary had to put himself in the position of the judge and take into account the same considerations as a g judge would have done when determining the specified period under s 34.

The Divisional Court considered that the determinate period of the sentence should have been 10½ years and that the Home Secretary should not have fixed a period in excess of the six years which the offender had already served.

h In reaching this decision, Simon Brown LJ considered a number of cases where a determinate sentence had been given for manslaughter and where in passing a life sentence the court had set out the determinate sentence it would have passed. He concluded (at 28–29):

j 'One cannot but recognise an apparent discordance between the two categories of case. The starting point for calculating s 34 tariffs is the appropriate determinate sentence were there no need to pass a life sentence for the protection of the public. Given that determinate sentences themselves are sometimes longer than otherwise they would be so as to provide some additional safeguard for the public, it might be thought appropriate to strip out that risk element and discount the general range of such sentences. Yet s 34 tariff periods appear to take longer, rather than

shorter, notional determinate sentences as their starting point. If it be suggested that the explanation for this lies in the fact that offences attracting life sentences are likely to be amongst the graver diminished responsibility manslaughter cases, I have to say that for my part I can find little support for this view in the facts of the various cases. There are, moreover, other considerations which might perhaps be thought to suggest that the tariff in life sentence cases—the point at which the parole board first starts to consider the possibility of releasing the prisoner under licence—should certainly be no longer than had considerations of public safety not dictated the need for an indeterminate rather than a determinate sentence in the first place. One should not overlook the peculiarly disadvantaged position of life sentence prisoners: not to be released back into society unless and until the parole board is satisfied that they have ceased to pose any real (as opposed to merely minimal) risk. This, as was recognised in *R v Parole Board, ex p Bradley* [1990] 3 All ER 828 at 838, [1991] 1 WLR 134 at 145, “may well cause the accused to serve longer, and sometimes substantially longer, than his just deserts”. Should not the corollary of that be that, if the prisoner can indeed safely be released back into the community, then the possibility of such release should not ordinarily be postponed by a long tariff period. Secondly it should be borne in mind that even where the parole board in life sentence cases is inclined to make a favourable recommendation, almost invariably it requires a two-year trial period during which the prisoner can be tested in open prison conditions. Given this in-built delay in the overall release process, ought not that process to start if anything earlier rather than later than in the case of determinate sentence prisoners whose eligibility for parole, under statute, starts at the half-way point of their sentence and who must in any event be released after serving two-thirds.’

He then considered what the specified period should be. After referring to the decision of this court in *R v Carr*, Simon Brown LJ said (at 31):

‘There, it will readily be seen, even before the decision in *Ex p Venables, Ex p Thompson*, the court took half rather than two-thirds of the appropriate determinate sentence when arriving at the specified period under s 34. In my judgment, following the House of Lords decision, that generally now should be regarded as the correct approach in s 53(2) cases.’

We agree. In the case of a young person who is to be sentenced to a period of detention for life under the provisions of s 53(2) or an adult who is to be sentenced to a discretionary life sentence, the general approach is to decide first the determinate part of the sentence that the judge would have imposed if the need to protect the public and the potential danger of the offender had not required him to pass a life sentence. It is the imposition of the life sentence that protects the public and is necessitated by the risk that the defendant poses. That element is therefore not to be reflected in the determinate part of the sentence that the court would have imposed; the determinate part is therefore that part that would have been necessary to reflect punishment, retribution, and the need for deterrence. It is we consider important that the judge should, when passing sentence, make clear to the defendant what that determinate period would have been.

The judge should then exercise his discretion in fixing the specified period. In so doing the general approach in the case of a young person should be to fix a

- a period at half the determinate sentence that would have been passed. This approach would in most cases reflect the court's duty under s 44 of the Children and Young Persons Act 1933 and take into account particularly the age of the defendant. There may be circumstances that might arise on the particular facts of a case where a longer period would be appropriate, but having regard in particular to the provisions of s 44, that would be the exceptional case.
- b In the case of adult offenders, we consider that again the general approach should be to begin consideration of the specified part under s 34 by taking half the determinate period that would have been passed; that determinate period will reflect the element of punishment, retribution and deterrence in the sentence. In many cases half the determinate period may well be the appropriate period to specify under s 34. However there may well be circumstances, as the decisions
- c of this court show, where it would be appropriate for the judge in the exercise of his general discretion and in circumstances that arise on the facts of a particular case to fix the specified period at a period which was more than half and up to two-thirds of the determinate sentence that would have been passed.

d THE POSITION UNDER THE CRIME (SENTENCES) ACT 1997

With effect from 1 October 1997, s 34 of the Criminal Justice Act 1991 was replaced by s 28 of the Crime (Sentences) Act 1997. The section was to have taken effect in full in conjunction with the provisions of Ch I of Pt II of the Act; as that chapter has not been brought into effect, s 28 takes effect as modified by para 5 of Sch 5.

- e With one exception, there has been no change to the substance of the statutory provision previously enacted in s 34 of the 1991 Act. Therefore the approach that we have outlined will remain applicable as will the provisions of the practice direction, although, as we have said, a judge should spell out not only the period specified under s 28(3) of the 1997 Act, but also the determinate sentence he
- f would have passed, but for the need to protect the public.

The exception relates to the treatment of time the defendant has spent on remand. It arises in this way.

- g Under the provisions of s 67 of the Criminal Justice Act 1967, a fixed term determinate prisoner has had the period he has spent on remand before sentence taken into account when calculating the period of the sentence which he has to serve in prison.

When s 34 of the 1991 Act was enacted, no express provision was made for taking the period of remand into account before the discretionary life prisoner's case was referred to the Parole Board.

- h However, by an amendment to s 34 (made by para 46 of Sch 9 to the Criminal Justice and Public Order Act 1994), the period on remand was to be taken into account; this was done by crediting the time on remand against the specified period which the court had fixed under s 34(2). The court was therefore placed in the same position when fixing the specified period under s 34(2) as it was in relation to all custodial sentences and not required to take the time on remand
- j into account in fixing the specified period under s 34(2). The relevant provisions of s 34 (as amended) make this clear and it may be helpful if we set them out, including sub-s (2), which we have set out above:

'... (2) A part of a sentence so specified shall be such part as the court considers appropriate taking into account—(a) the seriousness of the offence, or the combination of the offence and other offences associated with it; and



(b) the provisions of this section as compared with those of section 33(2) above and section 35(1) below. a

(3) As soon as, in the case of a discretionary life prisoner—(a) he has served the part of his sentence specified in the order (“the relevant part”); and (b) the Board has directed his release under this section, it shall be the duty of the Secretary of State to release him on licence ...

(5) A discretionary life prisoner may require the Secretary of State to refer his case to the Board at any time—(a) after he has served the relevant part of his sentence; and (b) where there has been a previous reference of his case to the Board, after the end of the period of two years beginning with the disposal of that reference; and (c) where he is also serving a sentence of imprisonment for a term, after he has served one-half of that sentence; and in this subsection “previous reference” means a reference under subsection (4) above or section 39(4) below made after the prisoner had served the relevant part of his sentence. b  
c

(6) In determining for the purpose of subsection (3) or (5) above whether a discretionary life prisoner has served the relevant part of his sentence—(a) account shall be taken of any corresponding relevant period; but (b) no account shall be taken of any time during which the prisoner was unlawfully at large within the meaning of section 49 of the Prison Act 1952 (“the 1952 Act”). d

(6A) In subsection (6)(a) above, “corresponding relevant period” means the period corresponding to the period by which a determinate sentence of imprisonment imposed on the offender would fall to be reduced under section 67 of the Criminal Justice Act 1967 ... e

The period on remand therefore was in effect deducted (by the operation of sub-s (6) and (6A)) from the specified period fixed by the court under s 34(2).

The 1997 Act made provision, by Ch I of Pt II, for a prisoner to serve the term of imprisonment to which he was sentenced; by s 9, the court was required to direct the number of days spent on remand which would count towards his sentence. Schedule 6 made provision for the repeal of s 67 of the 1967 Act. f

When s 28 (and some other provisions) of the 1997 Act was brought into force (by the Crime (Sentences) Act 1997 Commencement No 2 and Transitional Provisions Order, SI 1997/2200), Ch I of Pt II of the Act (including s 9) was not brought into force nor was that part of Sch 6 repealing s 67 of the 1967 Act. g

In the circumstances in which s 28 came into force, it took effect subject to the transitional provisions to which we have referred. For convenience we set the section out as it is in force:

‘(1) A life prisoner is one to whom this section applies if—(a) the conditions mentioned in subsection (2) below are fulfilled; or (b) he was under 18 at the time when he committed the offence for which his sentence was imposed. h

(2) The conditions referred to in subsection (1) (a) above are—(a) that the prisoner’s sentence was imposed for an offence the sentence for which is not fixed by law; and (b) that the court by which he was sentenced for that offence ordered that this section should apply to him as soon as he had served a part of his sentence specified in the order. j

(3) A part of a sentence specified in an order under subsection (2)(b) above shall be such part as the court considers appropriate taking into account—(a) the seriousness of the offence, or the combination of the offence and other

a offences associated with it; and (b) the effect which section 67 of the Criminal Justice Act 1967 would have had if it had sentenced him to a term of imprisonment; and (c) the provisions of this section as compared with those of sections 33(2) and 35(1) of the 1991 Act.

b (4) Where in the case of a life prisoner to whom this section applies the conditions mentioned in subsection (2) are not fulfilled, the Secretary of State shall direct that this section shall apply to him as soon as he has served a part of his sentence specified in the direction.

c (5) As soon as, in the case of a life prisoner to whom this section applies — (a) he has served the part of his sentence specified in the order or direction (“the relevant part”); and (b) the Parole Board has directed his release under this section, it shall be the duty of the Secretary of State to release him on licence.

d (6) The Parole Board shall not give a direction under subsection (5) above with respect to a life prisoner to whom this section applies unless—(a) the Secretary of State has referred the prisoner’s case to the Board; and (b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.

e (7) A life prisoner to whom this section applies may require the Secretary of State to refer his case to the Parole Board at any time—(a) after he has served the relevant part of his sentence; and (b) where there has been a previous reference of his case to the Board, after the end of the period of two years beginning with the disposal of that reference; and (c) where he is also serving a sentence of imprisonment or detention for a term, after he has served one-half of that sentence; and in this subsection “previous reference” means a reference under subsection (6) above or section 32(4) below.

f (8) In determining for the purpose of subsection (5) or (7) above whether a life prisoner to whom this section applies has served the relevant part of his sentence, no account shall be taken of any time during which he was unlawfully at large within the meaning of section 49 of the Prison Act 1952.

(9) An offence is associated with another for the purposes of this section if it is so associated for the purposes of Part I of the 1991 Act.’

Paragraph 5(3) of Sch 5 also requires:

g ‘Section 28(7) of this Act shall have effect as if—(a) any reference of a prisoner’s case made to the Parole Board under section 32(2) or 34(4) of the 1991 Act had been made under section 28(6) of this Act; and (b) any such reference made under section 39(4) of that Act had been made under section 32(4) of this Act.’

h Because s 9 has not been brought into force, provision is made for the continuation of the effect of s 67 of the 1967 Act; the indeterminate life prisoner is to continue to receive the benefit of having the period he has spent on remand being taken into account. However this is achieved through a different route. As  
j we have set out, the route under s 34 was by a credit against the specified period fixed by the court. Under s 28, the route chosen is to require the court to take the time spent on remand into account in fixing the specified period under s 28(3).

In computing the period at which the discretionary life prisoner’s case is to be referred to the Parole Board (s 28(5) and s 28(7), which correspond to s 34(3) and s 34(5) of the 1991 Act), no provision is made by s 28(8) (which corresponds to s 34(6) and (6A) of the 1991 Act) for the time on remand to be taken into account.

There is no reference to the provisions of s 67 of the 1967 Act in that subsection. Instead the court is obliged to take the provisions of s 67 into account as one of the matters it takes into account when fixing the specified period under s 28(3). a

The question then arises as to how that discretion is to be exercised. Under s 34, a prisoner would have been entitled to have the period on remand taken into account in computing the time at which his case would be referred to the Parole Board as it would have been credited against the specified period. For indeterminate sentences passed after 1 October 1997, that period no longer has to be credited in that way; a judge is therefore required to give consideration to taking into account the period the defendant has spent on remand in fixing the specified period under s 28(3). In the usual case, as a prisoner sentenced to a determinate period of imprisonment would receive credit for time on remand in computing the period of his sentence which he must spend in prison, then the judge will in the usual case need to give a similar credit in fixing the specified period under s 28(3). However, consideration of the time spent on remand is one of the matters for the judge's discretion and circumstances might well arise where it would not be appropriate to give credit for that time. b

The result of this legislative change will also necessitate detailed and accurate information as to time the defendant has spent on remand being made available (by the Crown or the prison service) to the court prior to any indeterminate life sentence being passed. c

#### THE PRESENT APPLICATIONS d

We therefore turn to the applications before us. As both applicants were sentenced on 11 and 22 September 1997 respectively, the provisions of the Crime (Sentences) Act 1997 (which came into force a few days later on 1 October 1997) do not apply to these applications; they are governed by the provisions of s 34 of the Criminal Justice Act 1991. e

#### M f

The applicant, M, then 16, pleaded guilty at the Crown Court at Nottingham on 27 February 1997 on two indictments: on the first indictment he pleaded guilty to a count of arson intending to damage property and being reckless as to whether property would be damaged; on the second indictment, he pleaded guilty to a count of arson being reckless as to whether life was endangered. He was sentenced by Judge Hopkin on 11 September 1997 to a sentence of detention for life under s 53(2) of the Children and Young Persons Act 1933. The judge specified eight years as the period under s 34. In reaching this decision, the judge did not specify the determinate sentence he would have passed. g

#### The facts in relation to M h

On the first indictment, the facts were that on 15 October 1996 M with two other youths had broken into an army cadet hut at Kirkby in Ashfield and stolen various items hoping to sell them. The hut was unoccupied and the applicant set fire to it hoping that any incriminating evidence would be destroyed; the fire brigade were summoned by someone who was passing by and when they arrived they found the applicant with a fire extinguisher in his hand; the police, who had also been summoned, arrested him. The cost of repairing the damage was estimated at £300. j

The applicant was released on bail and he moved into a small hostel in Kirkby in Ashfield run by a charity for six homeless and needy persons in a terraced



a house; there were five other residents. On the morning of 28 November 1996 the applicant moved out of the hostel and went to live with his mother.

b That evening, two of the residents went out for the evening; later the same evening at about 7.45, the other two left to go to a friend's house, leaving the building secure. As they left, one of them saw the applicant jogging towards the house. After they had gone, as he subsequently admitted, he broke into the house and set fire to a cushion and turned on the gas burners to help the fire spread. He said that he had started the fire deliberately having thought about it for sometime beforehand.

c One of the residents returned at 9.45 pm to find the house on fire; the fire brigade was summoned and the fire damage contained to one room. The gas had not exploded; had it done so very considerable damage would have been caused to that house and neighbouring houses. The following day the applicant returned and was arrested. As he admitted subsequently, he had gone back so to see how much damage he had caused and whether anyone had been killed. Those matters gave rise to the count in the second indictment.

d The applicant had had a disturbed upbringing with periods of foster care; he had two previous convictions for criminal damage—damaging windows—and one for handling. He had also been cautioned for an arson in 1994.

#### The sentence passed on M

e Prior to sentence, three psychiatric reports were obtained. The applicant admitted to the psychiatrists that he had been setting fires for some years, as he liked doing so. The reports were agreed that the applicant did not suffer from a mental illness under the terms of the Mental Health Act 1983; the consensus was that he was highly dangerous as he had many of the features of a compulsive fire setter. Although the consensus was that the applicant had a psychopathic disorder within the meaning of the 1983 Act, his lack of insight and motivation f rendered the prospects of treatment impossible. The panel at Rampton considered that in view of his youth and immaturity it would be inappropriate to admit him to a high security hospital.

g The judge concluded in the circumstances that he could not deal with the applicant under the 1983 Act. He formed the view, quite rightly, that without treatment the applicant would be highly dangerous and that the public might suffer very serious harm. He passed a sentence of detention for life. The judge was not referred to the decision of the Divisional Court in *Ex p Furber* (which had by then been reported briefly).

h On behalf of the applicant, Mr Walmsley has submitted that the judge must have determined that the appropriate determinate period was somewhere between 12 years (if the specified period under s 34 had been two-thirds) or 16 years (if the specified period had been half). Bearing in mind the age of the applicant and his plea, a period of 12 years, let alone 16 years was far too long. He submitted that in accordance with the approach we have indicated that should be taken towards s 34, a specified period of more than half of the determinate period j would in any event have been wrong in the light of *Ex p Furber*.

#### Conclusion on M

We see force in these submissions and grant leave to appeal. Although the offences were serious and the turning on of the gas taps a particularly aggravating feature, none the less, taking into account the age of the applicant, the circumstances of the offences and his guilty plea, we consider that the proper

determinate period should have been a period of ten years; a period of 12 or 16 years (which ever it was) was too long for a person of that age. We approach the fixing of the specified period under s 34 on the basis of the principles we have outlined. On the facts of this case, we see no reason to depart from a specified period of more than half the determinate period that would have been passed. We therefore substitute for the specified period of eight years, a specified period of five years. To that extent, the appeal is allowed.

L

On 13 February 1997 the applicant, L, who was then 17, pleaded guilty at the Crown Court at Hull to five counts of arson being reckless as to whether life was endangered. On 22 September 1997, after his eighteenth birthday, he was sentenced by Judge Davies to detention for life under the s 53(2) of the Children and Young Persons Act 1933. She considered the appropriate determinate sentence should be ten years and she set the specified period under s 34 at six years.

The facts relating to L

The facts relating to L can be briefly stated. In the early hours of 4 October 1996, (1) L, who was 17, set fire to various items of rubbish in the bin shed of an unoccupied end of terrace house, 55 Redmire Close, Hull. He lived at No 122. He used a lighter and toilet tissue to start the fire; a neighbour saw the smoke and alerted the occupant of No 57, the property next door to the fire. She awoke to the strong smell of smoke; the fire brigade was called and the fire extinguished.

(2) The same night L set fire to some discarded carpet in the bin shed of another unoccupied house, No 88, in the same street. He started the fire in the same way. A neighbour awoke the occupant of the next door property, No 90. The fire brigade evacuated the occupant and put out the fire. The damage was quite extensive; the occupant was very frightened. Prior to the fire the applicant had been seen looking at No 88 several times and after the fire he was seen to be playing with the debris.

In the early hours of the following day, 5 October 1996, the applicant set fire to a 'wheelie bin' placed near the bin sheds of adjoining houses in another street in Hull; the occupant of one of the adjoining flats was awakened by the fire brigade with his house full of smoke; he was suffering from asthma and coughing uncontrollably; he had to receive oxygen at the scene. The fire had melted the guttering on his flat.

Three days later, on the evening of 8 October 1996, the applicant set fire to the bin shed of 121 Redmire Close, the house next door to the house in which he lived. This was in the same street as he had set fires on 4 October. No 121 was unoccupied. He had again used toilet paper and a lighter to set the rubbish alight. He watched the fire, getting more excited when the fire brigade arrived and jumping up and down. The smoke from the fire filled the adjoining house and it had to be evacuated; one of the children in the house was asthmatic. The fire was extinguished.

The last fire was one the applicant had started at an unoccupied flat at 10 Helvelyn Close, Hull during the early hours of a day between the end of September and mid October 1996. A bed was set on fire; the fire brigade attended and put out the fire. Damage was confined to the flat but it was in the middle of a row of properties.

a Each of the bin sheds housed gas meters and there was therefore a risk of an explosion; each of the terraced houses in Redmire Close shared a common roof space, which would have enabled any fire that took hold to spread. The damage to the properties was estimated at £15,000.

b The applicant was arrested on 19 October 1996. He admitted starting the five fires and he accepted that he realised that life might be endangered, though he said he did not wish to harm anyone; he had appreciated the presence of gas meters in the sheds and the consequent risk of an explosion; he had wanted to see an explosion as he had seen one on television. There was evidence that many in the neighbourhood were very worried about the fires.

c The applicant came from an unsettled and deprived background; he had spent time at residential schools. Although he had no previous convictions, he had pleaded guilty to two offences of arson committed in Edinburgh in April and June 1996; the fires were at the home of a friend, the first when the friend was living in a block of flats and the second when the friend was living at a house; the damage caused was estimated to be £10,000. When he was sentenced by Judge Davies, she was told he was awaiting sentence for the offences committed in Edinburgh.  
d We were told that no further sentence had been passed by the courts in Scotland.

The sentence passed on L

e There were seven psychiatric reports before the judge; from these it was clear that the applicant was not suffering from a mental illness under the Mental Health Act 1983, but was assessed as suffering from a psychopathic disorder which was not treatable. There was considered to be a significant risk of reoffending and continued fire setting. The view was expressed that at sometime in the future he might develop a maturity and become treatable.

f The judge carried out a very careful sentencing exercise; she gave detailed consideration to each of the material matters and spelt them out clearly. It was a model exercise. She concluded that she could not deal with the applicant by a hospital order under the 1983 Act. She therefore concluded that because of the seriousness of the offences, the likelihood of the commission of further offences and the serious risk of harm to others, a period of detention for life was the only appropriate penalty. She said that it was impossible to conclude when the applicant would cease to be a danger to the public. She was plainly right in that view.  
g

h Mr Thackray, who has appeared on behalf of the applicant, although accepting as he did before the judge that a period of detention for life was appropriate, has submitted that the period of ten years as the period for which a determinate period would have been passed was too long. Mr Thackray, whilst accepting that the judge's attention was not drawn to the decision in *Ex p Furber*, also submitted that the specified period under s 34 should not have been more than half.

Conclusion on L

j We do not agree. Taking into account the age of the applicant, the circumstances of the offences and his guilty plea, we consider that ten years was at the low end of the period of a determinate sentence which could have been passed. These were very serious offences and considerable risk to the lives of others was caused. Having regard to the appropriate determinate period and the other particular circumstances of the case, we see no reason to interfere with the period of six years specified by the judge under s 34. We therefore refuse leave to appeal.



We must make it clear in respect of both M and L that our decision does not mean that at the expiration of five and six years respectively, they will be released; it only means that the Parole Board cannot consider the release of either young man until that period has expired. It will be for consideration at that time whether either remains a danger to the public. Depending on what view is taken at that time, either may be detained for a further indeterminate period.

*Appeal allowed in part in M's case. Application for leave to appeal in L's case refused.*

N P Metcalfe Esq Barrister.

## Glasgow City Council v Zafar

a

HOUSE OF LORDS

LORD BROWNE-WILKINSON, LORD SLYNN OF HADLEY, LORD LLOYD OF BERWICK, LORD HOPE OF CRAIGHEAD AND LORD CLYDE

b

13 OCTOBER, 27 NOVEMBER 1997

c

*Race relations – Discrimination – Employment – Discrimination on racial grounds – Applicant dismissed from employment with local authority for alleged misconduct – Applicant contending that dismissal constituted racial discrimination – Whether fact that employer acted unreasonably in dismissing employee giving rise to presumption of ‘less favourable treatment’ – Whether absence of non-satisfactory explanation for less favourable treatment giving rise to presumption of racial discrimination – Race Relations Act 1976, s 1.*

d

The applicant, a United Kingdom citizen of Asian origin, was employed by the respondent local authority as a social worker for some ten years. In March 1989 he was dismissed from his employment for the alleged sexual harassment of clients and fellow employees. The applicant issued proceedings against the respondent contending, inter alia, that the dismissal constituted racial discrimination within s 1<sup>a</sup> of the Race Relations Act 1976, which provided that a

e

person discriminated against another if on racial grounds he treated him less favourably than he treated or would treat others. The industrial tribunal found that the treatment afforded to the applicant by the respondent fell below the standards of a reasonable employer, which gave rise to the presumption that the applicant had been treated less favourably than others. The tribunal concluded that, in the absence of a non-racial explanation for that differential conduct, it was

f

obliged to draw an inference of racial discrimination. The Employment Appeal Tribunal dismissed the respondent’s appeal and it appealed to the Court of Session. The Second Division allowed the appeal on the ground that the tribunal had erred in drawing inferences both of less favourable treatment and of racial discrimination from the fact that the respondent’s treatment of the applicant had

g

been unreasonable. The applicant appealed to the House of Lords.

h

**Held** – In order to establish racial discrimination within the meaning of s 1 of the 1976 Act, a claimant had to show that he had been treated by the person against whom the discrimination was alleged less favourably than that person treated or would have treated another. Accordingly, the conduct of a hypothetical reasonable employer was irrelevant and it could not be inferred from the fact that an employer had acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances. It followed, in the instant case, that the tribunal had wrongly drawn an inference of less favourable treatment from the fact that the applicant had been treated

j

unfairly. Further, in the absence of any other explanation for the treatment afforded to the applicant, the tribunal had not been bound in law to draw an inference of racial discrimination, since it was only to draw such inferences as it considered proper from the primary findings of fact. The tribunal had therefore

a Section 1, so far as material, is set out at p 955 f, post

made the adverse finding of racial discrimination wholly on the basis of two inferences which were inadmissible and the appeal would accordingly be dismissed (see p 957 *a* to *e* and p 958 *b* to p 959 *c*, post).

Dictum of Neill LJ in *King v Great Britain-China Centre* [1992] ICR 516 at 528–529 applied.

Dicta of Browne-Wilkinson LJ in *Khanna v Ministry of Defence* [1981] ICR 653 at 659 and *Chattopadhyay v Headmaster of Holloway School* [1982] ICR 132 at 137 disapproved.

## Notes

For discrimination by employers generally and the liability of employers, see 4(2) *Halsbury's Laws* (4th edn reissue) paras 157, 180.

For the Race Relations Act 1976, s 1, see 6 *Halsbury's Statutes* (4th edn) (1992 reissue) 831.

## Cases referred to in opinions

*Baker v Cornwall CC* [1990] ICR 452, CA.

*Chattopadhyay v Headmaster of Holloway School* [1982] ICR 132, EAT.

*Khanna v Ministry of Defence* [1981] ICR 653, EAT.

*King v Great Britain-China Centre* [1992] ICR 516, CA.

*North West Thames Regional Health Authority v Noone* [1988] ICR 813, CA.

## Appeal

Abdur Rashid Zafar appealed from the decision of the Second Division of the Inner House of the Court of Session (Lord Justice Clerk (Ross), Lord McCluskey and Lord Morison) (1997 SLT 281) on 12 July 1996 allowing an appeal by his former employer, Glasgow City Council, as successors to Strathclyde Regional Council, from the Employment Appeal Tribunal and set aside a finding by an industrial tribunal of racial discrimination. The facts are set out in the opinion of Lord Browne-Wilkinson.

Kenneth Mure QC (of the Scottish Bar) and Sepala Munasinghe (instructed by Campbell Smith WS, Edinburgh) for the applicant.

James Peoples QC and Sarah Wolffe (both of the Scottish Bar) (instructed by Lewis Silkin, agents for Simpson & Marwick WS, Edinburgh) for the local authority.

Their Lordships took time for consideration.

27 November 1997. The following opinions were delivered.

**LORD BROWNE-WILKINSON.** My Lords, the applicant is a United Kingdom citizen of Asian origin. He was employed for some ten years by the Strathclyde Regional Council (the local authority) as a social worker. He was dismissed on 10 March 1989, the reason for his dismissal being given as sexual harassment of clients of the social welfare department of the local authority and of fellow employees.

The applicant brought, in all, six sets of proceedings in the industrial tribunal, some before and some after his dismissal. In very general terms, those proceedings alleged that, prior to his dismissal, the local authority had discriminated against him and victimised him on racial grounds in not appointing



a him to certain posts, that there was a long-term conspiracy against him, that his dismissal was unfair within the meaning of s 57(3) of the Employment Protection (Consolidation) Act 1978 in that there was no substantial ground for his dismissal and also that the dismissal was carried out in an unfair manner. The applicant further claimed that his dismissal constituted racial discrimination within s 1 of the Race Relations Act 1976.

b After a very long and complicated hearing, the industrial tribunal dismissed all the applicant's allegations save those hereafter mentioned. In particular, the tribunal held that the applicant's complaints of racial discrimination and victimisation relating to his failure to obtain certain appointments were groundless, that there was no long-term conspiracy against him, that there was no direct evidence of ill will or malice against him on grounds of his race or otherwise. In general, with one exception, the tribunal exonerated the local authority and its employees from the charges made against them. The one exception was that the tribunal held that the dismissal of the applicant was unfair and racially discriminatory. It is the reasoning of the tribunal on those two issues which is the subject matter of this appeal.

d The tribunal found the dismissal to be unfair, not on the grounds that no reasonable employer could have reasonably decided to dismiss the applicant, but on the grounds that the manner in which his dismissal was conducted was unfair. The tribunal found that the local authority had been guilty of unreasonable delay and had failed to investigate some allegations at the appropriate time, to issue appropriate warnings and to advise the applicant of the matters in relation to which his conduct was under investigation. On those grounds the tribunal found the dismissal to be unfair for the purposes of the 1978 Act.

e The tribunal then turned to the claim based on racial discrimination under the 1976 Act, s 1(1) of which provides:

f 'A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if—(a) on racial grounds he treats that other less favourably than he treats or would treat other persons ...'

The tribunal held that the local authority had treated the applicant less favourably than it would have treated others and that it had done so on the grounds of his race. It expressed its reasons for reaching those conclusions in the following words:

h 'It will be clear from the tribunal's earlier comments that they are satisfied that the treatment accorded to the applicant by the respondents fell far below the standards of a reasonable employer ... To treat someone in a way which falls far below the standards of the reasonable employer gives rise to a presumption that that person has been treated in a way different from the way in which others have been, or would be, treated. It is also clear that such departure from normal or reasonable standards constitute less favourable treatment, so that the evidence discloses that the respondents have treated the applicant less favourably than they have treated or would treat others.

j The applicant is, of course, a United Kingdom citizen of Asian origin. The tribunal then considered whether they should infer that the less favourable treatment accorded to the applicant was accorded to him "on racial grounds". The tribunal examined the case law on the subject. It appears to the tribunal from the decided case law that, once an applicant has demonstrated that (1) he is a member of a minority racial group, and (2) he

has been less favourably treated than others have been treated, or would be treated, there is an onus on the employer to give an innocent explanation for the treatment accorded to the complainant (innocent, in this context, meaning an explanation not involving racist considerations). If no such explanation is offered, the tribunal should draw an inference of race discrimination. [It is certainly true that *King v Great Britain-China Centre* [1992] ICR 516 merely suggests that it is legitimate for the industrial tribunal to draw an inference of racial discrimination in such circumstances, which implies that an industrial tribunal retains some discretion concerning whether or not the inference should be drawn. Other authorities, however, particularly *Chattopadhyay v Headmaster of Holloway School* [1982] ICR 132 esp at 136–137, suggest that, in such circumstances, the tribunal should draw an inference of discrimination. Much the same attitude was adopted in *Baker v Cornwall CC* [1990] ICR 452 esp at 461.] In these circumstances, the tribunal has no choice but to draw an inference adverse to the respondents and find that the applicant has been discriminated against by the respondents within the meaning of s 1(1), because no satisfactory explanation justifying the treatment accorded to the applicant has been accepted by them.’

The local authority appealed to the Employment Appeal Tribunal from the industrial tribunal decision both on unfair dismissal and on racial discrimination. The Employment Appeal Tribunal dismissed the appeal on both grounds. The local authority (being by this time Glasgow City Council, a successor of Strathclyde Regional Council) did not appeal further against the finding by the industrial tribunal of unfair dismissal. However, the local authority did appeal to the Court of Session against the adverse finding of racial discrimination under the 1976 Act. The Second Division (the Lord Justice Clerk (Ross), Lord McCluskey and Lord Morison) (1997 SLT 281) allowed the appeal and set aside the finding of racial discrimination. The applicant appeals to this House.

As will be apparent from the passage which I have cited from its reasons, the industrial tribunal made the adverse finding of racial discrimination against the local authority wholly on the basis of two inferences: first, an inference that because the local authority had afforded to the applicant treatment falling far below that of ‘a reasonable employer’ there was a presumption that they had treated the applicant differently and less favourably than others; second, that in the absence of a non-racial explanation for such differential conduct the tribunal had no choice in law but to draw the inference that the reason for such less favourable treatment was racial. The Second Division held the tribunal to have been in error on both these points. I agree.

Although, at the end of the day, s 1(1) of the 1976 Act requires an answer to be given to a single question (viz has the complainant been treated less favourably than others on racial grounds?), in the present case it is convenient for the purposes of analysis to split that question into two parts—(a) less favourable treatment and (b) racial grounds—as did the Second Division.

#### *Less favourable treatment*

The reasoning of the industrial tribunal on this issue is wholly defective. The 1976 Act requires it to be shown that the claimant has been treated *by the person against whom the discrimination is alleged* less favourably than *that person* treats or would have treated another. In deciding that issue, the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be

a a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant in which case he would not have treated the complainant 'less favourably' for the purposes of the 1976 Act. The fact that, for the purposes of the law of unfair dismissal, an employer has acted unreasonably casts no light whatsoever on the question whether he has treated the employee 'less favourably' for the purposes of the 1976 Act.

b I cannot improve on the reasoning of Lord Morison, delivering the opinion of the court, who expressed the position as follows (at 284):

c 'The requirement necessary to establish less favourable treatment which is laid down by s 1(1) of the 1976 Act is not one of less favourable treatment than that which would have been accorded by a reasonable employer in the same circumstances, but of less favourable treatment than that which had been or would have been accorded by the same employer in the same circumstances. It cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances.'

d Mr Mure QC, for the applicant, submitted that there were other grounds on which the industrial tribunal might have found that the local authority afforded less favourable treatment to the applicant. I do not find it necessary to consider these submissions in detail. The passage that I have quoted from the reasons of the tribunal show that the sole ground for the decision was the inference of less favourable treatment which was an inadmissible inference to draw.

*'On racial grounds'*

f The industrial tribunal, having wrongly drawn the inference of less favourable treatment, then held that, in the absence of any satisfactory non-racial explanation for such treatment, they were bound by authority to draw the inference that such less favourable treatment was on the grounds of the applicant's race. Mr Mure submitted that, despite the words they used, the tribunal were not in fact treating themselves as bound in law to draw the inference of racial motivation but were reaching a conclusion on all the evidence before them. I cannot so read their reasons. The tribunal rejected in the clearest terms all suggestions that, in the earlier stages of the unhappy history of this dispute, the local authority or any of its officers were in any way moved by improper racial prejudice in dealing with the applicant. If the tribunal meant to decide that, at this very last stage in the dealings between the parties, the attitude of the local authority on racial discrimination had changed and it had become racially prejudiced, the tribunal must surely have said so in the clearest terms. Instead, they expressed themselves as having 'no choice but to draw [the] inference' of racial prejudice, ie they held they were bound in law to draw the inference of racial prejudice in the absence of any other satisfactory explanation given by the local authority of the differential treatment afforded to the applicant.

j That being so, Mr Mure did not attempt to justify the process whereby the tribunal held itself to be bound in law to draw the inference of racial prejudice as being the ground for the discriminatory treatment alleged to have been accorded to the applicant. However, since the authorities are in a state of some confusion (due in part to some words of mine), it is desirable that your Lordships should seek to clarify how the law stands on this matter at the present time.



Claims brought under the 1976 Act and the Sex Discrimination Act 1975 present special problems of proof for complainants since those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them. Over the years since 1975 the courts have sought to give guidance to industrial tribunals as to how inferences of fact can properly be drawn in this context. The best guidance is that given by Neill LJ in *King v Great Britain-China Centre* [1992] ICR 516 at 528–529. After reviewing the relevant authorities, he said:

‘From these several authorities it is possible, I think, to extract the following principles and guidance. (1) It is for the applicant who complains of racial discrimination to make out his or her case. Thus if the applicant does not prove the case on the balance of probabilities he or she will fail. (2) It is important to bear in mind that it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption that “he or she would not have fitted in.” (3) The outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 65(2)(b) of the Act of 1976 from an evasive or equivocal reply to a questionnaire. (4) Though there will be some cases where, for example, the non-selection of the applicant for a post or for promotion is clearly not on racial grounds, a finding of discrimination and a finding of a difference in race will often point to the possibility of racial discrimination. In such circumstances the tribunal will look to the employer for an explanation. If no explanation is then put forward or if the tribunal considers the explanation to be inadequate or unsatisfactory it will be legitimate for the tribunal to infer that the discrimination was on racial grounds. This is not a matter of law but, as May L.J. put it in *North West Thames Regional Health Authority v. Noone* ([1988] ICR 813 at 822), “almost common sense.” (5) It is unnecessary and unhelpful to introduce the concept of a shifting evidential burden of proof. At the conclusion of all the evidence the tribunal should make findings as to the primary facts and draw such inferences as they consider proper from those facts. They should then reach a conclusion on the balance of probabilities, bearing in mind the difficulties which face a person who complains of unlawful discrimination and the fact that it is for the complainant to prove his or her case.’

In my judgment that is the guidance which should in future be applied in these cases. In particular, certain remarks of mine in the Employment Appeal Tribunal in *Khanna v Ministry of Defence* [1981] ICR 653 and *Chattopadhyay v Headmaster of Holloway School* [1982] ICR 132 to the effect that such inference ‘should’ be drawn put the matter too high, are inconsistent with later Court of Appeal authority and should not be followed.

For these reasons which are the same as those of the Second Division I would dismiss this appeal.

**LORD SLYNN OF HADLEY.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Browne-Wilkinson. For the reasons he gives I too would dismiss the appeal.

*a* **LORD LLOYD OF BERWICK.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Browne-Wilkinson and for the reasons he gives I, too, would dismiss these appeals.

*b* **LORD HOPE OF CRAIGHEAD.** My Lords, I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend Lord Browne-Wilkinson. I agree with it, and for the same reasons I also would dismiss this appeal.

*c* **LORD CLYDE.** My Lords, I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend Lord Browne-Wilkinson. I agree with it, and for the same reasons I also would dismiss this appeal.

*Appeal dismissed.*

Celia Fox Barrister.

# Buehler AG v Chronos Richardson Ltd

COURT OF APPEAL, CIVIL DIVISION

ROCH AND ALDOUS LJ

26, 27 FEBRUARY, 20 MARCH 1998

*Estoppel – Res judicata – Cause of action estoppel – Patent – Defendants unsuccessfully opposing patent granted to plaintiffs before Opposition Division of European Patent Office – Plaintiffs subsequently bringing proceedings against defendants alleging infringement of patent – Defendant alleging patent invalid and counterclaiming for revocation – Whether allegations of invalidity res judicata – Whether cause of action estoppel arising from decision of Opposition Division – Patents Act 1977, s 72 – Convention on the Grant of European Patents 1973, art 100.*

The plaintiffs were proprietors of a European patent which was granted on 15 January 1992. It was opposed by the defendants under art 99 of the Convention on the Grant of European Patents 1973 in proceedings before the Opposition Division of the European Patent Office and on 24 March 1995 a written decision was given rejecting the opposition, against which no appeal was filed. The plaintiffs subsequently brought proceedings in the Patents County Court against the defendants, alleging infringement of the patent. The defendants in their defence denied infringement and alleged that the patent was invalid and counterclaimed for its revocation under s 72 of the Patents Act 1977. The allegations of invalidity repeated those that were raised in the opposition. The plaintiffs applied to strike out the allegations of invalidity on the basis that they were res judicata, having been decided by the Opposition Division. The judge dismissed the application on the ground that the decision in opposition proceedings should not be treated as giving rise to an estoppel because to do so would be wholly incompatible with the scheme of European patent law which was incorporated into English law by the 1977 Act. The plaintiffs appealed, contending that there was cause of action estoppel even though the grounds of revocation in s 72 of the 1977 Act did not equate with the grounds of opposition in art 100 of the convention.

**Held** – Cause of action estoppel only applied when the cause of action in the earlier proceedings was identical to that in the later proceedings, and there was a judicial decision that was final. In the instant case, the causes of action pleaded by the defendants in their defence and counterclaim were not identical to those decided by the Opposition Division. Moreover, the decision of the Opposition Division was not a final decision as to the validity of the patent, since under the convention the national courts had exclusive jurisdiction over revocation proceedings, and therefore validity was finally decided by those courts. It followed that no cause of action estoppel arose from the decision of the Opposition Division. Accordingly, the appeal would be dismissed (see p 964 a, p 965 e to p 966 b f g, p 969 j and p 970 b c, post).

## Notes

For the effect of a European patent, see 35 *Halsbury's Laws* (4th edn) paras 753, 754.

For the Patents Act 1977, s 72, see 33 *Halsbury's Statutes* (4th edn) (1997 reissue) 219.



**Cases referred to in judgments**

- a** *Amersham International plc v Corning Ltd* [1987] RPC 53.  
*Arnold v National Westminster Bank plc* [1991] 3 All ER 41, [1991] 2 AC 93, [1991] 2 WLR, HL.  
*Biogen Inc v Medeva Plc* [1997] RPC 1, HL.  
*Brinkhof* 1993 GRUR 177.
- b** *Chiron Corp v Organon Teknika Ltd, Chiron Corp v Murex Diagnostics Ltd* [1994] FSR 448.  
*Henderson v Henderson* (1843) 3 Hare 100, [1843–60] All ER Rep 378, 67 ER 313, V-C.  
*Hoystead v Taxation Comr* [1926] AC 155, [1925] All ER Rep 56, PC.  
*Kirin-Amgen Inc v Boehringer Mannheim GmbH, Boehringer Mannheim GmbH v Janssen-Cilag Ltd* [1997] FSR 289, CA.  
*Lenzing AG's European Patent (UK)* [1997] RPC 245.  
*Nouvion v Freeman* (1889) 15 App Cas 1, HL.  
*Pall Corp v Commercial Hydraulics (Bedford) Ltd* [1989] RPC 703, CA.  
*Thoday v Thoday* [1964] 1 All ER 341, [1964] P 181, [1964] 2 WLR 371, CA.
- d** *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581, [1975] 2 WLR 690, PC.  
*Zahnkranzfraser* (Case No X ZR 29/93).

**Cases also cited or referred to in skeleton arguments**

- Boehringer Mannheim GmbH v Genzyme Ltd* [1993] FSR 716.
- e** *Bonzel (Tassilo) & Schneider (Europe) AG v Intervention Ltd* [1991] RPC 43.  
*Carl-Zeiss-Stiftung v Rayner & Keeler Ltd (No 2)* [1966] 2 All ER 536, [1967] 1 AC 853, HL.  
*Carl-Zeiss-Stiftung v Rayner & Keeler Ltd (No 3)* [1969] 3 All ER 897, [1970] Ch 506.  
*Gale's Application* [1991] RPC 305, CA.
- f** *Hocking & Co v Hocking* (1886) 3 RPC 291, CA.  
*Merrell Dow Pharmaceuticals Inc v H N Norton & Co Ltd* [1996] RPC 716, HL.  
*Mills v Cooper* [1967] 2 All ER 100, [1967] 2 QB 459, DC.  
*Page v Brent Toy Products Ltd* (1949) 67 RPC 4, Ch D and CA.  
*Shoe Machinery Co Ltd v Cutlan (No 2)* (1896) 13 RPC 141.

**g Appeal**

By notice dated 5 September 1997 Buehler AG appealed with leave from the order of Judge Peter Ford on 13 August 1997 in the Patents County Court dismissing their application to strike out the allegations of invalidity made in respect of their patent by the respondents, Chronos Richardson Ltd, in their

- h** defence and counterclaim in infringement proceedings brought against them by the appellants. The facts are set out in the judgment of Aldous LJ.

*Christopher Floyd QC* (instructed by *Briffa & Co*) for the appellants.

*Guy Burkill* (instructed by *Linnells, Oxford*) for the respondents.

**j**

*Cur adv vult*

20 March 1998. The following judgments were delivered.

**ALDOUS LJ** (giving the first judgment at the invitation of Roch LJ). The appellants, Buehler AG, are the proprietors of European Patent (UK) No 256222 in respect of an invention entitled 'Balance for the continuous weighing and for

the determination of the flow rate of bulk foodstuffs treated in a grain mill'. That patent was granted on 15 January 1992. On 14 October 1992 it was opposed by the respondents, Chronos Richardson Ltd, under art 99 of the Convention on the Grant of European Patents (Munich, 5 October 1973; TS 20 (1978); Cmnd 7090) (the European Patent Convention). There was a hearing by the Opposition Division on 29 October 1993, but it was not until 24 March 1995 that a written decision was given rejecting the opposition. No appeal was filed.

On 19 April 1996 the appellants started proceedings in the Patents County Court against the respondents alleging infringement of the patent. The respondents in their defence, served on 4 July 1996, denied infringement, alleged that the patent was invalid and counterclaimed for its revocation. The allegations of invalidity repeat the allegations that were raised in the Opposition. On 21 February 1997 the appellants applied to strike out the allegations of invalidity upon the basis that they were *res judicata* having been decided by the Opposition Division or were otherwise an abuse of process. That application was dismissed by Judge Peter Ford in his order of 13 August 1997. It is against that order that the appellants appeal. The respondent's notice seeks to support the judge's decision on grounds not relied on by him and also alleges that if the appellants are correct, the action should be struck out because there could not be infringement upon the construction of the claims that are binding upon the parties.

The basic issue raised in the appeal is the same as that dealt with by the judge: can a party who has unsuccessfully opposed a patent in the European Patent Office rely on the same allegations of invalidity as were dealt with by the European Patent Office as grounds of defence and counterclaim in proceedings for infringement brought by the patentee?

The judge held that decision in opposition proceedings should not be treated as giving rise to an estoppel because to do so would be wholly incompatible with the scheme of European patent law which is incorporated into English law by the Patents Act 1997. He went on to conclude that to litigate the matters raised in the defence and counterclaim did not amount to a misuse of the court's procedure in a way which would be manifestly unfair or otherwise bring the administration of justice into disrepute amongst right thinking people. Therefore there was no abuse of the process which would require the allegations to be struck out. The appellants challenge the first of those findings.

### *The legal background*

The European Patent Convention was entered into to strengthen co-operation between the states of Europe in respect of inventions and to enable protection to be obtained in the contracting states by a single procedure. For that purpose the European Patent Office was set up as part of a European organisation based in Munich. To implement the procedures laid down in the convention the Patent Office was required to have seven departments, a Receiving Section, Search Division, Examining Division, Opposition Divisions, a Legal Division, Boards of Appeal and an Enlarged Board of Appeal (art 15).

The procedure for obtaining a European patent is contained in Pts III and IV of the convention. The application once filed is dealt with by the Receiving Section which examines it to ensure that it complies with the formal requirements laid down. If it does, the Search Division produces a report upon validity which is sent to the applicant. The patent, if it is to proceed, is then published and thereafter examined by the Examining Division. The Examining Division either refuses or grants the patent. Within nine months of publication of the mention

a of the grant any person may give notice of opposition (art 99). The proceedings are not strictly an opposition as the patent has been granted. They are what can be called 'belated opposition' proceedings. The possible grounds for opposition, the patent is not patentable, insufficiency and extension of subject matter, are set out in art 100. The Opposition Division, having considered the evidence put forward by the parties and after hearing submissions, decides whether the grounds for opposition prejudice the maintenance of the patent (art 101(1)). 'If the Opposition Division is of the opinion that the grounds for opposition ... prejudice the maintenance of the European Patent' (art 102(1)), it is revoked. If the grounds do not prejudice the maintenance, the opposition is rejected. If the Opposition Division decides to maintain the patent subject to amendments proposed, the patent will be maintained in amended form subject to approval of the text by the patentee and payment of the printing fee. The decisions of the Receiving Section, Examining Divisions and of the Opposition Division are subject to appeal to the Board of Appeal (arts 106 and 110). Certain questions can be referred to the enlarged Board of Appeal. The Board of Appeal has power to remit the opposition back to the Opposition Division or to decide the appeal. If it does so, there is no further appeal.

The convention is split up into parts. Part I concerns 'General and Institutional Provisions'. Its first chapter sets out general provisions, the second provides for the setting up of the European Patent Organisation, the third provides for the organisation and duties of the European Patent Office and the fourth the composition and operation of the Administrative Council. Part II contains provisions as to substantive law designed to harmonise the law of contracting states. Part III is entitled 'Application for European Patents'. Chapter I is concerned with filing. The procedure adopted by the Patent Office up to grant is governed by the articles in Pt IV. The 'Opposition Procedure' is in Pt V and the 'Appeals Procedure' is in Pt VI. Part VII deals with procedure generally. Part VIII is entitled 'Impact on National Law'. Chapter I deals with the method of conversion of a European patent into a patent of a contracting state. Chapter II is concerned with 'Revocation and prior rights'. Article 138 is in this form:

*'Grounds for revocation*

(1) Subject to the provisions of Article 139, a European patent may only be revoked under the laws of a Contracting State, with effect from its territory, on the following grounds ...'

There are then set out five grounds of revocation: the patent is not patentable, insufficiency, extension of subject matter, extension of protection and lack of entitlement by the proprietor.

The Patents Act 1977 was enacted to, inter alia, give effect to the European Patent Convention. Section 77 provides that as from grant a European patent is to be treated as if it were a patent under the Act granted in pursuance of an application made under the Act. The power to revoke such a patent is contained in s 72. That section enables the court or the comptroller to revoke a patent upon the grounds of lack of patentability, insufficiency, extension of subject matter, extension of protection and lack of entitlement by the proprietor. It should be noted that the jurisdiction under s 72 exceeds that exercised by an Opposition Division under art 100.



*The appeal*

Mr Floyd QC, who appeared for the appellants, submitted that where there was a judicial decision that was final, both cause of action estoppel and issue estoppel can apply to the validity of a patent. That is correct: see *Chiron Corp v Organon Teknika Ltd*, *Chiron Corp v Murex Diagnostics Ltd* [1994] FSR 448 and *Kirin-Amgen Inc v Boehringer Mannheim GmbH*, *Boehringer Mannheim GmbH v Janssen-Cilag Ltd* [1997] FSR 289. He went on to submit that the distinction between cause of action and issue estoppel was not of great significance in this case because the respondents were not seeking to raise any ground other than those specifically decided in the European Patent Office. The difference between the two may not appear to be of great significance, but to disregard any significant difference could lead to a wrong conclusion.

*Cause of action estoppel*

The distinction between cause of action and issue estoppel was made clear by Lord Keith in *Arnold v National Westminster Bank plc* [1991] 3 All ER 41 at 46–47, [1991] 2 AC 93 at 104–105:

‘It is appropriate to commence by noticing the distinction between cause of action estoppel and issue estoppel. Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened ... The principles upon which cause of action estoppel is based are expressed in the maxims *nemo debet bis vexari pro una et eadem causa* and *interest rei publicae ut finis sit litium*. Cause of action estoppel extends also to points which might have been but were not raised and decided in the earlier proceedings for the purpose of establishing or negating the existence of a cause of action. In *Henderson v Henderson* (1843) 3 Hare 100 at 114–115, [1843–60] All ER Rep 378 at 381–382 Wigram V-C expressed the matter thus: “In trying this question, I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.” It will be seen that this passage appears to have opened the door towards the possibility that cause of action estoppel may not apply in its full rigour where the earlier decision did not in terms decide, because they were not raised, points which might have been vital to

a the existence or non-existence of a cause of action. The passage has since frequently been treated as settled law, in particular by Lord Shaw, giving the advice of the Judicial Committee of the Privy Council, in *Hoystead v Taxation Comr* [1926] AC 155 at 170, [1925] All ER Rep 56 at 64. That particular part of it which admits the possible existence of exceptional cases was approved by Lord Kilbrandon in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 at 590, saying: "The shutting out of a 'subject of litigation'—a power which no court should exercise but after a scrupulous examination of all the circumstances—is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless 'special circumstances' are reserved in case justice should be found to require the non-application of the rule."

Mr Floyd submitted that there was cause of action estoppel even though the grounds of revocation in s 72 do not equate with the grounds of opposition in art 100. He submitted that the cause of action before the Opposition Division and therefore the subject of the estoppel was the invalidity of the patent.

d Because the Opposition Division had rejected the opposition it was no longer open to the respondents to contend that the patent was invalid. He accepted that no estoppel applied to the grounds of revocation in s 72 which did not appear in art 100, but that, he submitted, was a special circumstance. Alternatively, Mr Floyd submitted, that the cause of action was invalidity upon the grounds set out in art 100.

e Cause of action estoppel is founded upon the principle that there must be finality to litigation. It applies to the issues raised and also to matters which might have been raised and decided in the earlier proceedings. But it only applies when the cause of action in the earlier proceedings is identical to that in the later proceedings.

f The causes of action in the proceedings before this court can be ascertained from the defence and counterclaim. In the defence invalidity is pleaded as a defence to an allegation of infringement. Thus the cause of action is infringement. The counterclaim raises a separate cause of action, namely that the patent, which is to be treated as if it were a patent granted under the 1977 Act, should be revoked pursuant to the court's jurisdiction under s 72.

g Before the Opposition Division of the European Patent Office, the cause of action, if it be a cause of action, was whether the patent should be maintained or revoked pursuant to the jurisdiction given to the Opposition Division by arts 100 to 102.

h The European Patent Office did not have before it and did not decide infringement. It follows that any submission that the respondents were estopped from challenging the validity of the patent as part of their defence in the action cannot be right. That was conceded.

j The cause of action pleaded by the respondents in their counterclaim is not, in my judgment, identical to that decided by the Opposition Division of the European Patent Office. The Opposition Division had to decide an opposition which required a decision as to whether the European Patent should be maintained or revoked upon the three grounds of opposition set out in art 100. The counterclaim contains an allegation of invalidity in revocation proceedings brought against the United Kingdom Patent under s 72 of the Patents Act 1977.

The fact that the grounds of revocation under s 72 are not the same confirms the view that the causes of action are not identical. a

Even though I am of the view that there can be no cause of action estoppel in this case as the causes of action are not identical, there is a more fundamental reason why no such estoppel arises. The decision of the Opposition Division was not a final judicial decision as to the validity of the patent.

The convention set up a European Patent Organisation. Its task was said in art 4 to be 'to grant European patents. This shall be carried out by the European Patent Office supervised by the Administrative Council'. That task is carried out by the various divisions of the European Patent Office and despite the fact that an opposition is a post-grant proceeding, the convention treats it as being part of the grant process. The convention reflects the dichotomy between the need for proper examination so that invalid patents are not granted and the damage inflicted upon applicants by delayed grant. The route chosen is quick publication followed by grant and belated opposition. Opposition proceedings are not true inter parties proceedings as art 114 makes clear. The Opposition Division can examine facts of its own motion and is not restricted to the facts, evidence and agreements provided by the parties. Rule 60 enables the European Patent Office to continue an opposition of its own motion despite withdrawal by one or all of the parties. (see G8/91 6 OJ 1993, 346 at 351 and G9/91, 7 OJ 408 at 418 (Official Journal of the European Patent Office)). b  
c  
d

Article 99 provides for 'Opposition'. The French text of that article uses the same word; the German text calls it 'Einspruch'. Revocation—'Nullité' in the French and 'Nichtigkeit' in the German—is covered by Ch II and in particular art 138. The convention views opposition and revocation proceedings as different proceedings, although the issues overlap. Article 138, which sets out grounds of revocation, states that 'a European patent may only be revoked under the law of a contracting state, with effect for its territory on the following grounds ...' No doubt, as Mr Floyd submitted, the article prevents revocation except on grounds set out in the article, but the convention, when read as a whole, lays down a logical structure with the national courts having exclusive jurisdiction over revocation proceedings and the European Patent Office having the task of granting European patents (art 4). Once granted, the patent becomes a patent of the chosen contracting state. It is the courts of that contracting state that have to decide infringement and revocation and any decision of the European Patent Office does not preclude the courts of the contracting state from deciding all issues of infringement and revocation. That was made clear in G9/91, OJ 7/1993 408. In that opposition the Enlarged Board of Appeal, which included K Bruckhausen from the German Bundesgerichtshof and J Brinkhof from the Dutch Court of Appeal, had to consider whether it was permissible on appeal to take into account fresh grounds of opposition. The Board said (at 419): e  
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g  
h

'The purpose of the appeal procedure inter partes is mainly to give the losing party the possibility of challenging the decision of the Opposition Division on its merits. It is not in conformity with this purpose to consider grounds for opposition on which the decision of the Opposition Division has not been based. Furthermore, in contrast to the merely administrative character of the opposition procedure, the appeal procedure is to be considered as a judicial procedure ... Although Article 114(1) EPC formally covers also the appeal procedure, it is therefore justified to apply this provision generally in a more restrictive manner in such procedure than in j



a opposition procedure ... This approach also reduces the procedural  
uncertainty for patentees having otherwise to face unforeseeable  
complications at a very late stage of the proceedings, putting at risk the  
revocation of the patent which means an irrevocable loss of rights.  
Opponents are in this respect in a better position, having always the  
possibility of initiating revocation proceedings before national courts, if they  
b did not succeed before the EPO.'

The Bundesgerichtshof in *Zahnkransfraser* (Case No X ZR 29/93) also held that  
a declaration of nullity (revocation) can be issued by the German courts on the  
same grounds that had been raised in an opposition before the European Patent  
Office. They said:

c 'a) As the Federal Patent Court rightly stated, the examination of  
patentability must take into account the entire existing state of the art  
without restrictions, i.e., including the cited prior art which ... was already the  
subject matter of the examination in opposition proceedings and in  
d opposition appeal proceedings before the European Patent Office. The fact  
that the nullity proceedings must take account of the entire matter at issue is  
a necessary consequence of the function of these proceedings and its  
relationship to the objection proceedings. It is true that the decisions  
e resulting from such proceedings represent expert opinions of considerable  
importance that must be considered as part of the finding of facts and the  
evaluation of the evidence; they cannot, however, enjoy any further legal  
effect (cf., although diverging in part, *Brinkhof*, 1993 GRUR 177 at 183, and the  
references cited by the Federal Patent Court). The opposition proceedings  
according to art 99 of the European Patent Convention, like the  
corresponding proceedings under national law (s 59 of the Patent Act), act as  
f an ex post facto examination of the protectability of a patent already granted.  
The holder of the patent and the opponent participate in these proceedings,  
but not as parties. In national law, this is a consequence of the fact that the  
opposition proceedings can also be continued ex officio after withdrawal of  
the opposition (s 61(1), Patent Act). A comparable regulation for European  
g patent law is contained in Rule 60 of the Implementing Order for the  
Convention on the Grant of European Patents of October 5, 1973  
(subsequently amended). This type of participation alone prevents the  
decisions of such proceedings having preclusive or prejudicial legal effect on  
any nullity proceedings. The subsequent appeal proceedings are not  
restricted to a mere legal verification of the decision previously issued ...  
h Rather, these proceedings amount to an additional trial court. Here, too,  
there is no reason for holding that the decision in such proceedings should  
have a legal effect that could prejudicially prevent a subsequent investigation  
in the nullity proceedings of the cited prior art examined in these appeal  
proceedings. Irrespective of the legal status of the appeal decisions of the  
European Patent Office, such a conclusion would be incompatible with the  
j structure and principles of nullity litigation in national law. It is the latter  
which, according to art 138(1) of the European Patent Convention, are  
decisive, since European patent law subjects nullity proceedings to the  
national courts and the applicable procedural law. According to the latter,  
an action for nullity, as in the case of a corresponding national patent, can be  
brought by anybody and the court as a matter of principle must determine  
the facts of the case ex officio and investigate protectability in detail.

According to its function and structure, the purpose of the proceedings is to exercise the general interest in ensuring that those rights are removed from the patent register which, not entitled to protection, have been wrongly granted. As in the case of national patents, this function excludes the possibility of eliminating or only partially considering a state of the art that was already the subject matter of evaluation during the granting and opposition proceedings before the European Patent Office. Since by art 138 of the European Patent Convention the subsequent destruction of a European patent already granted is transferred to the national authorities of the contracting states with respect to their own sovereign territories and subject to their own laws, it would have required an express regulation if this power granted to the national courts, the details of which are not specified, were to be restricted by a decision issued in the granting or opposition proceedings. Such express regulation is contained neither in the European Patent Convention nor in its implementation into national law by the Act on International Patent Conventions. On the contrary, both include the question of patentability according to art 52 of the European Patent Convention expressly and unreservedly within the examination of the European patent in nullity proceedings.'

Of course a decision of the Bundesgerichtshof is not binding upon this court, but I believe that the reasoning is applicable. Further, it would be very odd, absent statutory provision, if English law required conclusions reached by the Opposition Division to be binding upon the parties in revocation proceedings whereas German law was to the contrary.

The view of the Bundesgerichtshof in *Zahnkrantzfraser* is consistent with that taken in this country over the years, albeit in cases where the question of estoppel was not argued.

In *Amersham International plc v Corning Ltd* [1987] RPC 53 the defendants sought a stay of High Court proceedings pending determination of opposition proceedings in the European Patent Court. Falconer J (at 58) said as part of his reasoning for rejecting the application:

'... it seems to me reasonable to infer ... that the intention behind the relevant provisions of the European Patent Convention is that revocation of a European patent should primarily be a matter for the national court of the designated state and that when validity is put in issue in proceedings for infringement of a European patent, which can only be brought in the appropriate court of the designated state, the intention is that both infringement and validity should be litigated in that court.'

In *Pall Corp v Commercial Hydraulics (Bedford) Ltd* [1989] RPC 703 the defendants sought a stay of the proceedings pending determination of an opposition that was before the European Patent Office. Whitford J (at 706) clearly thought that a decision on issues of validity by the European Patent Office would not bar the national court from considering those issues in revocation proceedings. On appeal, Dillon LJ was of the same view. He said (at 710):

'The effect, of course, of successful opposition proceedings in the European Patent Office would be to destroy the patent altogether ... If, however, the European Patent Office does not revoke the patent or declare it invalid—if, in other words, the opposition proceedings fail—then it is still open to the defendants to dispute validity of the patent once again at the trial

a of the infringement proceedings in any country in the Community. In other words, successful opposition proceedings put an end to the patent; unsuccessful opposition proceedings do not prevent the issue of validity being challenged afresh in proceedings in the national courts.'

b In *Lenzing AG's European Patent (UK)* [1997] RPC 245 at 262 Jacob J made it clear that he believed that art 138 provided an opportunity for the national courts to consider an attack on the patent after opposition. Although his view was not stated as applying to a case where the parties were the same, it is clear from the general tenor of his judgment that that was his view.

c In *Biogen Inc v Medeva Plc* [1997] RPC 1 the Opposition Division had maintained the patent. Lord Hoffmann, who gave the leading speech, concluded that the patent was invalid, despite the persuasive authority of the European Patent Office decision.

d Mr Floyd relied upon the law in Austria as supporting his submission that a decision in opposition proceedings was *res judicata*. In that country nullity proceedings have by Act to be stayed pending a decision in the opposition proceedings before the European Patent Office. The Act also provides that issues decided by the European Patent Office in opposition proceedings are binding upon the parties in nullity proceedings. That was recognised in Case T301/95 1998 EPO r 142, a case where the Technical Board of Appeal had to decide whether opposition proceedings could be initiated and prosecuted by a 'straw' opponent. Mr Burkill, who appeared for the respondents, submitted that the law e in Austria did not throw any light upon how the convention was to be applied to the issues before this court. Austrian law was governed by the Austrian Act and, in so far as any inference could be drawn, it was that a decision in opposition proceedings did not finally determine the issues of validity of a patent as, if that was the effect of the convention, then there was no need for the Austrian Act to make provision that decisions reached by the European Patent Office were *res* f *judicata*.

I do not believe that the position in Austria throws light upon the effect of the convention. The law as stated in the Austrian Act appears to be peculiar to that state and there is nothing before this court which suggests that the Act was enacted otherwise as a matter of expedience.

g The decision of the Opposition Division, relied on as giving rise to an estoppel, concluded the opposition and once the appeal period had expired there was no possibility of the parties continuing with it. In that sense it was final. But as pointed out by Lord Herschell in *Nouvion v Freeman* (1889) 15 App Cas 1, that can be said of some interlocutory judgments. He said (at 9):

h 'It is obvious, therefore, that the mere fact that the judgment puts an end to and finally settles the controversy which arose in the particular proceeding, is not of itself sufficient to make it a final and conclusive judgment upon which an action may be maintained in the Courts of this country ...'

j For an estoppel to arise the judgment of the earlier court, in this case the decision of the Opposition Division of the European Patent Office, must finally and conclusively decide the validity of the patent. That it did not do. Validity is finally decided in revocation proceedings by the courts of the contracting states. It follows that no cause of action estoppel arises from the decision of the Opposition Division of the European Patent Office.



*Issue estoppel*

Issue estoppel can arise where a plea of res judicata cannot be established because the causes of action are not the same (see *Thoday v Thoday* [1964] 1 All ER 341, [1964] P 181). But it cannot arise unless the judgment relied upon as giving rise to the estoppel was a final judgment. That being so, for the reasons already stated, no issue estoppel arises in this case.

*Conclusion*

The decision of the Opposition Division disposed of the opposition. It did not provide grounds for an estoppel in revocation proceedings under s 72 of the Act. If it had done so, it would probably not have helped to shorten these proceedings as there would remain considerable difficulty in application.

The judge was right. Therefore there is no need to consider the matters raised in the respondent's notice. I would dismiss the appeal.

**ROCH LJ.** I agree.

*Appeal dismissed. Leave to appeal to the House of Lords refused. Application for a stay granted.*

8 June 1998. *The Appeal Committee of the House of Lords (Lord Goff of Chieveley, Lord Clyde and Lord Hutton) refused leave to appeal.*

Dilys Tausz Barrister.

## Clough v Tameside and Glossop Health Authority

QUEEN'S BENCH DIVISION AT MANCHESTER

BRACEWELL J

24 JULY 1997

*Discovery – Legal professional privilege – Waiver – Consultant's report referring to earlier medical report prepared for use in litigation – Whether privilege attaching to earlier report waived when consultant's report disclosed – Whether production of document may be ordered for fair disposal of cause or matter – RSC Ord 24, rr 10(1), 13(1).*

The plaintiff, who had given birth to a child suffering from Down's Syndrome, issued proceedings against the defendant health authority, claiming damages in respect of the negligent failure to give her an amniocentesis test. The defendants conceded that an amniocentesis was not performed but denied negligence, and in the course of preparing the case for hearing, obtained a report from Dr P, the senior house officer, who had been actively involved with the treatment of the plaintiff during her ante-natal care. That report was disclosed to a consultant psychiatrist for the purpose of preparing a report as to what injuries, if any, the plaintiff had suffered as a result of the alleged negligence and her condition and prognosis. The defendants disclosed the psychiatrist's medical report, which recited the receipt of the communication from Dr P, to the plaintiff with the intention of relying on it at trial. The plaintiff applied for disclosure of Dr P's report, but the defendants resisted the application. The plaintiff applied to the district judge under RSC Ord 24, rr 10(1)<sup>a</sup> and 13<sup>b</sup> requiring the defendants to produce the document for their inspection on the ground that it was necessary for the fair disposal of the case and the district judge ordered the disclosure of the document. The defendants appealed, contending, inter alia, that since Dr P's report had been prepared for the purpose of litigation it was privileged and remained so, despite mention in the psychiatrist's report, as the service of an expert's report did not waive privilege in connected documents, until the report had been put in evidence at the trial.

**Held** – Where an expert in his report referred in passing to material supplied to him by the instructing solicitor as part of the background documentation in the case on which his expert opinion was sought, any privilege attaching to that material was waived on the service of the report on the other party. Thus, in the instant case, although Dr P's report was privileged as it had been obtained for use in litigation, since it had been supplied to the consultant psychiatrist in order for him to consider it as part of the background information in formulating his opinion, and since his report had been served on the plaintiff, the privilege in respect of both reports was waived. In any event, fairness dictated that the plaintiff should not be forced to meet a defence based on an expert's opinion which was based on documents that the plaintiff was not privy to. Accordingly, the appeal would be dismissed (see p 975 j to p 976 a d to p 977 b g, post).

<sup>a</sup> Rule 10(1) is set out at p 973 g h, post

<sup>b</sup> Rule 13 is set out at p 973 j, post

## Notes

For legal professional privilege in general, see 13 *Halsbury's Laws* (4th edn) paras 71–78, and for cases on the subject see, 18 *Digest* (2nd reissue) 179–192, 1598–1707.

## Cases referred to in judgment

*Balkanbank v Taher* (1994) *Times*, 19 February.

*Balkanbank v Taher* [1995] 2 All ER 904, [1995] 1 WLR 1067, CA.

*Booth v Warrington Health Authority* [1992] PIQR P37.

*Comfort Hotels Ltd v Wembley Stadium Ltd* (Silkin and ors, third parties) [1988] 3 All ER 53, [1988] 1 WLR 872.

*Fairfield-Mabey Ltd v Shell UK Ltd* (Metallurgical Testing Services (Scotland) Ltd, third party) [1989] 1 All ER 576.

*General Accident Fire and Life Assurance Corp v Tanter* [1984] 1 All ER 35, [1984] 1 WLR 100.

*Guinness Peat Properties Ltd v Fitzroy Robinson Partnership (a firm)* [1987] 2 All ER 716, [1987] 1 WLR 1027, CA.

*Harmony Shipping Co SA v Saudi Europe Line Ltd* [1979] 3 All ER 177, [1979] 1 WLR 1380, CA.

*National Justice Cia Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer* [1993] 2 Lloyd's Rep 68.

*Naylor v Preston Area Health Authority* [1987] 2 All ER 353, [1987] 1 WLR 958, CA.

*Waugh v British Railways Board* [1979] 2 All ER 1169, [1980] AC 521, [1979] 3 WLR 150, HL.

*Youell v Bland Welch & Co Ltd (No 3)* [1991] 1 WLR 122.

## Interlocutory appeal

The defendants, the Tameside and Glossop Health Authority, appealed from the decision of District Judge Harrison sitting at the Manchester District Registry given on 2 September 1996, whereby he ordered the defendants to disclose to the plaintiff, Angela Clough, a copy of the statement of Dr Pandey, a senior house officer who had been actively involved with the treatment of the plaintiff during her ante-natal care, and referred to in the report of Dr George Hay, a consultant psychiatrist, prepared for the purpose of identifying the injuries, if any, the plaintiff had suffered as a result of the defendant's alleged negligence, her condition and prognosis. The appeal was heard in Manchester. The facts are set out in the judgment.

*Nicholas Braslavsky* (instructed by *Hempsons*, Manchester) for the defendants.

*Margaret de Haas* (instructed by *Linder Myers*, Manchester) for the plaintiff.

**BRACEWELL J.** In this case, the defendants appeal from an order of District Judge Harrison, dated 2 September 1996, whereby he ordered the defendants, within 28 days, to disclose to the plaintiff a copy of the statement of Dr Pandey, referred to in the report of Dr George Hay, dated 20 May 1992.

The background circumstances are, that by a statement of claim in the High Court, the plaintiff has claimed damages for negligence against the defendants arising out of the birth of a child suffering from Down's Syndrome, who was born at Tameside General Hospital on 26 June 1989.

The essence of the plaintiff's allegations is that, when pregnant, she requested an amniocentesis test, inter alia by reason of her age and family history; that she did not have such a test and was not given the opportunity to have one; that had



a such a test been given, it would have indicated a Down's Syndrome abnormality and that in consequence she would have elected to have the pregnancy terminated.

b The defence denies negligence, concedes that an amniocentesis was not performed but contends that treatment and care of the plaintiff accorded with a responsible body of medical opinion then prevailing. Causation is in issue and liability denied.

Issues arise as to whether the plaintiff expressed an anxiety as to the need for an amniocentesis, if so, to whom and with what response and whether the hospital enabled the plaintiff to have informed consent.

c During the course of the preparation of the case for hearing, the defendants obtained a report from Dr Pandey, who was a senior house officer who had been actively involved with the treatment of the plaintiff during her ante-natal care. The communication was obtained by the defendants on behalf of the Medical Defence Union for whom they act, and the purpose of the communication was for use in litigation.

d It therefore came within the ambit of *Waugh v British Railways Board* [1979] 2 All ER 1169, [1980] AC 521. Thereafter, among other documentation, the communication from Dr Pandey was disclosed by the defendants to Dr Hay, who is a consultant psychiatrist, for the purpose of instructing Dr Hay to prepare a report on the plaintiff as to what injuries, if any, the plaintiff had suffered as a result of the alleged negligence and her condition and prognosis.

e The report was duly prepared by Dr Hay, dated 2 May 1992, and the report recited the receipt by him of the communication from Dr Pandey among other documents sent by the defendant's solicitors.

f Without doubt, it would have been open to the defendants not to disclose the report of Dr Hay, if they did not intend to use it at trial, and the plaintiff would have been restricted to a subpoena at the hearing, according to the general principle of privilege attaching to litigation. However, the defendants did disclose the medical report to the plaintiffs with the intention of relying upon it. The plaintiff thereupon applied for disclosure of the communication from Dr Pandey which had formed part of the instructions to Dr Hay. The defendants resisted and accordingly the plaintiff applied to the district judge, under RSC Ord 24, r 10(1), which states:

g 'Any party to a cause or matter shall be entitled at any time to serve a notice on any other party in whose pleadings, affidavits or witness statements reference is made to any document requiring him to produce that document for the inspection of the party giving the notice and to permit him to take copies thereof.'

h Rule 10(2) makes provision for objection by the party on whom such notice is served. The effect of the rule is that, the court has a discretion whether or not to make such an order and the order will not be made if good cause to the contrary is shown. The party against whom the order is sought will be excused if he is

j privileged from producing the document.

Order 24, r 13, states:

'No order for the production of any documents for inspection or to the Court, or for the supply of a copy of any document, shall be made under any of the foregoing rules unless the Court is of the opinion that the order is necessary for disposing fairly of the cause or matter or for saving costs.'

It is, therefore, for the party applying for production to satisfy the court that the order is necessary in the context of the case for disposing fairly of the cause or matter. a

When the application was argued before the district judge, the submissions were restricted to the use, or potential use, which Dr Hay made of the statement from Dr Pandy. The defendants argued that whereas Dr Hay was instructed on quantum, Dr Pandy was dealing with liability and, therefore, Dr Hay did not make use of the material upon which to base any part of the conclusions and that his opinion would be unchanged if all reference to Dr Pandy's statement were deleted. It was argued that the statement of Dr Pandy was irrelevant. The district judge read Dr Pandy's statement and in exercising his discretion to order disclosure noted that the pleadings related not solely to matters after birth, but also to concerns prior to birth and the distress alleged, and he concluded: b

'It is indeed highly possible that Dr. Hay was informed of the facts by Dr. Pandy. It specifically concerns information concerning the plaintiff's mental condition in the ante-natal stages and her state of mind. It is my view therefore, that the statement should be disclosed.'

Therefore, the district judge decided the case solely on the basis of discretion, the argument of irrelevance having been advanced before him. c

The matter comes before me, de novo, and different arguments have been advanced on privilege. d

There is in law, a clear distinction between the privilege attaching to communications between solicitor and client and that attaching to reports prepared for the purposes of litigation. In the former case the privilege attaches to all communications, whether related to litigation or not. In the latter case, the privilege attaches only to documents or to other written communications prepared with a view to litigation: *Waugh v British Railways Board* and *Comfort Hotels Ltd v Wembley Stadium Ltd* (Silkin and ors, third parties) [1988] 3 All ER 53, [1988] 1 WLR 872. There is a further distinction, that there is no property in the opinion of an expert witness, so whereas a solicitor could not, without his client's consent, be compelled to express an opinion on the merits of the case, a third party, who has provided a report to the client, can be subpoenaed to give evidence by the opposing side; *Harmony Shipping Co SA v Saudi Europe Line Ltd* [1979] 3 All ER 177, [1979] 1 WLR 1380. e

The general rule in civil cases, and indeed criminal cases, is that under English law, professional privilege is firmly established. A party cannot be required to disclose communications between himself and his lawyer or communications between the lawyer and third parties which come into existence for the purpose of obtaining legal advice. A proof of evidence from a potential witness of fact, is not, as such, disclosable. Neither is a report from a potential witness of expert opinion. A party may be required to produce a statement or expert's report in advance of the hearing as a pre-requisite to using and relying upon such statement or report. However, if a party does not intend to adduce the evidence, he is not, and cannot be required to disclose it, although an expert can be subpoenaed by the other side. Hence, if the defence, in the present case, obtained the medical report for the purpose of the plaintiff's litigation and decided not to disclose it to the plaintiff, the defence would be able to resist application for disclosure and the only remedy would be for the plaintiff to subpoena the expert at the trial. f

a The primary contention of the defendants, is that the statement of Dr Pandey is privileged, and remains so, despite mention in Dr Hay's report and therefore it is submitted any application to disclose under Ord 24, r 10 is defeated by the existing authorities, in that the privilege has not been waived expressly or implicitly.

b Counsel on both sides, rely on a number of authorities. It is common ground in this case, between counsel, that a privileged document, if intentionally sent to the other party, ceases to be privileged—*Balkanbank v Taher* (1994) Times, 19 February, a decision of Clarke J, and *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership (a firm)* [1987] 2 All ER 716, [1987] 1 WLR 1027, a decision of the Court of Appeal.

c However, the defendants contend, that the service of an expert's report, does not waive the privilege in *connected* documents, until the report has been put in evidence at the trial. Reliance is placed on *General Accident Fire and Life Assurance Corp v Tanter* [1984] 1 All ER 35, [1984] 1 WLR 100, a decision of Hobhouse J and *Booth v Warrington Health Authority* [1992] PIQR P37, a decision of Tucker J.

d These authorities are persuasive but are not binding on me as first instance decisions.

The facts of *Booth v Warrington Health Authority* have considerable resemblance to the current circumstances. It was a medical negligence case, in which midwives gave statements to the health authority which were disclosed to a consultant obstetrician who made reference to the statements in his report.

e It was held, that in the absence of some unequivocal act of waiver, the incorporation of part of a witness's statement into an expert's report, was not sufficient to amount to waiver of privilege and to justify production under Ord 24, r 11.

f In reaching that conclusion, Tucker J relied on *Fairfield-Mabey Ltd v Shell UK Ltd (Metallurgical Testing Services (Scotland) Ltd, third party)* [1989] 1 All ER 576, a decision of Judge Bowsher QC, which has been criticised as inconsistent with the *Comfort Hotels* case, in which Hoffmann J accepted that service of a witness statement under Ord 38, r 2A, waived privilege in respect of that document, and also inconsistent with *Youell v Bland Welch & Co Ltd (No 3)* [1991] 1 WLR 122, a decision of Phillips J.

g *The Supreme Court Practice* 1997 vol 1 para 38/2A/11, under the heading 'Saving of right to privilege' states:

'... The mere service of a witness statement does not waive privilege in the statement or its connected documents and such privilege continues until the statement has been put in evidence at the trial ...'

h In support of that proposition, *Balkanbank v Taher* [1995] 2 All ER 904, [1995] 1 WLR 1067 is cited. Having considered the authority, it appears to me that *Balkanbank v Taher*, does not support the proposition set out in the Supreme Court Practice and therefore is not authority for it.

j On consideration of all the available authorities and arguments, I conclude that the service of a statement does waive privilege in respect of that document. In considering the effect on privilege of a *connected* document, such as a reference to another statement in an expert's report, *Phipson on Evidence* (14th edn, 1990) p 529, draws a distinction between the expert identifying documents on which he has relied in making his report, and on the other hand, merely referring to another document in passing, which, according to the author, will not necessarily amount to a waiver, in that, the facts will be irrelevant because the expert's



opinion will be formed on hypothetical facts. The contention is advanced that a mere reference by an expert to the materials furnished by the instructing solicitor, should not and does not necessarily destroy any privilege which would otherwise exist over any part of the material. a

The author of *Phipson* recognises that there will be cases when it will be necessary to establish the exact basis of an expert's report, or the terms of a previous inconsistent statement by a witness of fact, as well as other circumstances where it will be desirable that the material relied on by the expert, is revealed to the other party in court. b

I find that statement is too restricted and too narrow. In *General Accident Fire and Life Assurance Corp v Tanter* [1984] 1 All ER 35, [1984] 1 WLR 100 Hobhouse J summarised the principles governing waiver of privilege regarding connected documents and concluded, that service of a statement, pursuant to an order of the court, would not of necessity have the effect of waiving privilege for connected documents. Potentially, there might appear to be tension between the rule, that an expert witness is entitled to refuse to produce documents or answer questions relating to communications of his instructing solicitor, versus the court's entitlement to ascertain the true facts on the basis of the report and the independent opinion on those facts as set out in the *Harmony Shipping* case. c

For my part, I can appreciate a clear distinction between material supplied to an expert by an instructing solicitor as part of the background documentation in the case upon which an expert opinion is sought, and on the other hand, communications between solicitor and expert which fall outside that category. d

In the first instance, I am persuaded that the privilege is waived and in the instant case, the supply to Dr Hay of a medical report of Dr Pandey, could only be in order for Dr Hay to consider it as part of the background information in formulating his opinion. The mere fact that Dr Hay may have found it unhelpful or even irrelevant, if that was the case, does not alter the status of the material supplied as part of his instructions and background material in coming to his independent opinion. A statement was supplied to Dr Hay to consider, and the resulting report was served on the other side, on the basis of such a statement having been considered by Dr Hay. In those circumstances, I hold that the privilege was waived and it matters not if the statement of Dr Pandey was considered material by Dr Hay. e

In any event, I have no hesitation in exercising my discretion in favour of disclosure for the following reasons. Experts are in a special and indeed unique category of witness, in that, under s 3 of the Civil Evidence Act 1972, an opinion on any relevant matter on which an expert is qualified to give expert evidence, 'shall be' admissible. The duties of experts are clearly laid down in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer* [1993] 2 Lloyd's Rep 68. Those duties apply to all the courts in all divisions and require experts to give independent assistance to the courts by way of objective, unbiased opinion in relation to matters within their expertise. An expert must state the facts or assumptions on which the opinion was based and should not omit to consider material facts which detract from any concluded opinion. An essential element of the process is for a party to know and to be able to test in evidence the information supplied to the experts in order to ascertain if the opinion is based on a sound factual basis or on disputed matters or hypothetical facts yet to be determined by the courts. f

If an expert has discounted some evidence supplied to him, he may, at the conclusion of the case, be held wrong to have done so and his opinion may g

a thereby be invalidated. Equally, he may have assumed an incorrect significance for a particular piece of material. It is only by proper and full disclosure to all parties, that an expert's opinion can be tested in court: in order to ascertain whether all appropriate information was supplied and how the expert dealt with it. It is not for one party to keep their cards face down on the table so that the other party does not know the full extent of information supplied. Fairness  
b dictates that a party should not be forced to meet a case pleaded or an expert opinion on the basis of documents he cannot see. Although civil litigation is adversarial, it is not permissible to withhold relevant information, nor to delete nor amend the contents of a report before disclosure, as was submitted by counsel for the defendants to be the practice of some firms of solicitors.

c The Commercial Courts and the Family Division, have been in the forefront of developing procedures whereby experts give unbiased opinions based on instructions and on information disclosed and known to all parties.

This is, in my judgment essential if experts are to be of assistance to the court. The report of Lord Woolf, 'Access to Justice', specifically commends this approach to expert evidence and the trend in the Queen's Bench Division is  
d developing to require candour, particular in professional negligence cases. In *Naylor v Preston Area Health Authority* [1987] 2 All ER 353 at 360, [1987] 1 WLR 958 at 967 Donaldson MR stated:

e '... whilst a party is entitled to privacy in seeking out the "cards" for his hand, once he has put his hand together, the litigation is to be conducted with all the cards face up on the table. Furthermore, most of the cards have to be put down well before the hearing ... I personally think that in professional negligence cases, and in particular in medical negligence cases, there is a duty of candour resting on the professional man.'

f I have, with the agreement of both parties, read the report of Dr Pandey. Whether it advances the case or not, in any respect, is a matter which can only be judged by testing all the evidence in the case. To attempt to question Dr Hay's conclusions without having that report available would, in my judgment, tie counsel's hands at the hearing, so as to handicap proper investigation. If the statement of Dr Pandey turns out to be significant, then the production is essential. If, on the other hand, it is of little or no material importance, that information  
g should also be available. Candour is crucial. I therefore order the document to be disclosed as satisfying the test in Ord 24, rr 10 and 13.

*Appeal dismissed.*

K Mydeen Esq Barrister.

## Hough v P & O Containers Ltd (Blohm + Voss Holding AG and others, third parties)

QUEEN'S BENCH DIVISION (ADMIRALTY COURT)

RIX J

27 FEBRUARY, 25 MARCH 1998

*Conflict of laws – Jurisdiction – Exclusive jurisdiction – Plaintiff employed by defendant English shipowners under contract containing an exclusive Hamburg jurisdiction clause – Plaintiff commencing proceedings in England against defendant for damages for personal injury – Defendant serving third party notice out of jurisdiction on third party domiciled in Germany – Whether English courts having jurisdiction over third party proceedings – Whether courts seised of original action having jurisdiction over courts conferred with jurisdiction by agreement – Civil Jurisdiction and Judgments Act 1982, Sch 1, arts 6(2), 17.*

The plaintiff, who was employed by the defendant English shipowners, was injured while working as an electrician on board one of the defendants' ships while she was undergoing repairs in a German shipyard. The plaintiff brought proceedings in England against the defendants alleging negligence and breach of statutory duty. Although cl 9 of the repair contract provided that German law should apply to the handling of all repair orders and that the courts of Hamburg should have jurisdiction, the defendants applied for and obtained leave under RSC Ord 11, r 1(1)(c) to issue and serve out of the jurisdiction a third party notice on the yard. The defendants alleged that it was an express and/or implied term and/or condition of the contract that the yard would take all reasonable steps to avoid foreseeable risk of injury to the plaintiff, and that his injury was caused by breach of contract and/or negligence on the part of the yard. The defendants further alleged that it was an implied condition of the contract that the yard would indemnify them against any loss caused by its breach of contract or negligence. The yard applied under Ord 12, r 8 to set aside the third party notice, relying, *inter alia*, on art 17<sup>a</sup> of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (which had the force of law in the United Kingdom by virtue of s 2(1) of the Civil Jurisdiction and Judgments Act 1982 and was set out in Sch 1 thereto), which provided that where the parties had agreed that a court of a contracting state would have jurisdiction, that court 'shall have exclusive jurisdiction'. The defendants contended that jurisdiction in England should be maintained, relying on art 6(2)<sup>b</sup> of the 1968 convention, which provided that a person domiciled in a contracting state 'may' be sued as a third party in the court seised of the original proceedings 'unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case'. The master dismissed the application and the yard appealed. The issues arose, *inter alia*, (i) whether the agreed jurisdiction under art 17 of the convention took precedence over the special jurisdiction under art 6(2), and (ii) if so, whether art 17 applied.

a Article 17 is set out at p 982 *h j*, post

b Article 6(2) is set out at p 982 *g*, post



**a** **Held** – (1) Having regard to the use of the word ‘may’, the special jurisdiction under art 6(2) of the convention was merely permissive. However, art 17 was expressed in mandatory terms and therefore had the effect of excluding that jurisdiction. It followed that, where it applied, art 17 took priority over art 6(2) (see p 986 *c d*, post); *Kurz v Stella Musical Veranstaltungen GmbH* [1992] 1 All ER 630 applied; *Kinnear v Falconfilms NV (Hospital Ruber Internacional and anor, third parties)* [1994] 3 All ER 42 considered.

**b** (2) In the absence of evidence of German law as to the construction of cl 9 of the repair contract, the court had to construe the clause as though it was part of an English contract, and assume that German law was the same as English law. Accordingly, since there were no words of limitation in cl 9, the defendants’ claims against the yard fell within it. Moreover, as the relationship of the parties arose solely out of the repairs to the defendants’ ship and the incident giving rise to the parties’ dispute arose out of that relationship, cl 19 related to a dispute ‘in connection with a particular legal relationship’ within the meaning of art 17, and therefore art 17 applied. The appeal would accordingly be allowed (see p 984 *j* to p 985 *c* and p 988 *e*, post).

**c** **d** Per curiam. As a matter of syntax and good sense, the word ‘these’ in the proviso to art 6(2) refers to the ‘original proceedings’ and not to the third party proceedings. Furthermore, the word ‘solely’ emphasises that the motive for the institution of the original proceedings has to be directed exclusively to the attempt to draw the third party away from his proper convention forum. The test is thus a narrow one designed to meet a situation where the plaintiff and the defendant are effectively in collusion to bring a claim against a third party in the plaintiff’s or defendant’s domicile, or otherwise where, even without collusion, the plaintiff has no good reason to sue the defendant, but is hoping that by doing so the defendant will, with the aid of art 6(2), bring the third party within the plaintiff’s domicile (see p 983 *j* to p 984 *a*, post).

**f** **Notes**

For the general jurisdiction of the court under the 1968 convention, see 8(1) *Halsbury’s Laws* (4th edn reissue) paras 618–634, and for cases on the subject, see 11(1) *Digest* (2nd reissue) 11–13, 13–15.

**g** For the Civil Jurisdiction and Judgments Act 1982, Sch 1, arts 6, 17, see 11 *Halsbury’s Statutes* (4th edn) (1991 reissue) 1138, 1145.

As from 1 December 1991 Sch 1 to the 1982 Act was substituted by the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 1990, SI 1990/2591, art 12(1), Sch 1.

**h** **Cases referred to in judgment**

*Aggeliki Charis Cia Maritima SA v Pagnan SpA, The Angelic Grace* [1995] 1 Lloyd’s Rep 87, CA.

*Continental Bank NA v Aeokos Cia Naviera SA* [1994] 2 All ER 540, [1994] 1 WLR 588, CA.

**j** *Kinnear v Falconfilms NV (Hospital Ruber Internacional and anor, third parties)* [1994] 3 All ER 42, [1996] 1 WLR 920.

*Kongress Agentur Hagen GmbH v Zeehaghe BV* Case C-365/88 [1990] ECR I-1845.  
*Kurz v Stella Musical Veranstaltungen GmbH* [1992] 1 All ER 630, [1992] Ch 196, [1991] 3 WLR 1046.

*Meeth v Glacetal SARL* Case 23/78 [1978] ECR 2133.

*Sills v Tillbury Cargo Handling Ltd* (2 November 1995, unreported), QBD.  
*Spitzley v Sommer Exploitation SA* Case 48/84 [1985] ECR 787.

### Interlocutory appeal

Blohm + Voss Holding AG, Blohm + Voss GmbH and Blohm + Voss Industries GmbH appealed from the order of Master Miller on 8 December 1997 dismissing their application under RSC Ord 12, r 8 to set aside the third party notice served on them in Germany under Ord 11, r 1(1)(c) by the defendant, P & O Containers Ltd, in an action brought by the plaintiff, David Hough, claiming damages for negligence and breach of statutory duty. The appeal was heard and judgment delivered in chambers. The case is reported by permission of Rix J. The facts are set out in the judgment.

*Patrick Green* (instructed by *Holman Fenwick & Willan*) for Blohm + Voss.  
*David Melville* (instructed by *Thomas Cooper & Stibbard*) for P & O.

*Cur adv vult*

25 March 1998. The following judgment was delivered.

**RIX J.** This case illustrates a transnational legal problem which reads like a set moot. A New Zealand electrician, employed by an English shipowning company, alleges that he was injured through the fault of his employer while his ship was in dry dock in Germany. He sues the shipowner in England. The shipowner says that the accident was the fault of the German yard where the ship was under repair, and brings third party proceedings against the yard. The yard says that the repair contract between it and the shipowner is governed by German law and contains a Hamburg jurisdiction clause. The issue before me is between the shipowner and the yard. Can the shipowner sustain jurisdiction in England for its third party proceedings against the yard, on the basis that the prospect of facing attack in England and suing for an indemnity or contribution in Germany would be inefficient and would expose the shipowners to the danger of irreconcilable judgments in separate jurisdictions? Or is the yard entitled to enforce the jurisdiction clause and compel the shipowner to claim in Germany? To put the question in terms of the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the Brussels Convention) (set out in Sch 1 to the Civil Jurisdiction and Judgments Act 1982), since the yard is domiciled in Germany: which takes precedence, the special jurisdiction under art 6(2), or the agreed jurisdiction under art 17? And does it matter that the shipowners' claim against the yard is brought in tort as well as contract, and also includes a claim for a contribution under the Civil Liability (Contribution) Act 1978?

The electrician is the plaintiff in these proceedings, Mr David Hough. The shipowner is the defendant, P & O Containers Ltd (P & O). The third parties, the yard, are three companies in the Blohm + Voss group, namely Blohm + Voss Holding AG, Blohm + Voss GmbH and Blohm + Voss Industries GmbH. Three companies have been sued as third parties because, since the date of the repair contract, the original contract party, Blohm + Voss AG, has been restructured into these companies. However, the current evidence is that the relevant successor to the rights and obligations of Blohm + Voss AG is the second third party, Blohm + Voss GmbH. At any rate no distinction was drawn

a by either side between the three third parties for the purpose of the argument before me. I shall therefore refer generally to the third parties as 'Blohm + Voss'.

b Mr Hough's injury is said to have occurred in the following circumstances. On 3 December 1992 he was working as an electrician on board P & O's vessel, the Remuera Bay, while she was undergoing repairs in the Blohm + Voss yard in Hamburg. He was instructed by a fellow employee to check a salt water pump which was not working. When he removed the terminal cover, he received an electric shock which threw him across the deck, causing him injuries from which he alleges he is still suffering. The electric shock was caused by loose wires lying within the terminal box. A report from a Blohm + Voss engineer blames Mr Hough for bringing about his own injury. A report c from an expert consulted by P & O blames both Mr Hough and Blohm + Voss. Mr Hough, however, has brought his claim against P & O alone, in tort, alleging negligence and breach of statutory duty. His writ issued on 31 December 1996 also alleged breach of contract, but this cause of action does not appear to be reflected in his statement of claim served 3 December 1997. The d writ had in fact been served not long after its issue, but P & O agreed to extend time for his statement of claim generally. The writ was issued in the Admiralty Court.

P & O's third party notice is dated 17 September 1997, ie before Mr Hough's statement of claim. An affidavit sworn on the same day by Mr Rupert Strange, a partner in Messrs Thomas Cooper & Stibbard, sought leave ex parte for e issuing and serving the notice out of the jurisdiction upon the third parties as necessary or proper parties under RSC Ord 11, r 1(1)(c). Although the draft third party notice made mention of a contract between P & O and the first third party, and alleged that the third party claim was for a contribution up to a full indemnity grounded on the allegation that Mr Hough's damages arose from f the third parties' negligence, breach of statutory duty and/or contract, Mr Strange's affidavit did not refer to or exhibit the contract with the yard. Neither third party notice nor affidavit identified the statutory duty allegedly breached by Blohm + Voss, presumably a statutory duty under German law.

Leave to issue and serve the third party notice out of the jurisdiction upon Blohm + Voss in Germany was granted the same day, 17 September 1997. On g 1 December 1997 Blohm + Voss issued a summons under Ord 12, r 8 to set aside the third party notice on the ground that Blohm + Voss were domiciled in Germany for the purposes of the Brussels Convention. The affidavit of Mr Robert Wilson dated 2 December 1997 developed the grounds on which the third parties challenged the jurisdiction of the English court over Blohm + h Voss. Thus reliance was placed not only on art 2 of the convention on the basis of German domicile, but also, so far as any claim was made in contract, on art 5(1) on the basis that Germany was the place of performance of any obligation in question; and, so far as any claim was made in tort or statutory duty, on art 5(3) on the basis that Germany was where the harmful effect i occurred; and in any event on art 17, on the ground that cl 9 of the contract entered into between P & O and the second third party contained an agreement for jurisdiction in Hamburg.

Clause 9 provides as follows:

'The foregoing conditions and the law of the Federal Republic of Germany to be applied between domestic parties shall apply exclusively to



the handling of all repair orders unless anything to the contrary shall have been expressly agreed upon. Place of performance and jurisdiction shall be Hamburg if the party ordering is an officially registered merchant as defined by the Commercial Code. The yard may, however, also choose another location where the party ordering has a place of business as the place of jurisdiction.'

There has been no dispute before me that cl 9 is part of the relevant contract between P & O and Blohm + Voss, or that P & O is 'an officially registered merchant as defined by the Commercial Code'. P & O and Blohm + Voss have therefore agreed that the courts of Hamburg shall have jurisdiction over their disputes, or at any rate, as Mr Melville who has appeared before me on behalf of P & O has conceded, those disputes arising out of 'the handling of [P & O's] repair orders'. Mr Melville nevertheless submits that cl 9 does not embrace the claims that P & O makes in the third party proceedings.

In Mr Strange's second affidavit sworn on 5 December 1997, he continued to rely on the third parties as being necessary or proper parties to the action commenced by Mr Hough, but he also relied on art 6 of the convention. In his third affidavit sworn on 8 December 1997 Mr Strange said that, prior to service of Mr Wilson's affidavit, he did not have a copy of the contract between P & O and Blohm + Voss, but he conceded that 'I had been informed that the contract between the parties contained an exclusive jurisdiction clause incorporating German law'. He also developed submissions as to why jurisdiction in England should be maintained, eg that it would be unreasonable to force P & O to run the risk of irreconcilable judgments in two different courts.

On 8 December 1997 Blohm + Voss's summons was heard by Master Miller. He held in favour of P & O and dismissed the summons. He also ordered that Mr Strange's second and third affidavits be regarded as having been sworn in substitution for Mr Strange's first affidavit in support of P & O's ex parte application for leave to serve out of the jurisdiction. The hearing before me was Blohm + Voss's appeal from Master Miller. I have no note or information of the reasons for Master Miller's decision.

The argument before me focused on arts 6(2) and 17 of the convention. It will be convenient if I set them out, below. Article 6 provides:

'A person domiciled in a Contracting State may also be sued ... (2) as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case.'

Article 17 provides:

'If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction ...'

On behalf of P & O Mr David Melville submitted that Blohm + Voss were within art 6(2), that the proviso to it did not apply, and that art 6(2) took precedence over art 17, even if art 17 applied to the present case. As it was, he also submitted that art 17 did not apply, for three separate reasons: first,

a because cl 9 was limited to disputes relating to the handling of P & O's repair orders, and did not apply to a claim by a stranger to the contract for damages for personal injuries; secondly, because cl 9 did not cover a claim in tort as distinct from a claim in contract; and thirdly, because art 17 did not apply on its own terms since cl 9 was not a term by which the parties had agreed jurisdiction 'to settle any disputes which have arisen or may arise in connection with a particular legal relationship'.

b On behalf of Blohm + Voss Mr Patrick Green on the other hand submitted that art 17, where it applied, was mandatory and operated to the exclusion of art 6(2) which was merely permissive; that art 6(2) did not apply, since the case fell within the proviso to it; and that art 17 did apply, since cl 9 fell within art 17 and P & O's claims fell within cl 9.

c *Are P & O's claims within art 6(2)?*

This is a threshold question, because otherwise art 2 in any event mandates suit against Blohm + Voss in Germany ('persons domiciled in a Contracting State shall ... be sued in the courts of that State'). Mr Green conceded that P & O's third party proceedings would have been within art 6(2), subject to the application of the proviso. He submitted that the case fell within the proviso because suit against Blohm + Voss in England was an attempt to frustrate the purposes of the convention (irrespective of cl 9). Thus Mr Hough should have sued Blohm + Voss in their domicile in Germany (art 2), and could then have joined P & O in that action, either (for the purposes of any claim in contract) under art 5(1), on the ground that Germany was 'the place of performance of the obligation in question', or (for the purposes of any claim in tort) under art 5(3), on the ground that Germany was 'the place where the harmful event occurred'. However, the suit in England was 'solely with the object of removing him from the jurisdiction of the court which would be competent in his case'.

f In my judgment, this submission, which Mr Green candidly described as 'not his best point', is in error. Of course, any litigant who seeks to serve a party in some convention state different from the convention state of his domicile is seeking thereby to remove him from the jurisdiction of the court which would otherwise be competent. The proviso is clearly intended to have a narrower compass than that: otherwise the submission proves too much. As the European Court stated in *Kongress Agentur Hagen GmbH v Zeehaghe BV* Case C-365/88 [1990] ECR I-1845 at 1866 (para 21):

h 'Accordingly, an application for leave to bring an action on a warranty or guarantee may not be refused expressly or by implication on the ground that the third parties sought to be joined reside or are domiciled in a Contracting State other than that of the court seised of the original proceedings.'

j It is important in my view to have regard to two features of the proviso: the first is that the word 'these' in the phrase 'unless these were instituted' refers, both as a matter of syntax and good sense, to the 'original proceedings' and not to the third party proceedings. The second is that the word 'solely' emphasises that the motive for the institution of the original proceedings, presumably the motive for their institution in the forum where they have been brought, has to be directed exclusively to the attempt to draw the third party away from his

proper convention forum. The test, in other words, is a narrow one designed to meet a situation where the plaintiff and the defendant are effectively in collusion to bring a claim against a third party in the plaintiff's or defendant's domicile, or otherwise where, even without collusion, the plaintiff has no good reason to sue the defendant, but is hoping that by doing so the defendant will, with the aid of art 6(2), bring the third party within the plaintiff's domicile. If there was good reason to sue the defendant in the domicile where he was sued, then it could hardly be said that the original proceedings were instituted 'solely' with the object of affecting the forum where the third party is sued. Thus Professor Jenard in his report, under the heading of art 6(2) writes:

'Moreover, the court seised of the original action will not have jurisdiction over an action on the warranty if the original proceedings were instituted solely with the object of ousting the jurisdiction of the courts of the State in which the warrantor is domiciled.' (See OJ 1979 C59 p 27.)

It follows that P & O's third party proceedings are within art 6(2).

*Are P & O's claims within cl 9?*

Clause 9 contains no express language defining the scope of the claims or disputes which are to be subject to the agreed jurisdiction in Hamburg. The first paragraph of the clause, which specifies German law, refers to 'the handling of all repair orders', and also applies 'The foregoing conditions' to such cases. Among these conditions is the third paragraph of cl 3, which provides as follows:

'As long as the ship is at the Yard, persons or companies other than the ship's crew may only carry out work to the ship with the express consent of the Yard. The party ordering shall take responsibility for the ship's crew and the persons or companies instructed by it adhering to the "Conditions for Work at the Yard."'

In the light of that paragraph it seems to me to be difficult to submit that cl 9 is not intended to cover claims arising out of injury occasioned to the ship's crew during repairs at the yard. As it is, P & O's third party statement of claim expressly pleads the repair contract with Blohm + Voss, alleges an 'express and/or implied term and/or condition' of that contract that Blohm + Voss would take all reasonable steps to avoid foreseeable risk of injury to Mr Hough, and that his injury was caused by 'breach of contract and/or negligence' on the part of the yard. It also pleads an implied condition of the contract that Blohm + Voss would indemnify P & O against any loss caused by the former's breach of contract or negligence. Moreover, Mr Melville was prepared to concede that a claim in connection with the handling of P & O's repair order was within cl 9. I do not see how P & O can plead a claim under the contract, but say that the yard's contractual responsibility to it, if any, in respect of Mr Hough's injury is not a matter within cl 9.

No relevant evidence of German law has been put before me as to the construction of cl 9. In the circumstances I have to construe cl 9 as though it was part of an English law contract, and assume that German law is the same as English law. There are no words of limitation in cl 9, other than perhaps the expression 'the handling of all repair orders'. I do not see why a claim to be indemnified for breach of any implied obligation under the contract is not



- a within cl 9, whether or not that phrase defines the clause's scope. Similarly, I do not see why any liability in tort parallel with the pleaded contractual liability and arising out of the same facts is not also within cl 9: see *Aggeliki Charis Cia Maritima SA v Pagnan SpA, The Angelic Grace* [1995] 1 Lloyd's Rep 87 at 89–91 and *Continental Bank NA v Aeokos Cia Naviera SA* [1994] 2 All ER 540 at 545–546, [1994] 1 WLR 588, [1994] 1 WLR 588 at 592–593. The same applies to any liability to contribute under statute arising out of identical facts.

b I would therefore hold that P & O's claims fall within cl 9.

*Is cl 9 within art 17?*

- c The next question is whether cl 9 is such a clause as comes within art 17. The issue here is whether the jurisdiction clause in this case relates to disputes 'in connection with a particular legal relationship'. It seems to me that there is no difficulty about this. The relationship of the parties in this case arises solely out of the repairs to P & O's vessel at the Blohm + Voss yard. There is no other relationship between the parties. The incident giving rise to the parties' dispute arose out of and in connection with that relationship.

- d Which has priority, art 6(2) or art 17?

- e This it seems to me is the critical question raised by the parties' submissions. Mr Melville submitted that art 6(2) had priority, a submission which he based not on any language of the convention but on the concern that in no other way could a party in P & O's situation be protected against the dangers of litigation in two different jurisdictions. He also relied upon the English authority of *Kinnear v Falconfilms NV (Hospital Ruber Internacional and anor, third parties)* [1994] 3 All ER 42, [1996] 1 WLR 920, a decision of Phillips J. Mr Green on the other hand submitted that art 17 had priority, since where it applied it was mandatory, whereas art 6(2) was only permissive.

- f In *Kinnear's* case the executors of an English actor sued a film production company in England both in contract and in negligence in respect of an accident he had suffered during filming in Spain. Following the accident the actor had been taken to a Spanish hospital where he had died. The production company claimed that his death was not due to his injuries but to medical malpractice by the hospital, and sought to bring third party proceedings against the hospital.
- g Phillips J held that the test of whether such third party proceedings could be brought in England against a third party domiciled in Spain depended on English rules of court. He held that on the facts the practical reality was that in order for the production company to secure contribution from joint tortfeasors all the parties had to be brought before the same tribunal, and that since the
- h English jurisdiction was the only one that offered that possibility the application of art 6(2) was justified; and that for essentially the same reason the court would not in its discretion decline jurisdiction, even though it was not more convenient to try the proceedings in England rather than in Spain, where the accident and alleged malpractice had both occurred. Phillips J considered
- j both the *Jenard* and the *Schlosser* (OJ 1979 C59 p 71) reports and in effect accepted a submission that art 6(2) was not to be given a narrow construction. He concluded ([1994] 3 All ER 42 at 48, [1996] 1 WLR 920 at 926):

'In my judgment *Schlosser's* commentary recognises that where domestic procedure permits a third party to be joined in proceedings, this is likely to be on grounds which justify overriding the basic right of the

third party to be sued separately in the country of his domicile and that those grounds are almost certain to be some form of nexus between the plaintiff's claim against the defendant and the defendant's claim against the third party.'

Mr Melville emphasised the words in that citation 'overriding the basic right ... to be sued separately in the country of his domicile', and relied on those as supporting the priority of art 6(2).

In my judgment, however, Mr Melville has confused the relationship between art 2 and the special jurisdictions within section 2 of the convention on the one hand with the relationship between art 17, under section 6 dealing with prorogation of jurisdiction, and other jurisdictions under the convention on the other hand. In the former case, art 6(2) is indeed a 'special jurisdiction', and where it properly applies will override the basic rule set out in art 2. That, however, the upholding of a special jurisdiction is permissive and not mandatory is emphasised by the word 'may' which appears in arts 5 and 6, and is well illustrated by the reasoning in *Kinnear's* case itself. Article 17, however, where it applies, is mandatory ('shall have exclusive jurisdiction') and the effect of it is to exclude not only the merely permissive jurisdictions under arts 5 and 6 but even the mandatory (but not of course universal) principle of art 2 itself (where art 17 conflicts with art 2, which in the present case of course it does not).

The mandatory and exclusive nature of art 17 has been recognised in *Kurz v Stella Musical Veranstaltungen GmbH* [1992] 1 All ER 630, [1992] Ch 196. There Hoffmann J said ([1992] 1 All ER 630 at 637, [1992] Ch 196 at 203):

'This argument in my judgment misinterprets what art 17 means when it says that the chosen or "prorogated" jurisdiction is to be *exclusive*. It does not mean "unique", that the parties are limited to choosing a single jurisdiction. It means only that their choice, whatever it is, shall (subject to the exceptions made in sentence 5) have effect to the exclusion of the jurisdictions which would otherwise be imposed on the parties by the earlier articles of the convention. Once the parties have availed themselves of art 17 by the prescribed method, jurisdiction becomes a question of the intention of the parties.' (Hoffmann J's emphasis.)

That art 17, where it applies, takes priority over art 6(2) was also contemplated by the Jenard report (p 27), where Professor Jenard says:

'However, under Article 17, the court seised of the original action will not have jurisdiction over the action on the warranty where the warrantor and the beneficiary of the warranty have agreed to confer jurisdiction on another court, provided that the agreement covers actions on the warranty.'

Moreover *Dicey and Morris on the Conflict of Laws* (12th edn, 1993) (4th Cumulative Supplement 1997) p 51 comments as follows: 'Article 6(2) would not be applicable if the third party claim is subject to an agreement to submit to the jurisdiction of another Contracting State' citing, by reference to footnote 86 on p 372 of the main work, *Meeth v Glacetal SARL* Case 23/78 [1978] ECR 2133 and *Spitzley v Sommer Exploitation SA* Case 48/84 [1985] ECR 787.

The judgment of the European Court in *Meeth v Glacetal SARL* does not, however, directly support that citation, although the opinion of Advocate

a General Capotorti does (see [1978] ECR 2133 at 2148). The case concerned a reciprocal jurisdiction clause which required each party to a contract of sale to be sued by the other only in the courts of their respective states. The question then arose as to the status of a set-off in any such proceedings. The court held that in the light of the need to respect the parties' autonomy as required by art 17, but also of the need to avoid superfluous procedure, which forms the basis of the convention as a whole, art 17 did not prevent a court under such a reciprocal clause from taking into account a set-off connected with the legal relationship in dispute 'if such court considers that course to be compatible with the letter and spirit of the clause conferring jurisdiction' (see [1978] ECR 2133 at 2142–2143 (para 8)).

b The opinion of the Advocate General, however, had distinguished between a set-off submitted purely as a defence and a counterclaim. He had advised that the former would be within the jurisdiction of the court of the defendant's domicile, but that the latter would not be. He had argued that the Jenard report (in the passage I have cited above) made clear that art 17 took precedence over art 6(2). He then inferred by analogy that art 17 should take precedence over art 6(3) as well. Article 6(3) provides that a person can be sued 'on a counterclaim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending'.

c Similarly, the judgment in *Spitzley v Sommer Exploitation SA* does not directly support the citation. There the European Court held that where a plaintiff enters an appearance in relation to a set-off raised by his defendant, then it does not matter that the set-off is not based on the same contract or subject matter as the claim and that there exists in relation to the set-off a valid agreement under art 17 conferring exclusive jurisdiction on the courts of another contracting state: the court seised of the proceedings still retains jurisdiction over the set-off by virtue of art 18.

d Article 18 of the convention provides:

'Apart from jurisdiction derived from other provisions of this Convention, a court of a Contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered solely to contest jurisdiction ...'

e In other words, just as a defendant may waive his right to rely on art 17 and enter an appearance elsewhere than in the courts to which art 17 would grant exclusive jurisdiction, so also may a plaintiff with regard to his defendant's set-off. The judgment does not mention art 6, but cites *Meeth v Glacetal SARL* for the observation that the need to avoid superfluous procedure forms the basis of the convention as a whole. That reflected the opinion of Advocate General Sir Gordon Slynn, who also cited *Meeth v Glacetal SARL* together with art 6 as clearly showing 'that multiplicity of proceedings is to be avoided' ([1985] ECR 787 at 792).

f These two decisions may be said to indicate that, where it can, the European Court will seek to mitigate the divisive tendency of art 17 to create multiplicity of proceedings. They could also be said to promote the rationale behind art 6. As such they do not really in themselves support the views of the Jenard Report, *Dicey and Morris* and Advocate General Capotorti as to the precedence of art 17 over art 6. Be that as it may, it seems to me that they do not undermine those views either. Blohm + Voss have not chosen to appear without protest, but



have sought to rely upon their contractual jurisdiction clause and art 17. The mandatory terms of art 18 cannot therefore be given effect. Similarly, it would not be within 'the letter and spirit of the clause conferring jurisdiction' (to quote *Meeth v Glacetal SARL*) for the English court to retain jurisdiction over P & O's third party proceedings against Blohm + Voss. The mandatory precedence of art 17 over art 6 is also supported by *Kaye Civil Jurisdiction and Enforcement of Foreign Judgments* (1987) pp 643, 644, 650 and 1088, and by O'Malley and Layton *European Civil Practice* (1989) pp 446, 447, 450, 551 and 552. In my judgment, much as the court might regret multiplicity of proceedings, it is bound to recognise P & O's valid agreement to litigate its claim in Hamburg. In any event, not that this is a relevant consideration in applying the convention in such circumstances, it cannot be said that Hamburg is an inappropriate or inconvenient jurisdiction for that claim. What one sees here are the irreconcilable differences between the right of Mr Hough to sue P & O in England, where P & O is to be found, and the right of Blohm + Voss to be sued by P & O in Hamburg, where P & O had agreed to litigate.

Mr Melville submitted that if Mr Hough had sued both P & O and Blohm + Voss in England, then it would be seen even more clearly that the court ought to prefer the rationale of art 6, in that case art 6(1), to the enforcement of cl 9 and art 17. However, it seems to me, although the issue does not arise for decision before me, that the position would be the same (see *Kaye* and *O'Malley and Layton* above).

In these circumstances matters of discretion or *forum non conveniens* do not arise.

For these reasons, this appeal and this challenge by Blohm + Voss to the jurisdiction of the English courts over P & O's third party claim must succeed.

### Postscript

Lastly, I mention briefly two other matters which were raised before me. Mr Green submitted that P & O's affidavit seeking leave *ex parte* to issue and serve the third party notice out of the jurisdiction was not frank, in that it failed to disclose the existence of the Hamburg jurisdiction clause. In his second affidavit Mr Strange conceded that he had known that the contract between P & O and Blohm + Voss had contained 'an exclusive jurisdiction clause incorporating German law'. I would therefore infer that he knew or should properly have deduced that the clause provided for jurisdiction in Germany. In my judgment, he should have disclosed this fact in his original affidavit. As it is, I have held in any event that P & O's assertion of jurisdiction over Blohm + Voss in England must fail.

The second matter, which is connected, is that it might be supposed that there is no need for leave to serve out under Ord 11, r 1(1) in any event, since in a proper case the procedure allows for service out without leave under r 1(2). In the case of an Admiralty action, however, it would seem that there is no right to adopt the procedure under r 1(2), and an intended plaintiff has to seek leave under r 1(1): see Ord 75, r 4(4), which provides: '... Order 11, rule 1(2) shall not apply to a writ by which any Admiralty action is begun.' *The Supreme Court Practice* 1997 vol 1, para 75/4/3 indicates that in *Sills v Tilbury Handling Ltd* (2 November 1995, unreported) Clarke J held that 'any Admiralty action' included all Admiralty actions in personam and was not limited to those referred to in Ord 75, r 4(1) and r 4(1A). The oddity is, therefore, that in the

- a* case of an Admiralty action in personam, even though the intended defendant (here, the intended third party) is domiciled in a convention country, leave must be sought in reliance on the gateways in Ord 11, r 1(1), and it is not possible to rely directly on the provisions of the convention. Whether that was really intended, and what the rationale of that provision is, is uncertain. Clarke J suggested that the Rules Committee might consider this apparent
- b* anomaly.

*Appeal allowed.*

Kate O'Hanlon Barrister.

# Vosnoc Ltd v Transglobal Projects Ltd

QUEEN'S BENCH DIVISION

JUDGE RAYMOND JACK QC SITTING AS A JUDGE OF THE HIGH COURT

4, 23 JULY 1997

*Arbitration – Commencement – Notice requiring appointment of arbitrator – Letter stating that dispute referred to arbitration – Whether letter constituting notice requiring appointment of arbitrator – Whether letter sufficient to commence arbitration proceedings – Limitation Act 1980, s 34(3) – Arbitration Act 1996, s 14.*

*Arbitration – Commencement – Extension of time fixed by agreement – Circumstances in which court should extend time – Arbitration Act 1996, s 12(3).*

V Ltd entered into a contract of affreightment with T Ltd dated 23 August 1994 for the shipment of pipes; T Ltd were to be responsible for the stevedoring, ie the loading and unloading of the pipes. Clause 17.8 of the contract provided that any dispute between the parties should be referred to three arbitrators in London, one to be appointed by each of the parties and the third by the two chosen arbitrators. Clause 17.9 incorporated the 1922 Hague Rules, which provided, by art III, r 6, that unless suit was brought within one year of delivery, T Ltd were discharged from all liability in respect of the pipes. A dispute subsequently arose in respect of damage caused to the pipes during the loading, stowage and the voyage and the unloading. On 16 September 1995 and bearing in mind the one-year time bar V Ltd wrote to T Ltd seeking an extension of time to commence suit. T Ltd made no reply and on 19 September V Ltd faxed a letter to T Ltd, stating that the dispute was thereby referred to arbitration in London pursuant to cl 17.8 of the contract. No further steps were taken to progress the arbitration until 6 March 1997 when V Ltd appointed an arbitrator and wrote to T Ltd requesting it to do the same. T Ltd replied, stating that the letter of 19 September did not satisfy the requirements necessary to bring suit for the purposes of art III, r 6 of the Hague Rules. Thereafter V Ltd sought a declaration that the dispute had been validly referred to arbitration on or before 19 September, or alternatively an extension of time under s 12(3)<sup>a</sup> of the Arbitration Act 1996 to commence arbitration proceedings.

**Held** – (1) In contrast to the UNCITRAL Model Law, the provisions of s 34(3)<sup>b</sup> of the Limitation Act 1980 and s 14<sup>c</sup> of the 1996 Act made it clear that a notice merely referring a dispute to arbitration was not sufficient to commence arbitration proceedings: the notice had to require the recipient to arbitrate and to appoint an arbitrator. A notice which only requested that the matter be referred to arbitration did not carry with it by implication a request that the other party appoint his arbitrator. It followed that V Ltd's letter of 19 September was insufficient to commence the arbitration and accordingly the declaration sought would be refused (see p 999 *b* to p 1000 *a* and p 1002 *j*, post); dictum of Lord Denning MR in *Nea Agrex SA v Baltic Shipping Co Ltd* [1976] 2 All ER 842 at 847 not followed.

a Section 12(3) is set out at p 1000 *j*, post

b Section 34(3) is set out at p 995 *e*, post

c Section 14 is set out at p 995 *g* to *j*, post



- a (2) When granting an extension of time under s 12(3)(a) of the 1996 Act, the court would have to be satisfied that the circumstances were outside the reasonable contemplation of the parties when they agreed to the time bar and that an extension would be just. The subsection placed no limit on 'the circumstances' and therefore the court would look at the whole of the circumstances in which the application for an extension of time arose. In the
- b instant case, the letter of 19 September, contrary to its intention, did not succeed in bringing suit and would not have been in the reasonable contemplation of the parties in August 1994. Moreover, since (i) the extension of time was required as a result of V Ltd's failure, through ignorance of English law, to include in the letter an express requirement that T Ltd appoint an arbitrator, (ii) T Ltd knew that the purpose of the letter was to commence arbitration proceedings and (iii)
- c V Ltd's claim was substantial, it would be just to grant an extension of time under s 12(3)(a) for the commencement of arbitration (see p 1001 b g to p 1002 b f j, post).

### Notes

- d For the commencement of an arbitration, and the statutory power to extend time for commencing arbitration proceedings, see 2 Halsbury's Laws (4th edn reissue) paras 650, 654.

For the Limitation Act 1980, s 34, see 24 Halsbury's Statutes (4th edn) (1989 reissue) 688.

### Cases referred to in judgment

- e *Frota Oceanica Brasileira SA v Steamship Mutual Underwriting Association (Bermuda) Ltd, The Froatanorte* [1995] 2 Lloyd's Rep 254.
- Libra Shipping and Trading Corp Ltd v Northern Sales Ltd, The Aspen Trader* [1981] 1 Lloyd's Rep 273, CA.
- NV Handels-en-Transport Maatschappij 'Vulcaan' v A/S J Ludwig Mowinckels Rederi*
- f [1938] 2 All ER 152, HL.
- Nea Agrex SA v Baltic Shipping Co Ltd* [1976] 2 All ER 842, [1976] QB 933, [1976] 2 WLR 925, CA.
- Petreded Ltd v Tokumaru Kaiun Co Ltd, The Sargasso* [1994] 1 Lloyd's Rep 162.
- Surrendra Overseas Ltd v Government of Sri Lanka* [1977] 2 All ER 481, [1977] 1 WLR
- g 565.

### Cases also cited or referred to in skeleton arguments

- Bulgaris v La Plata Cereal Co SA* (1947) 80 Ll L Rep 455, DC.
- Comdel Commodities Ltd v Siporex Trade SA* [1990] 2 All ER 552, [1991] 1 AC 148, HL.
- h *Garrick Shipping Co v Euro-Frachtkontor GmbH, The World Agamemnon* [1989] 2 Lloyd's Rep 316.
- Hookway (FE) & Co Ltd v H W Hooper & Co* [1950] 2 All ER 842, CA.
- Intermare Transport GmbH v Naves Transoceanicas Armadora SA, The Aristokratis* [1976] 1 Lloyd's Rep 552.
- j *Kruidenier (H) (London) Ltd v Egyptian Navigation Co (No 2), The El Amria* [1980] 2 Lloyd's Rep 166.
- Liberian Shipping Corp v A King & Sons Ltd* [1967] 1 All ER 934, [1967] 2 QB 86, CA.
- Moscow V/O Exportkhleb v Helmville Ltd, The Jocelyne* [1977] 2 Lloyd's Rep 121.
- Navigazione Alta Italia SpA v Concordia Maritime Chartering AB, The Stena Pacifica* [1990] 2 Lloyd's Rep 234.

*Sparta Navigation Co v Transocean America Inc, The Stephanos* [1989] 1 Lloyd's Rep 506. a

*Steamship Co of 1912 v Anglo-American Grain Co Ltd, The Leise Maersk* [1958] 2 Lloyd's Rep 341, DC.

*Transpetrol Ltd v Ekali Shipping Co Ltd, The Aghia Marina* [1989] 1 Lloyd's Rep 62.

### Originating summons b

By notice dated 13 March 1997 the plaintiff, Vosnoc Ltd, a company incorporated in Cyprus, sought (i) a declaration that all disputes with the defendant, Transglobal Projects Ltd, an English company, under a contract of affreightment was validly referred to arbitration on or before 19 September 1995, or alternatively (ii) an extension of time for the commencement of arbitration proceedings. The facts are set out the judgment. c

*Simon Picken* (instructed by *Richards Butler*) for Vosnoc.

*Richard Southern* (instructed by *Clifford Chance*) for Transglobal.

*Cur adv vult* d

23 July 1997. The following judgment was delivered.

**JUDGE RAYMOND JACK QC.** By their originating summons the plaintiffs, Vosnoc Ltd, claim a declaration that certain disputes between themselves and the defendants, Transglobal Projects Ltd (Transglobal), were validly referred to arbitration on or before 19 September 1995. That is the date of a letter sent by fax from Vosnoc to Transglobal, and the dispute centres on the wording of a paragraph in that letter. Vosnoc ask in the alternative for an extension of time for the commencement of arbitration proceedings. Vosnoc is a company incorporated in Cyprus and with an address in Nicosia. Transglobal is an English company with an address in Dartford. e

### *The facts*

The background to the matter is as follows. Vosnoc entered a contract of affreightment with Transglobal dated 23 August 1994 for the shipment of pipes. They were to be shipped by four vessels from Port Kembla in New South Wales to Kuantan in Malaysia, where they were to be coated. They were then to be shipped to Dampier or Port Hedland in Western Australia where they were required for a pipeline. Transglobal were to be responsible for the stevedoring, that is the loading and unloading, the stowage and unstowage, of the pipes. f

Clause 17.8 of the contract provides for arbitration: g

'Should any dispute between the contractor and charterers, the matter in dispute shall be referred to three persons in London, to be appointed by each of the parties hereto and the third by the two chosen. Their decision or that of any two of them shall be final and for the purpose of enforcing any award their decision may be made a rule of court. The arbitrators shall be shipping men. The arbitration is to be conducted in accordance with the rules of the London Arbitrators [sic].'

Clause 17.9 was in terms which it was accepted for the purpose of the applications before me incorporated the 1922 Hague Rules. So, by art III r 6, unless suit was brought within one year of delivery Transglobal were discharged from all liability h

a whatever in respect of the pipes. Mr Picken, who appeared for Vosnoc, reserved their right to argue in any arbitration that this was not so.

The dates of discharge in Western Australia were: vessel 1, 19–25 September 1994; vessel 2, 4–11 October; vessel 3, 17–22 October; vessel 4, 2–8 November. The contract provided for the inspection of the pipes during discharge. Damage was noted, which provides the basis of the intended claims.

b Between 30 September 1994 and 23 March 1995 there was correspondence between Vosnoc and Transglobal concerning the claims. On 16 September 1995 Vosnoc sent a letter fax to Transglobal asking for an extension of time commence to suit. The letter said:

c ‘KARRATHA TO PORT HEDLAND GAS PIPELINE PROJECT CARGO DAMAGE CLAIM: We refer Trans Global Projects to our facsimile transmissions dated ... Due to the complexity of the claims, final adjustment in quantifying costs for each of the consignments will not be accomplished within the (12) month time period. We are requesting at this juncture an extension of suit time of (1) year effective from 30 September 1995 ... Should you have any further questions please feel free to contact the undersigned. We eagerly await your response.’

d There was none.

Three days later, on 19 September 1995, Vosnoc sent by fax from Singapore the letter to Transglobal which I mentioned at the start of the judgment. It reads:

e ‘KARRATHA ... You are referred to the Contract of Affreightment between our respective companies and made on 23 August, 1994. Pursuant to that Contract of Affreightment you were responsible, inter alia, to load ... During loading, stowage and the voyage and the unloading of the pipes serious damage was caused to the pipes in consequence of which this company has suffered loss and damage and has become liable to the owner

f and consignee of the pipes, Pilbara Energy Pipeline Company Pty Limited. Under the Contract of Affreightment, pursuant to Clause 17.8 thereof, it is provided that all disputes between our respective companies shall be referred to the Arbitration of three persons in London. By this letter the dispute between our respective companies is referred to the Arbitration of three Arbitrators in London pursuant to the provisions of Clause 17.8 of the

g Contract of Affreightment such Arbitration to be conducted in accordance with the Rules of the London Arbitrators.’

The bottom of the letter had a space for a signature in acknowledgement of receipt and it asked for that to be done by fax.

h On the same date, 19 September 1995, proceedings relating to the damage to the pipes were commenced in the courts of South Korea between Bredero Price (Malaysia) Sdn Bhd (BPM) and Yukong Line Ltd. Transglobal had time chartered from Yukong the vessels to perform their contract with Vosnoc. BPM has the same holding company as Vosnoc. Vosnoc had entered an agreement with BPM

j whereby Vosnoc were to arrange the transportation and stevedoring of the pipes, and also their coating in Kuantan. The action in Korea is proceeding. It is not in evidence what stage it has reached. The damages which Vosnoc seek to claim against Transglobal are the sums of \$Aus801,055 and \$US155,216 which Vosnoc have had to pay, or are liable for, to BFM under Vosnoc’s contract with BPM.

There was no response from Transglobal to Vosnoc’s letter of 19 September 1995. Nor was anything done at this stage by either side to appoint arbitrators.



On 25 September 1995 lawyers in Western Australia acting for BPM, Cocks Macnish, wrote to Transglobal asking for information as to the stevedores, which was given by letter of 6 October. On 31 January 1996 they asked for further information, and wrote a chasing letter on 15 February. On 22 February Transglobal responded referring Cocks Macnish to their solicitors, Clifford Chance. On 1 March Cocks Macnish copied to Clifford Chance their letter of 31 January and asked for a reply as a matter of urgency. None was given. Meanwhile in that February Clifford Chance had advised Transglobal on Vosnoc's letter of 19 September 1995. The advice was given because Transglobal sent a package of documentation to Clifford Chance which included the letter and it was not specifically sought. The advice they gave is not known.

The next event is that on 6 March 1997 solicitors for Vosnoc, Richards Butler, asked Mr Michael Ferryman if he would accept appointment as arbitrator nominated by Vosnoc in respect of the relevant disputes. The following day, 7 March, Mr Ferryman accepted the appointment. Also on 6 March 1997 Richards Butler wrote to Transglobal referring to the contract of affreightment and Vosnoc's letter of 19 September 1995. They stated that Vosnoc had appointed Mr Ferryman as arbitrator and called on Transglobal to appoint theirs. Clifford Chance replied on 11 March. They said that the letter of 19 September did not satisfy the requirements necessary to bring suit for the purpose of art III, r 6 of the Hague Rules. They also stated that without prejudice to that contention they had appointed on behalf of Transglobal Mr John Maskell as arbitrator. Vosnoc's proceedings were issued on 13 March.

There was thus an 18-month gap between the letter of 19 September 1995 and any further step to progress an arbitration. There is no explanation for this in the evidence from Vosnoc. Mr Southern has submitted on behalf of Transglobal that the explanation has to be that Vosnoc never intended to commence an arbitration by their letter of 19 September and did not think that they had done so. That cannot be right. Whether or not the letter is effective for its purpose, the intention is clear. Vosnoc had the one-year time bar well in mind. That is why on 16 September 1995 they wrote asking for an extension. That letter also shows that for one reason or another they were not ready to proceed with an arbitration once it was commenced. Having got no response to the request for an extension Vosnoc wrote as they did on 19 September. The intention was to protect their position by bringing suit within the year. They intended to do so by giving notice of arbitration. Having done that, they considered that their position was preserved. In March 1997 their position was such that they wished to proceed.

#### *The law relating to commencement of arbitration and its application*

It might be thought that to commence an arbitration the party claiming should give notice to the other requesting arbitration in accordance with the agreement. Article 21 of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (21 June 1985) (the UNCITRAL Model Law) takes that approach:

'Commencement of arbitral proceedings. Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.'

a Vosnoc's letter would meet this requirement. English law may take a different approach. Whether in practice it does so is the main point which I have to decide.

b English law as to when an arbitration is commenced has based itself on the relevant provisions of the Limitation Acts 1939 and 1980 and now of the Arbitration Act 1996. A barring provision which does not arise under statute but is contractual will not be covered by these provisions. It is established that in those circumstances the statutory provisions should be applied by analogy: see *Nea Agrex SA v Baltic Shipping Co Ltd* [1976] 2 All ER 842, [1976] QB 933.

c The relevant provision here is that in force on 19 September 1995, namely s 34(3) of the Limitation Act 1980. Its predecessor was s 27(3) of the Limitation Act 1939, which was the provision in question in the *Nea Agrex* case. It was repealed with effect from 31 January 1997 and replaced by s 14 of the Arbitration Act 1996. Section 27(3) of the 1939 Act provided:

d 'For the purposes of this Act ... an arbitration shall be deemed to be commenced when one party to the arbitration serves on the other party or parties a notice requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator, or, where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring him or them to submit the dispute to the person so named or designated.'

Section 34(3) of the 1980 Act provided:

e 'For the purposes of this Act and of any other limitation enactment an arbitration shall be treated as being commenced—(a) when one party to the arbitration serves on the other party or parties a notice requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator; or (b) where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, when one party to the arbitration serves on the other party or parties a notice requiring him or them to submit the dispute to the person so named or designated.'

Section 14 of the 1996 Act provides:

g '(1) The parties are free to agree when arbitral proceedings are to be regarded as commenced for the purposes of this Part and for the purposes of the Limitation Acts.

(2) If there is no such agreement the following provisions apply.

h (3) Where the arbitrator is named or designated in the arbitration agreement, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to submit that matter to the person so named or designated.

j (4) Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter.

(5) Where the arbitrator or arbitrators are to be appointed by a person other than a party to the proceedings, arbitral proceedings are commenced in respect of a matter when one party gives notice in writing to that person requesting him to make the appointment in respect of that matter.'

Section 14 is evidently intended to be a complete code covering all situations. Unless the meaning of 'a person designated' in an agreement is in some way to be stretched to cover persons to be appointed by a designated person, s 27(3) of the 1939 Act and s 34(3) of the 1980 Act would not cover those numerous cases where the arbitrator is to be appointed by, for example, the president of a professional body. Section 14 also avoids the use of 'deemed' and 'treated as', which occur in its predecessors.

Although in some circumstances art III, r 6 might be a 'limitation enactment' for the purpose of s 34(3), that would seem not to be the case where the provision applies by reason of a contractual incorporation. That was evidently the view of Hobhouse J in *Petreded Ltd v Tokumaru Kaiun Co Ltd, The Sargasso* [1994] 1 Lloyd's Rep 162 at 164.

The main authority on s 27(3) of the 1939 Act and hence on s 34(3) of the 1980 Act is the decision of the Court of Appeal in *Nea Agrex SA v Baltic Shipping Co Ltd* [1976] 2 All ER 842, [1976] QB 933. In that case the words of the notice were: 'Please advise your proposals in order to settle this matter, or name your arbitrators. Expecting your reply ...' Two points were taken: first, that it was in the alternative; second, that the arbitration agreement provided for arbitration by a single arbitrator. As to the requirements of a notice Lord Denning MR said ([1976] 2 All ER 842 at 847-848, [1976] QB 933 at 944-945):

'Whilst it is undesirable to introduce too much technicality, I think it is important that there should be clear rules as to when an arbitration is deemed to have commenced. There must, of course, be an arbitration agreement, that is a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not: see s 32 of the Arbitration Act 1950. In this charterparty cl 23 was such an agreement. It is deemed to include a provision that the reference shall be to a single arbitrator: see s 6 of the 1950 Act. In order to commence the arbitration, there must, I think, be a notice in writing served by one party on the other party. This notice must contain a requirement. It must require the other party to do one or other of two things: either (1) "to appoint an arbitrator or (2) "to agree to the appointment of an arbitrator". The first alternative (1) is appropriate in a case where the reference is to two arbitrators, one to be appointed by each party. In such a case the arbitration is deemed to commence when the one party, expressly or by implication, requires the other party to appoint his arbitrator. If he simply says: "I require the difference to be submitted to arbitration in accordance with our agreement", that is sufficient to commence the arbitration; because it is by inference a request to the other to appoint his arbitrator. The second alternative (2) is appropriate when the reference is to be to a single arbitrator. In such a case the arbitration is deemed to commence when the one party, expressly or by implication, says: "The time has come when we must submit the difference to arbitration in accordance with our agreement. I must ask you to agree to the appointment of an arbitrator." Now he cannot compel the other party to agree, or even to reply to the requirement. It seems to me that a notice which says: "I require the difference between us to be submitted to arbitration" is sufficient to commence the arbitration; because it is by implication a request to agree to the appointment of an arbitrator. So in any case a simple notice in writing requiring the difference to be submitted to arbitration is deemed to be a commencement of the arbitration.'



a Goff LJ said ([1976] 2 All ER 842 at 851–852, [1976] QB 933 at 949–950):

b [Section 27(3)] is, as the charterers submit, a “deeming section”, but the  
c question is whether, as they say, the methods prescribed are deemed to be  
d sufficient without prejudice to any other way in which arbitration may in  
fact be commenced, or whether the statutory methods are the only ones for  
the purposes of limitation. In my view, the latter is correct, because the steps  
envisaged by the section are such as by their very nature would commence  
an arbitration and do not require to be deemed such, *although I agree with*  
*Lord Denning MR that the necessary request may be implied. However, it is not*  
*necessary to reach a final decision on that point.* The section I think clearly  
envisages that a party who wishes to commence arbitration will, when there  
are to be arbitrators on both sides, call on his opponent “to appoint an  
arbitrator” and, when the reference is to a single arbitrator, will call on him  
“to agree to the appointment of an arbitrator”. However, if he adopts the  
wrong course, that would not in my judgment make his requisition a nullity,  
or prevent arbitration commencing. It would be no more than an  
irregularity capable of being remedied. In the case of a single arbitrator the  
sensible course would be either to submit a name or names for approval, or  
to ask the other side to do so, but I am inclined to think that a formal notice,  
merely calling on him to agree to the appointment of an arbitrator, would  
suffice to commence the arbitration, and so save the claim from becoming  
time-barred, but this again we need not I think decide.’ (My emphasis.)

e Shaw LJ said ([1976] 2 All ER 842 at 854–855, [1976] QB 933 at 953–954):

f ‘I agree ... It is to be observed that this [s 27(3)] is a deeming provision  
designed to ascertain for the purposes of the Limitation Act 1939 the point of  
time at which an arbitration is to be regarded as having commenced. It does  
not exclude other direct means of establishing the commencement of an  
arbitration. If a general principle is to be extracted from s 27(3) it seems to  
me that where a dispute arises which is within the scope of a pre-existing  
agreement to submit disputes to arbitration, then an arbitration is  
commenced when one party gives notice to the other intimating that he  
proposes to invoke the arbitration agreement and requiring that other party  
g to take some step towards setting an arbitration in train. By analogy with the  
procedure prescribed in s 27(4) of the 1939 Act, such a notice must be in  
writing and served in accordance with the rules there set out. The  
commencement of the arbitration would coincide with the service of the  
notice on the other party. The giving of such notice is a matter inter parties  
h and is a procedural and not a decisive step. Accordingly, its form and terms  
do not call for an excessively strict scrutiny. If, in substance, a party  
communicates (i) an intention to resort to arbitration and (ii) a requirement  
that the other party should do something on his part in that regard, this will  
in general suffice to define the commencement of arbitration or, for the  
purposes of art III, r 6, of the Hague Rules, the date when “suit is brought”.’

j In the *Nea Agrex* case the notice did call for the appointment of an arbitrator.  
So Mr Southern submitted on behalf of Transglobal the remarks of Lord  
Denning MR as to a notice of arbitration implying a request to appoint (with  
which Goff LJ agreed) were obiter. I do not think that they were. They were, it  
seems to me, the foundation for his conclusion that the notice in that case was  
adequate. Goff LJ agreed with Lord Denning MR but did not think it

necessary to decide that point. Shaw LJ did not refer to the implication point. Although his judgment begins 'I agree', in my view that should be taken in the context of the judgment as reflecting his agreement with the outcome of the appeal.

After the *Nea Agrex* case came *Surrendra Overseas Ltd v Government of Sri Lanka* [1977] 2 All ER 481, [1977] 1 WLR 565. Here a letter stated:

'In view of the attitude taken by the Charterers in their calculation of Laytime, Owners will be putting the matter to Arbitration. We will be advising you concerning details of the Arbitrator appointed in due course.' (See [1977] 2 All ER 481 at 484-485, [1977] 1 WLR 565 at 570.)

Kerr J held that the letter did not mark the commencement of anything: it was all in the future. After citing a passage from the speech of Lord Maugham LC in *NV Handels-en-Transport Maatschappij 'Vulcaan' v A/S J Ludwig Mowinckels Rederi* [1938] 2 All ER 152 at 157 he said ([1977] 2 All ER 481 at 486, [1977] 1 WLR 565 at 571):

'The first part of this statement is not relevant for present purposes, but it seems to me that the reference to the usual practice in the second part is relevant to the question whether the letter can fairly be read as implying a requirement that the proposed respondents should appoint an arbitrator. To my mind the only implication of the letter is that, at any rate for the time being, the charterers could sit back and await developments. It may be that if the owners had simply said: "We hereby require this dispute to be referred to arbitration", the position would be different. It might then be said that they had also impliedly added: "We therefore require you to appoint your arbitrator." I will assume that this would be so, though I do not so decide, any more than did the majority of the Court of Appeal in *Nea Agrex SA v Baltic Shipping Co Ltd*. But even on this assumption I think that this letter does not go far enough. It merely referred to an arbitration in the future and contains no present requirement of any kind. For the purposes of limitation the commencement of an arbitration must be clear and unequivocal. This letter is vague and couched in the future tense. I therefore hold that this contention fails.'

I do not think that I should deduce from the manner in which Kerr J expressed himself any view on the question which he did not decide. But he certainly regarded it as an open question.

In *The Sargasso* [1994] 1 Lloyd's Rep 162 there was a fax stating that the claimants had appointed Mr Ferryman as their arbitrator and calling on the respondents to appoint theirs. The main issue was whether there was an agreement to arbitrate. Hobhouse J held that there was, and that time ceased to run with the receipt of the fax.

In *Frota Oceanica Brasileira SA v Steamship Mutual Underwriting Association (Bermuda) Ltd, The Froatanorte* [1995] 2 Lloyd's Rep 254 at 261 Longmore J cited with evident approval the passage from Lord Denning MR's judgment in the *Nea Agrex* case to the effect that a requirement to submit a difference to arbitration carries with it by implication a request in relation to appointment. He found that the facts before him were clearer than in the *Nea Agrex* case because the relevant letter called for suggestions for suitable names (which in effect calls for an appointment). The application in the case was for the appointment of an

a arbitrator where there had been awe-inspiring delay. It had been submitted that in any event the claim was barred because of lack of a sufficient notice.

b Lastly, it is suggested in a footnote in Mustill and Boyd *Commercial Arbitration* (2nd edn, 1989) p 199 that the decision in the *Nea Agrex* case on the facts 'represents the limit of the Court's indulgence'. The note ends: 'Both cases [the *Nea Agrex* case and the *Surrendra* case] leave open the question whether "I require this dispute to be referred to arbitration" is sufficient.'

c The issue I have to decide is whether a notice requiring differences to be submitted to arbitration in accordance with an agreement satisfies s 34(3) because it carries with it by implication a request that the recipient appoint his arbitrator. Is the judgment of Lord Denning MR in the *Nea Agrex* case to be followed on the point?

d Section 27(3) of the 1939 Act and s 34(3) of the 1980 Act spell out what is to be done to commence an arbitration and thereby to stop limitation running in the circumstances which the sections cover. There is, it seems to me, in this context an important distinction between serving a notice which expressly requires an act to be done and a notice which states something from which that act should follow though it is not referred to. Further, although of course the correct construction of a statutory provision may be affected by its context, if a statutory provision provides for a notice requiring something, it is ordinarily to be expected that the notice must do so expressly.

e There is, I think, a contrast between the UNCITRAL Model Law and the English statutes, which shows a difference in approach between them. English law has taken the approach that something more must be done than to request that the matter be referred to arbitration. A step must be taken towards getting the arbitration under way, a step towards the appointment of the tribunal. If all that is needed is a notice referring the matter to arbitration, it makes pointless the spelling out in the statutes what is to be done in the situations which they cover.

f I cannot see any distinction in this respect between the three statutory provisions, and the position would be the same with the new s 14. It seems particularly clear that it cannot have been the intention that the carefully considered provisions of that section would be met by a notice simply referring the dispute to arbitration.

g I can see factors of policy which point the other way. Thus many commercial men would think that an arbitration is commenced by giving notice of arbitration, and that this should be sufficient for the purposes of the Hague Rules. Many, many arbitrations are held in England involving foreign parties. When the possibility of arbitration arises they may or may not have English solicitors to advise them. They are otherwise unlikely to be familiar with the provisions of the English law as to limitation. There is nothing sophisticated about the implication made by Lord Denning MR. Provided the notice makes plain that the arbitration is to commence at the date of the notice, it is plain that the respondent is required to do what the arbitration agreement provides, namely to appoint his arbitrator. However, these are reasons for framing the statutory provisions in another way, rather than for reading them in another way. English law, has it

h seems to me, taken the policy decision that, to stop time running, the notice must take a step further than a requirement to arbitrate.

j Having reached that conclusion, should I, as a judge at first instance, none the less apply the law as stated by Lord Denning MR in the *Nea Agrex* case, leaving it to a higher court to say whether the law as so stated was right or wrong? It has stood without criticism (so far as I am aware) for 20 years. On the other hand both in the *Surrendra* case and *Mustill and Boyd* the point is noted as undecided. I



have hesitated considerably; but I have concluded that, as the point is an open one, I should apply the law as I find it to be. a

Having reached that decision, I can turn to some subsidiary submissions. Mr Picken sought help from the terms of the letter, and, as I have mentioned, Mr Southern sought help from the history thereafter.

Mr Picken submitted that the reference in the letter to cl 17.8 assisted him because it brought in the provisions of the clause as to arbitrators and their appointment. I do not consider that this can help. It may make an implication easier: but it cannot meet the requirement of the section as I have held it to be. b  
The terms of the letter including these references do, however, make it clear that the reference is immediate. The present case is different to the *Surrendra* case in this respect. I have mentioned and rejected Mr Southern's submission that the history thereafter shows that Vosnoc did not intend an immediate reference. But, c  
whatever the events following may show, the letter has to be construed in accordance with its terms. It is either a sufficient notice or it is not. What happened after it cannot affect that. It appears that what Vosnoc were seeking to do was to protect their position without having to advance the reference once it was made. If Transglobal had acted on the letter and appointed an arbitrator they d  
could, if they chose to, have forced the arbitration ahead unless Vosnoc had persuaded the arbitrators appointed to stay the proceedings for a period. The position would have been similar to that where a writ has been served. There is no equivalent in arbitration proceedings to a protective writ which can 'lie in a drawer' without being served. It is interesting that in the *Nea Agrex* case the letter giving notice was dated 31 May 1972, the claimants, the charterers, appointed their arbitrator on 8 December 1972 and then nothing happened until November 1973. e

Mr Picken submitted that, if his primary submission relying on Lord Denning MR in the *Nea Agrex* case was wrong, the defect in the letter as a notice to comply with s 34(3) was an irregularity which did not make the notice ineffective and was capable of being cured as happened by Richards Butler's letter of 6 March 1997 calling on Transglobal to appoint their arbitrator. He relied on the judgment of Goff LJ in the *Nea Agrex* case. The defect in the *Nea Agrex* case was that the notice called for the appointment of the respondent's arbitrators whereas the arbitration agreement provided for arbitration by a single arbitrator. If the notice was required expressly to call for the appointment of an arbitrator by Transglobal, I f  
do not think that its omission to do so was an irregularity. An essential element, g  
the primary element, would then have been missing.

#### *The alternative application for an extension of time to commence arbitration*

The application for an extension of time is to be considered as of today and the relevant power is given by s 12 of the Arbitration Act 1996. Section 12(3) provides: h

'The court shall make an order only if satisfied—(a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time, or (b) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.'

j

The provision in question is art III, r 6. The burden is on Vosnoc to satisfy me of the matters in question. Mr Picken made his application under both (a) and (b).

The 1996 Act is the consequence of the work of the Departmental Advisory Committee on Arbitration Law chaired by Lord Saville. The Committee's

a Report on the Arbitration Bill gives reasons for the replacement of s 27 of the Arbitration Act 1950 with its reference to undue hardship by a different provision. In short it was intended to make it more difficult to obtain an extension. But the report does not provide assistance as to the construction of the new provision.

b Subsection (3)(a) requires the court to be satisfied of two matters, one as to the circumstances being outside the reasonable contemplation of the parties when they agreed the time bar, one that an extension would be just. Mr Picken submitted that the circumstances in which the application would come to be made, namely that Vosnoc had intended to give notice to commence arbitration and to stop time running, but had failed because they did not include in their notice a request to Transglobal to appoint an arbitrator, were circumstances outside the reasonable contemplation of the parties in August 1994. Mr Southern submitted that the only reasonable contemplation in August 1994 was that, if a party with a claim did not take the necessary step, then its rights would be lost. He submitted that the parties are deemed to know the law.

d In my view the question is not whether in August 1994 the parties would reasonably have contemplated that the time bar would apply and rights be lost in the circumstances which may have in fact arisen. For that is not what the subsection says. And whatever the circumstances, if the time bar applies, it applies—the parties have no reason to think otherwise. It is the circumstances before the court which must have been outside the parties' reasonable contemplation. Are those circumstances limited to the circumstances in which the claim has arisen? For example, it might come about that, contrary to what e might have been reasonably expected, damage did not become apparent until after the time bar had operated. Or it might be that what had seemed a trivial loss later emerged as substantial, this not being in the reasonable contemplation of the parties. There are no such circumstances here.

f Or may the circumstances include as well circumstances being those in which it comes about that an extension is required but which do not relate to the claim? Examples might be the failure of communications or the illness of the person handling the matter for the claimant. Such circumstances would bring in here the failure of the letter of 19 September to bring suit for the purpose of art III, r 6 of the Hague Rules.

g The subsection places no limit on 'the circumstances'. I conclude that the court should look at the whole of the circumstances in which the application for an extension arises. The significant aspect of the letter of 19 September is that contrary to its intention it did not succeed in bringing suit: it would be what may be called 'a near miss'. In my view such an event would not have been in the reasonable contemplation of the parties in August 1994.

h I come then to the second requirement of the paragraph, that it would be just to extend the time. The main factors are: (a) the extension would be required as a result of the failure of Vosnoc to include in the letter of 19 September an express requirement that Transglobal appoint an arbitrator. This was a mistake for which the explanation is most likely an ignorance of the requirement of English law on a point which was not determined by authority. (b) Vosnoc's intention to give notice of arbitration and to prevent time running against them was clear from the two letters of 16 and 19 September 1995. In view of that clear intention and the terms of the latter letter it is surprising that Transglobal did not think that the purpose of the latter was to commence arbitration proceedings. However, that was apparently their reaction: I refer to the penultimate sub-paragraph of para 4 of Mr Panayides's second affidavit. (c) Transglobal were advised as to the

effect of the letter of 19 September 1995 in February 1996. They must have been told that the intention was to give a notice to prevent time running. They may have been advised that its effect was uncertain; they may have been advised on the basis of Lord Denning MR in the *Nea Agrex* case that it did so; they are, it seems to me, less likely to have been advised that it definitely failed to do so.

(d) Vosnoc's claim is substantial. The loss of such a claim by reason of a time bar counts more in their favour than the loss of the time bar may alternatively count for Transglobal: see by analogy *Libra Shipping and Trading Corp Ltd v Northern Sales Ltd, The Aspen Trader* [1981] 1 Lloyd's Rep 273 at 280. (e) Vosnoc did nothing for 18 months after the letter of 19 September. This delay is not explained. The initial inaction at least was apparently due to the situation described in their letter of 16 September asking for a year's extension. The relation to the Korean proceedings is unexplained. (f) Vosnoc applied to the court as soon as the point was taken against them. (g) Transglobal assert that they would have been prejudiced by the assumed failure to serve an appropriate notice. If they have done so, they have themselves to blame at least in part. I refer to (b) above, and to a lesser extent (c). In para 19 of his first affidavit Mr Panayides refers to matters of prejudice. They are as follows.

(i) Problems in making any recovery from the stevedores after the passage of so much time. These will be made less by the reports which were prepared at the time. The damage is established by them. Any dispute would seem to be as to how it arose. It seems to me that the stevedores may well have the greater difficulty in rebutting the suggestion that it was their conduct. I accept, however, that, although no specific problems are pointed to, Transglobal may well have suffered some prejudice through the passage of time.

(ii) Mr Russell, the deputy chairman of Transglobal who was dealing with the matter in 1994, retired at the end of 1996. It is not suggested that he cannot help Transglobal. He would seem at a remove from the events themselves.

Weighing these matters I am satisfied that it would be just in all the circumstances to grant Vosnoc an extension if one were needed. I find the combination of (a), (b) and (d) in particular persuasive. I would therefore grant Vosnoc an extension of time under s 12(3)(a).

Mr Picken put his case under s 12(3)(b) on the basis that the conduct of Transglobal in keeping silent as to a point on the time bar makes it unjust to hold Vosnoc to the bar. If Transglobal had not done so, Vosnoc could have applied for an extension under the section in force until 31 January 1997, namely s 27 of the 1950 Act, and would have obtained one under the more generous provisions of the section. I do not consider that Transglobal have caused any difficulties which Vosnoc have. Having sent their letter and received no acknowledgment and kept silent, they cannot complain that Transglobal also kept silent. I would not grant an extension under s 12(3)(b).

The outcome is that I hold that Vosnoc's letter of 19 September 1995 was not in terms which were appropriate to commence suit for the purpose of art III, r 6 of the Hague Rules, but I hold that there should be such an extension of time under s 12(3)(a) of the Arbitration Act 1996 for the commencement of arbitration as is needed.

Order accordingly.



a **Customs and Excise Commissioners v British Field Sports Society**

COURT OF APPEAL, CIVIL DIVISION

b BELDAM, HUTCHISON AND MUMMERY LJJ

28 NOVEMBER 1997, 30 JANUARY 1998

c *Value added tax – Supply of goods or services – Supply – Supply in course of a business – Society campaigning to oppose legislation against field sports – Subscriptions paid by members – Whether campaigning activities facilities or advantages available to members – Whether society to be treated as carrying on a business – Value Added Tax Act 1983, s 47(2)(a)(3).*

d *Value added tax – Supply of goods or services – Supply of services for a consideration – Direct link – Society campaigning to oppose legislation against field sports – Society funded by members' subscriptions – Whether direct link between subscriptions and benefit to members of campaigning activities.*

e The defendant society was formed in 1930 to protect the rights of its members to engage in field sports. The members paid annual subscriptions and were entitled to attend and vote at the society's annual general meeting. In 1990 the benefits offered by the society were widened to include insurance cover and a country sports directory. From 1990 the commissioners required the society to account for value added tax on its subscription income at the standard rate;

f that proportion attributable to insurance was allowed as an exempt supply; and the part attributable to publications was zero-rated. The society was allowed to reclaim input tax on the same basis. However, in April 1993 the commissioners decided pursuant to s 47(3)<sup>a</sup> of the Value Added Tax Act 1983 that the society's lobbying, public relations and other activities as a pressure

g group for the promotion of field sports were not to be treated as business activities. They ruled that the input tax recoverable by the society should be restricted accordingly, although they still required the society to account for output tax on the whole of the members' subscriptions, apart from the exempt and zero-rated supplies, as it was providing 'facilities and advantages' available to its members and thus deemed to be carrying on a business within s 47(2)(a).

h The society appealed against assessments made for the periods ended June, September and December 1993, contending that its campaigning activities were deemed to be business activities within s 47(2)(a). The commissioners contended that any benefits from the society's campaigning activities accrued to all who took part in field sports, whether or not they were members of the

j society, and that there was no direct link between the subscriptions and any benefit to the society's members from those activities. A value added tax tribunal allowed the society's appeal and its decision was upheld on appeal. The commissioners appealed.

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a Section 47, so far as material, is set out at p 1008 f to j, post

**Held** – The appeal would be dismissed for the following reasons—

(1) The scope of the phrase ‘facilities or advantages’ in s 47(2)(a) of the 1983 Act was wide enough to include the campaigning, lobbying and related public relations activities of the society, which were therefore deemed to be business activities within the meaning of that subsection. The society, in return for a subscription, provided its members with the facility or advantage of putting forward a collective view in a professional way using means effective in influencing public opinion and, accordingly, input tax which the society had incurred in engaging professional services to assist its members in putting forward that collective view was attributable to the provision of facilities or advantages available to its members and was deductible (see p 1011 c to p 1012 a and p 1014 b, post).

(2) Where the members of a society had paid voluntary subscriptions for the society to provide benefits to them in accordance with its rules, there was a direct link between the payment of the subscription and the funding of the campaigning activities by the society. The benefits were perceived by the members as accruing to them equally, since they were provided in pursuit of a common purpose for which they subscribed, namely the promotion of field sports generally. It was for that advantage that the members paid their subscriptions and, accordingly, there was a direct link between the subscriptions and the society’s campaigning activities (see p 1013 h to p 1014 b, post); *Apple and Pear Development Council v Customs and Excise Comrs* Case 102/86 [1988] 2 All ER 922 distinguished.

### Notes

For the activities of clubs and associations deemed to be the carrying on of a business for value added tax purposes, see 49(1) *Halsbury’s Laws* (4th edn reissue) paras 17–18.

For the link between supply and consideration, see *ibid* para 86.

For the Value Added Tax Act 1983, s 47 (now the Value Added Tax Act 1994, s 94), see 48 *Halsbury’s Statutes* (4th edn) (1995 reissue) 796.

### Case referred to in judgments

*Apple and Pear Development Council v Customs and Excise Comrs* Case 102/86 [1988] 2 All ER 922, [1988] ECR 1443, ECJ.

### Cases also cited or referred to in skeleton arguments

*British Tenpin Bowling Association v Customs and Excise Comrs* [1989] VATTR 101.

*Customs and Excise Comrs v Automobile Association* [1974] 1 WLR 1447, [1974] 1 All ER 1257, DC.

*Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, [1955] 3 All ER 48, [1955] 3 WLR 410, HL.

*Institute of Leisure and Amenity Management v Customs and Excise Comrs* [1988] STC 602.

*Netherlands Board of Tourism v Customs and Excise Comrs* (1994) VAT Decision 12935.

*Royal Highland and Agricultural Society of Scotland v Customs and Excise Comrs* [1976] VATTR 38.

- a *Turespaña (Spanish Tourist Office) v Customs and Excise Comrs* (1996) VAT Decision 14568.

### Appeal

- b The Commissioners of Customs and Excise appealed from a decision of Hidden J ([1997] STC 746) on 21 March 1997 whereby he dismissed their appeal from a decision of a value added tax tribunal sitting at London (chairman: R K Miller CB) released on 31 May 1996 ((1996) VAT Decision 14189) allowing an appeal by the British Field Sports Society against a decision of the commissioners to assess the society to value added tax in respect of accounting periods ended 30 June, 30 September and 31 December 1993. The facts are set out in the judgment of Beldam LJ.

c *Nigel Fleming QC and Robert Jay* (instructed by the *Solicitor for the Customs and Excise*) for the commissioners.

- d *David Milne QC and Aparna Nathan* (instructed by *Knights, Tunbridge Wells*) for the society.

*Cur adv vult*

30 January 1998. The following judgments were delivered.

- e **BELDAM LJ.** The Commissioners of Customs and Excise (the commissioners) appeal on a point of law from the decision of Hidden J ([1997] STC 746) who on 21 March 1997 upheld the decision of the value added tax tribunal (chairman: R K Miller CB) released on 31 May 1996 ((1996) VAT Decision 14189) in favour of the British Field Sports Society (the society) which had appealed against the assessments to value added tax (VAT) made by the commissioners for the accounting periods ended 30 June, 30 September and 31 December 1993.

### THE FACTS

- g *The society*

- h The society was formed in 1930 with a view to protecting the rights of its members to carry on field sports. Its foundation was prompted by increasing attacks on field sports in the 1920s. The society aimed to scrutinise all legislation which might adversely affect field sports and to organise a proper opposition to measures which might be introduced in Parliament to the detriment of its members. It undertook to reply effectively to misleading propaganda about field sports and, as the society considered a successful attack on one field sport would lead to an attack on others, it aimed to provide a society which was strong enough to protect every branch of field sports so that it could effectively represent the opinions of its members in defence of their rights. As the main attack was directed against hunting, the society's membership contained many hunt supporters.

The objects of the society are set out in r 3 of its rules. They are as follows.

- (a) To ensure the retention of field sports as an integral part of the activities of modern society. (b) To show how field sports enrich and conserve the



wildlife of our country. (c) To keep a watching brief in Parliament and in the European Parliament on everything likely to affect field sports; to promote legislation where necessary and to oppose legislation likely to be harmful to the interests of field sports. (d) To assist every branch of field sports and the interests of all field sportsmen and to promote field sports through literature, films, the press, television and radio. (e) To provide information, advice, services and assistance to members.

The head office of the society is in Kennington Road, London, SE1. It has a total staff of about 50, of whom about half are at headquarters. There are 14 regional directors. At its London headquarters it has a very active public relations staff and employs eight other public relations staff in its regional offices.

The affairs of the society are managed by a board of 12 who are responsible for its day-to-day organisation and running. The board has an absolute discretion in directing the administration and expenditure of the funds of the society for the protection and advancement of the rights and interests of the society's members. The board reports to the council. Members of the society who have paid the current full membership subscription are entitled to attend and vote at general meetings of the society and may propose and vote on resolutions at the meeting.

Today the society has about 80,000 members and the membership is increasing. 60,000 are subscribing members. Others are covered by family membership and joint subscription. The annual subscription rate in 1993 was £20. Trade membership was £40 or £80. It is common knowledge that in recent years the attacks on the right to carry on field sports have increased in intensity with increased public relations campaigning, demonstrations and attempts to introduce legislation. The society decided that to counteract these attacks and to carry out its objective of protecting its members' rights and interests, it would have to make a substantial increase in its use of outside consultants in public relations, in research, campaigning, printing and in supplying the media with information. In short, if it was to perform its obligations for which the members paid their subscriptions, it would have to engage on the members' behalf all those professional services which in the modern world are needed to make any impact on public opinion.

Thus in the last ten years the society has pursued the aims of its members with more energy and resources in campaigns and with a substantial increase of expenditure, particularly in the last five years.

### *The tax background*

Until 1990 the society had been treated as outside the scope of VAT, not being a business as defined in s 47 of the Value Added Tax Act 1983, now replaced by s 94 of the Value Added Tax Act 1994. In 1990 the society thought it would add to the attraction of membership by offering members substantial legal liability insurance and a free legal help line, insurance against disability arising from an accident whilst participating in a recognised country sport, discount on home insurance cover, free regular copies of the society's newspaper and a free country sports directory with a regional sporting planner and current special offers. From 1990 onwards, the commissioners required the society to account for VAT on its subscription income at the standard rate; that proportion of the subscription attributable to insurance was allowed as an

- a exempt supply and the part attributable to the provision of literature as a zero-rated supply. The society was allowed to reclaim input tax upon the same basis. However, in April 1993 the commissioners sought to deny the society the right to set off input tax by ruling that the tax incurred by the society in providing their members with professional services in public relations, printing, publishing, lobbying and its other campaigning activities,
- b was not attributable to the provision of facilities or advantages available to its members. The commissioners still required the society to account for VAT on the whole of the members' subscriptions, apart from exempt or zero-rated supplies, as it was providing facilities and advantages available to its members and thus deemed to be carrying on a business within the meaning of s 47(2)(a) of the 1983 Act. It is this ruling which gave rise to the society's appeal to the
- c tribunal, to the decision of Hidden J and to this appeal.

*The facts found by the tribunal*

- In addition to the facts as I have outlined them, the tribunal found that in the course of its campaigning the society takes a whole series of actions, such
- d as publishing advertisements, producing literature, leaflets and booklets which it sends to journalists, making presentations at media conferences, arranging for representation on television, lobbying MPs in the House of Commons and organising rallies. It further said ((1996) VAT Decision 14189 p 13):

- e 'The evidence we find to be overwhelming that the members of this Society pay their subscriptions for a package of benefits of which the most important is to have the Society carry on its campaigning activities, which activities it carries on for them and on their behalf.'

- f The society is not a body formed to promote some object for its own sake for the public good but is a society whose members are self-interested and which exists to defend the members' ability to pursue their sport from threats seen as affecting them all and that is why they join and why they pay their subscription. The tribunal later said (at p 14):

- g 'We find upon the particular facts that having the Society campaigning in defence of their sport is a clear and very identifiable advantage. It is plainly an advantage available to them. They do not merely sponsor it. Through their membership of the society—collectively they both are the society and control what it does—their commission the campaigning activities. Those activities are carried on for the members. They are
- h activities which an individual member however illustrious and however good his connections could not hope to carry out, or to carry out anything like so effectively, alone in defence of his ability to pursue his own sport. That is why the members have come together in the Society so that collectively they can make their case so very much more strongly. The advantage to them provided by the campaigning is, of course, provided by
- i the Society; and it is provided in return for their subscription, since that is the core of the arrangement between them.'

The tribunal went on to consider whether the necessary link between payment of the members' subscriptions and the advantages provided in return for them was established and held on the evidence that there was a direct link

between the services provided by the society for its members and the consideration it received. a

#### THE LEGISLATION

Section 2(1) of the 1983 Act provides:

‘Tax shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.’ b

Section 14 provides for credit for input tax against output tax:

‘(1) A taxable person shall, in respect of supplies made by him, account for and pay tax by reference to such periods (in this Act referred to as “prescribed accounting periods”), at such time and in such manner as may be determined by or under regulations. c

(2) Subject to the provisions of this section, he is entitled at the end of each such period to credit for so much of his input tax as is allowable under section 15 below, and then to deduct that amount from any output tax that is due from him. d

(3) Subject to subsection (4) below, “input tax”, in relation to a taxable person, means the following tax, that is to say—(a) tax on the supply to him of any goods or services ... being ... goods or services used or to be used for the purpose of any business carried on or to be carried on by him; and “output tax” means tax on supplies which he makes.’ e

Subsection (4) makes provision for apportionment where goods or services are supplied and are used partly for the purposes of a business and partly for other purposes.

Section 15 regulates the amount of input tax for which a taxable person is entitled to take credit at the end of any period. f

The meaning of ‘business’ is given in s 47, which provides:

‘(1) In this Act “business” includes any trade, profession or vocation.

(2) Without prejudice to the generality of anything else in this Act, the following are deemed to be the carrying on of a business—(a) the provision by a club, association or organisation (for a subscription or other consideration) of the facilities or advantages available to its members; and (b) the admission, for a consideration, of persons to any premises. g

(3) Where a body has objects which are in the public domain and are of a political, religious, philanthropic, philosophical or patriotic nature, it is not to be treated as carrying on a business only because its members subscribe to it, if a subscription obtains no facility or advantage for the subscriber other than the right to participate in its management or receive reports on its activities.’ h

#### *The arguments*

The commissioners contended that the only question arising on the appeal was whether the campaigning activities of the society are deemed business activities within s 47(2)(a). They challenge whether the campaigning activities of the society can constitute a clear and identifiable advantage as the tribunal j



a held. They argued that the tribunal's reasons: (1) raise pure points of law which do not depend on impeaching the tribunal's conclusion on the evidence or findings of fact; (2) amount to subtly different ways of stating the same point, namely that all the members derive a benefit from the sure and admittedly selfish knowledge that their interests are being furthered; and (3) seek to distinguish between campaigning societies, whose members join from self-interested motives, and societies which seek to promote some object or cause for the public good, when there is no justification in the United Kingdom (or European Union) VAT legislation for such a distinction, and the consequent differential tax treatment.

c The commissioners criticise the reasoning and conclusions of Hidden J because they contend he failed to deal with the key point of principle, namely whether the campaigning activities of the society are capable of coming within the words 'facilities or advantages' as correctly interpreted within the VAT legislation. Further, he did not address the commissioners' argument that there was no direct link between the payment of the subscription and the provision of facilities or advantages as a separate point.

d The commissioners argued that mere furtherance of an ideological end or principle in the public arena is not a facility or advantage for a member of the association who subscribes. The activities of the society benefited those who were not members and who espoused the same aspirations and there was no sufficient link between the payment of subscription and the supply of the facility or advantage. The commissioners denied that they were seeking to attack the tribunal's finding of fact in this regard, or, if they were, they were contending that it was one to which no reasonable tribunal could have come. It advanced two policy arguments: first, that the decision of the tribunal and Hidden J rendered the law uncertain, and second, that if pursuit of the objectives of a body such as the society without more was to be treated as the provision of a facility or advantage to the individual members, then every such body which was active, which carried out public relations activities and which advertised or publicised its views, aims or objectives, or which campaigned, would fall outside s 47(3) and would fall to be treated as carrying on a business. These policy arguments have a familiar ring but carry little weight in deciding the meaning of a legislative expression which the commissioners seek to interpret to deny the taxpayer the right to set off input tax. It is, however, said that the draftsman of s 47, in referring to facility or advantage, must have had in mind the provision of some tangible or concrete benefit beyond the furtherance of the society's ideological objectives. In short, the commissioners argue that acting as a collective voice, campaigning on behalf of members, even furthering the interests of members by such campaigning cannot without more be the provision of a facility or advantage to those members. By reference to art 13A(1)(1) of EC Council Directive 77/388 on VAT (the Sixth Directive) and the First Report from the Commission of the European Communities to the Council on the application of the common system of value added tax, submitted in accordance with art 34 of the Sixth Directive (COM(83) 426 final, 14 September 1983, p 46), the commissioners relied upon a statement in the report:

'Organisations which do not limit their activities to the collective representation of their members may become liable for the tax if the

subscriptions they receive actually represent a consideration for individually identifiable services provided to their members.' a

Thus the commissioners argue that the supply of services to its members by the society does not represent the supply of individually identifiable services provided to the society's members.

It is, of course, very easy to limit a legislative expression by adding words such as 'individually identifiable' but in my view unjustifiable. The court, in construing the VAT legislation, should have regard to the fact that the legislation was intended to implement the Sixth Directive. None the less there is considerable scope in the directive for variations in national legislation. Article 13 is concerned with national exemptions and aims to secure correct and straightforward application of such exemptions and to prevent possible evasion, avoidance or abuse. However, the commissioners' case is that the society is not an exempt body, since it has to account for VAT in respect of its subscription income save in respect of zero-rated or exempt supplies. b  
c

In so far as the subscription is apportioned by commissioners to zero-rated and exempt supplies, the balance is clearly attributable to the society's expenditure in protecting the interests and rights of its members. The paragraph of the First Report of the Commission following that quoted suggests that such consideration would be remuneration for services because it is capable of being expressed as a specific amount of money. In my view, the Commission was referring to the need for services to be individually identifiable, not to a requirement for them to be individually provided to the members of the association. d  
e

Further, the commissioners' description of the benefits provided, such as acting as a collective voice and campaigning on behalf of members, is calculated to disguise the issue. The society does not seek to set off input tax incurred for acting as a collective voice or campaigning; it seeks to set off the tax which it is required to pay for the professional and other services it employs in the deemed business it conducts for its members. f

The society argued that the provision of the services of public relations consultants, scrutiny of legislation, organising demonstrations and making presentations to the media are clearly identifiable benefits to the members who could not individually provide them effectively. The finding that this is what the members pay for by their subscription is a finding of fact supported by the evidence. In so far as the words 'facility or advantage' used in s 47 may have a special meaning in the context in which they are used, that is a question of law but otherwise the commissioners are simply seeking to reverse conclusions of fact which were open to the tribunal on the evidence they heard and which could not be said to be perverse. In particular, the finding by the tribunal that the members of the society paid their subscription for a package of benefits of which the most important is to have the society carrying on its campaigning activities, which activities it carries on for them and on their behalf, is not open to review. Further, the society contends that output tax and input tax must be treated consistently; the commissioners are seeking to treat them inconsistently because they expect the society to account for output tax on that part of its subscription income attributable to campaigning and they deem the whole of the society's activities to constitute a business under s 47(2)(a). It follows that input tax attributable to campaigning is accordingly recoverable. g  
h  
j

a Although s 47 does not define facilities or advantages, s 47(3) does give two instances of matters which, if not excepted, would amount to facilities or advantages, namely the right to participate in the management of a body and the receipt of reports on the activities of that body. Facilities or advantages should be given their ordinary everyday meaning. It is quite obviously an advantage to members for the society to provide the organisation and to carry out the objects of the society and, in instructing professionals to assist in the campaigns, the society is doing so on behalf of the individual members each of whom benefits directly and in the manner they expect in return for the payment of their subscription.

c *Conclusion*

d Section 47(3) is in my view instructive for it proceeds upon the basis that, unless excepted, a body of the nature there described would be carrying on a business if its members, in return for a subscription, obtained only the facility or advantage of the right to participate in management or receive a report on its activities. This seems to me to indicate that the scope of the phrase 'facilities or advantages' is very wide and if a member receives a facility or an advantage from the provision of a report on the society's activities, I cannot see on what logical basis he would not receive a facility or advantage from professional services engaged on his behalf to further the objects to which the report relates. Similarly, if the mere right to participate in the society's management is to be regarded as a facility or advantage, how can the benefit of the services provided by management be excluded?

f In ordinary usage 'facilities' refers to the means, resources or conveniences which make it easier to achieve a purpose, eg facilities for research, and 'advantages' means the benefit or gain, usually of something not previously enjoyed or available. The use of synonym and paraphrase in statutory construction is generally unhelpful because not infrequently they impart a different nuance to the words interpreted. Nevertheless, since it is clear that 'facilities' and 'advantages' are used in s 47 in their widest sense, it seems to me permissible in this case to resort to the meanings which would ordinarily be given to these two English words. On this basis I consider the conclusion of the tribunal was entirely justifiable. It reached no conclusion of fact which was unsupported by the evidence nor did it form a view of the facts which could not reasonably be entertained. The society, in return for the subscription, provided the members with the facility or advantage of putting forward a collective view in a professional way using the means which in modern conditions are essential if public opinion is to be effectively influenced. In the course of argument Mr Fleming QC accepted that if trade members had united to employ similar services in defence of their interests in supplying equipment for hunting, shooting and fishing, they would have been entitled to deduct as input tax the tax paid in securing the same services as the society provided for its members. I cannot see a basis for distinguishing the united efforts of those who actively participate in the sports concerned.

j The policy arguments put forward by the commissioners are unconvincing. A decision concerning the facilities and advantages provided by one society cannot determine the characteristics of facilities or advantages provided by another. The scope of the inquiry whether there is provision of facility or advantage in return for a subscription is so wide and the circumstances are



likely to be so variable that it is not possible to envisage criteria which will be determinative in every case. The law is only likely to be confused if tribunals are invited to regard the circumstances in a particular case as determinative of the circumstances in another when the analogy between the two is inexact.

Mr Fleming argued that the tribunal's finding that there was a direct link between the payment of subscription and the facilities or advantages provided conflicted with the decision of the Court of Justice of the European Communities in *Apple and Pear Development Council v Customs and Excise Comrs* Case 102/86 [1988] 2 All ER 922, [1988] ECR 1443.

The passages on which he relied are in the judgment of the court:

'14. It is apparent from the order for reference that the council's functions relate to the common interests of the growers. In so far as the council is a provider of services, the benefits deriving from those services accrue to the whole industry. If individual apple and pear growers receive benefits, they derive them indirectly from those accruing generally to the industry as a whole. In that connection, it must be stated that the possibility cannot be ruled out that, in certain circumstances, only apple growers or else only pear growers can derive benefit from the exercise of specific activities by the council.

15. Moreover, no relationship exists between the level of the benefits which individual growers obtain from the services provided by the council and the amount of the mandatory charges which they are obliged to pay under [the Apple and Pear Development Council Order 1980, SI 1980/623]. The charges, which are imposed by virtue not of a contractual but of a statutory obligation, are always recoverable from each individual grower as a debt due to the council, whether or not a given service of the council confers a benefit upon him.

16. It follows that mandatory charges of the kind imposed on the growers in this case do not constitute consideration having a direct link with the benefits accruing to individual growers as a result of the exercise of the council's functions. In those circumstances, the exercise of those functions does not therefore constitute a supply of services effected for consideration within the meaning of art 2(1) of the Sixth Directive.' (See [1988] 2 All ER 922 at 938, [1988] ECR 1443 at 1468.)

The question referred to the Court of Justice by the House of Lords was:

'... the exercise by the Apple and Pear Development Council of their functions pursuant to Article 3 of the Apple and Pear Development Council Order 1980, SI 1980/623 (as amended by the Apple and Pear Development Council (Amendment) Order 1980, SI 1980/2001), and the imposition on growers pursuant to Article 9(1) of an annual charge for the purposes of enabling the council to meet administrative and other expenses incurred or to be incurred in the exercise of such functions, constitute "the supply of ... services effected for consideration" within the meaning of Article 2 of the Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes ...' (See [1988] 2 All ER 922 at 938, [1988] ECR 1443 at 1466-1467.)

The question was whether a charge imposed on growers to meet administrative and other expenses incurred in the exercise of its functions by

a the Apple and Pear Development Council amounted to consideration for the supply of services. It is clear that the court held that the services and the benefits deriving from them were provided by the council to the whole industry. Individual growers derived benefit only indirectly from the benefits which accrued to the industry as a whole. Further, the growers were bound to pay the charges levied whether or not they received benefits and thus the charges could not constitute consideration having a direct link with the benefits accruing to individual growers.

It is also worth noticing the opinion of the Advocate General (Sir Gordon Slynn) who pointed out that the Apple and Pear Development Council was also empowered to impose an additional charge to meet the costs of particular schemes adopted. Such a scheme was launched to promote the sale of standard top quality apples which was known as the 'Kingdom Scheme'. This was a voluntary scheme, and apart from an initial government grant was self-financing. He later pointed out (see [1988] 2 All ER 922 at 936, [1988] ECR 1443 at 1462):

d 'In this case (where what is in issue takes place within the territory of a member state and importation is not involved), there is no transaction to which a particular payment can be related and indeed it is perfectly possible for some growers to be unable to point to services specifically supplied to them as opposed to the industry as a whole. Some brands of apples may not be advertised or promoted; the apple growers may get no benefit from the promotion of pears and conversely. It does not seem to me that the obligatory payment of the levy and the obligatory discharge of statutory functions unrelated to individual growers constitute the necessary transaction let alone any form of bargain. *The position seems to me to be very different in relation to the kingdom scheme where growers voluntarily pay for services directed to their specific products.*' (My emphasis.)

The Advocate General's remarks highlight a point I ventured to make earlier that the circumstances in which facilities or advantages are conferred in return for a consideration are likely to be so variable that it is not possible to formulate universal criteria. On the facts of the *Apple and Pear Development Council* case the Court of Justice was obviously justified in taking the view that there was no direct link between the mandatory charges imposed on individual growers and any benefits which accrued to them and thus that there was no consideration for the benefits. Where, as in the present case, the members of the society have paid voluntary subscriptions for the society to provide benefits to the members and to each of them in accordance with the rules of the society, there is a direct link as the tribunal found. The benefits are perceived by the members as accruing to them equally for they are provided in pursuit of a common purpose for which they subscribe. Each member may be anxious for the society to protect his interest and right in carrying out his particular sport but it is clear that the members perceive a threat to one sport as a threat to all and obtain the advantage of the promotion of field sports generally and the protection of the rights of members in a stronger more effective manner than any individually could achieve. As the tribunal said, it is for this advantage that they pay their subscriptions.

In my judgment the decision of the Court of Justice in the *Apple and Pear Development Council* case does not undermine the conclusions of the tribunal or Hidden J. a

I would dismiss the appeal.

HUTCHISON LJ. I agree.

MUMMERY LJ. I also agree. b

*Appeal dismissed with costs. Leave to appeal to the House of Lords refused.*

Douglas Johnston Esq Barrister.



a **Murray v Yorkshire Fund Managers Ltd  
and another**

COURT OF APPEAL, CIVIL DIVISION

b NOURSE, SCHIEMANN LJ AND SIR JOHN VINELOTT

22, 23 OCTOBER, 11 DECEMBER 1997

c *Equity – Breach of confidence – Confidential information – Damages – Use of information obtained in confidence – Business plan containing confidential information in connection with proposed acquisition of assets of a company in receivership – Plaintiff a member of team preparing plan – Information disclosed to second defendant in order to obtain finance for project from first defendant – Plaintiff excluded from team and second defendant, without his consent, using information for his own benefit – Whether plaintiff having claim for damages for breach of confidence against second defendant.*

d In 1991 the plaintiff and five other individuals joined forces to acquire the assets of a company which had been placed in administrative receivership, through the medium of a new company of which the plaintiff was to be the managing director. The relationship between the members of the team was not regulated by any contract, nor was there a partnership between them. With a view to attracting  
e finance for the project, a business plan containing highly confidential information was prepared, and was communicated to the defendants. However, the first defendant, Y Ltd, indicated that it was unlikely to invest in it if the plaintiff remained in the team, whereupon the other members agreed to the plaintiff being replaced as prospective managing director by the second defendant, H, an  
f investment manager employed by Y Ltd. Thereafter, with the consent of the other members, H started to make use of the confidential information for his own benefit, and in due course the purchase of the company from the administrative receivers was completed and H became managing director of the new company. Subsequently, the plaintiff brought an action for damages against the defendants for breach of confidence. The judge dismissed the action against Y Ltd on the  
g ground that it had made no use of the confidential information, but entered judgment against H, for damages to be assessed, on the ground that the members of the team each had equal rights in the confidential information and therefore the plaintiff's consent, which he had not given, was an essential prerequisite to H's use of it.

h **Held** – In order to succeed in an action for breach of confidence, a plaintiff had to show, apart from contract, that the information had the necessary quality of confidence about it, that it had been imparted in circumstances importing an obligation of confidence and that there had been an unauthorised use of the information to the detriment of the party communicating it. In the instant case,  
j the first two elements were present. However, since there had never been a binding agreement that all the members of the team would continue to participate, if one of them was excluded from the project, he could not, after his exclusion, prevent the others from using the confidential information as they pleased. It followed that once the plaintiff's relationship with the other members of the team had been dissolved, the information, which was an adjunct of that

relationship, ceased to be his property and therefore the use of it by H was not unauthorised. Accordingly, the appeal would be allowed (see p 1020 *c* to *e*, p 1023 *a b e* to *g* and p 1024 *b c f g*, post).

Dictum of Megarry J in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47 applied.

*Seager v Copydex Ltd* [1967] 2 All ER 415 distinguished.

## Notes

For breach of confidence, see 16 *Halsbury's Laws* (4th edn reissue) para 906.

## Cases referred to in judgments

*Cescinsky v George Routledge & Sons Ltd* [1916] 2 KB 325.

*Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

*Heyl-Dia v Edmunds* (1899) 81 LT 579.

*Mathers v Green* (1865) LR 1 Ch App 29.

*Powell v Head* (1879) 12 Ch D 686.

*Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923, CA.

*Steers v Rogers* [1893] AC 232, HL.

## Cases also cited or referred to in skeleton arguments

*Ackroyds (London) Ltd v Islington Plastics Ltd* [1962] RPC 97.

*Cranleigh Precision Engineering Ltd v Bryant* [1964] 3 All ER 289, [1965] 1 WLR 1293.

*International Scientific Communications Inc v Pattison* [1979] FSR 429.

*Lloyd v Grace Smith & Co* [1912] AC 716, [1911–13] All ER Rep 51, HL.

*Morris v C W Martin & Sons Ltd* [1965] 2 All ER 725, [1966] 1 QB 716, CA.

*My Kinda Town Ltd v Soll* [1983] RPC 407, CA.

*Nahhas v Pier House (Cheyne Walk) Management Ltd* (1984) 270 EG 328.

*Port Swettenham Authority v T W Wu & Co (M) Sdn Bhd* [1978] 3 All ER 337, [1979] AC 580, PC.

*Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378, [1967] 2 AC 134, HL.

*Terrapin Ltd v Builders Supply Co (Hayes) Ltd* [1960] RPC 128, CA.

## Appeal

The second defendant, Michael Edward Hartley, appealed from the decision of Judge Michael Kershaw QC sitting as a judge of the High Court in the Queen's Bench Division at Manchester on 20 September 1995, whereby, in an action brought by the plaintiff, Drummond Murray, for breach of confidence, he gave judgment for the plaintiff against Mr Hartley, for damages to be assessed, but dismissed the action against the first defendant, Yorkshire Fund Managers Ltd (YFM). The facts are set out in the judgment of Nourse LJ.

*David Waksman* (instructed by *Eversheds*, Leeds) for Mr Hartley.

*Eric Shannon* (instructed by *Mainman Heywood*, Manchester) for Mr Murray.

*Steven Coles* (instructed by *Davies Arnold Cooper*) for YFM.

*Cur adv vult*

11 December 1997. The following judgments were delivered.

**NOURSE LJ.** This is an action for breach of confidence brought by the plaintiff, Drummond Murray, in which, on 20 September 1995, Judge Kershaw QC entered judgment against the second defendant, Michael Edward Hartley, for damages to be assessed, the action as against the first defendant, Yorkshire Fund Managers Ltd

a (YFM), being dismissed on the ground that it had made no use of the confidential information. Mr Hartley now appeals to this court. Mr Murray has not appealed against the dismissal of the action as against YFM.

b Several grounds of appeal are relied on by Mr Hartley. Without objection from the parties, we have started by hearing argument on the question whether, on the facts admitted or as found by the judge, there was a breach of confidence in law, it being agreed that if that question is answered in the negative the appeal must succeed and no other question need be argued. We now give judgment on that question.

c The facts can be taken mainly from the judge's judgment and many of them can be stated in his own words. In 1991, when the material events occurred, Mr Murray had for several years been involved in the purchase of companies, his expertise being in the field of marketing. At that time he and Mr Mark Fielding were on a register of people looking for investment opportunities which was maintained by Messrs Robson Rhodes, a well-known firm of chartered accountants. Mr Fielding's background was in accounting, finance and management. Robson Rhodes regarded Mr Murray and Mr Fielding as being d complementary to each other by reason of their different fields of expertise. In March 1991 they suggested to them that they might be interested in a buy-in/ buy-out of the assets of a company called Serviscope Electronics Ltd (Serviscope).

e At the beginning of 1990 Serviscope, which had a nationwide depot network from which warranty and after sales service was provided to major UK manufacturers, distributors and retailers of domestic appliances and home entertainment equipment, was a subsidiary of Granada plc. However, it had been losing money and in January 1990 Granada sold all the shares in it for a consideration of £1 to a company called Computec Electronics Service and Maintenance Engineering Ltd (Computec), which had been established in 1985 by Mr Michael O'Brien and whose business was the repairing of appliances and f equipment of the kind serviced by Serviscope.

g After the acquisition of Serviscope Mr O'Brien approached various possible sources of working capital. One of them was YFM, for whom Mr Hartley was then working as an investment manager. Over a period of about four months in 1990 Mr Hartley, on behalf of YFM, spent quite a lot of his time investigating the Serviscope business. In the end, Mr O'Brien was unable to raise money from YFM or elsewhere and on 14 February 1991 administrative receivers were appointed of both Computec and Serviscope. They advertised the goodwill of Serviscope together with the benefit of leasehold interests in its various depots. It was at that point that Robson Rhodes approached Mr Murray and Mr Fielding.

h It was obvious that any buy-in/buy-out of the assets of Serviscope would have to be accomplished quickly if the goodwill of the company was to be preserved. A team was quickly put together consisting, in addition to Mr Murray and Mr Fielding, of four existing employees of Serviscope, Mr Wills, Mr Rickard, Mr Wilkinson and Mr Stimpson. Mr O'Brien himself was very keen to be included, but was regarded as a liability rather than as an asset and was therefore excluded. j The initial plan was that a new company should be incorporated or an existing company acquired off the shelf, in which Mr Murray would invest £70,000 and have 20% of the shares and the other five members of the team would each invest £20,000 and have 10% of the shares. The remaining 23% of the shares would be available as equity participation to any provider of venture capital, who would also provide the necessary working capital by way of loan. Mr Murray would be the managing director of the new company.



Robson Rhodes looked on Mr Murray and Mr Fielding as their clients and wrote them a letter dated 7 March 1991 in which they set out what they would do and what they would charge. They also prepared a fact sheet bearing the same date, which they sent within a few days to various providers of venture capital, with some of whom they were able to arrange meetings. On 13 March there was a meeting with a potential investor, whose representative told Robson Rhodes on the telephone afterwards that they did not wish to proceed with an investment and that Mr Murray gave them particular cause for concern. That was not at that stage reported to Mr Murray or Mr Fielding. Meanwhile, a business plan was prepared by the team, Mr Murray contributing to the section which dealt with marketing. The judge said:

'That section is short, but its importance is not to be measured by its length. Any provider of loan capital would obviously want to know about not only the way in which a potential borrower proposed to set about making money but also about any outlay of money on the marketing side of the business, and it does not take long to express a conclusion that little or no outlay is proposed.'

The final version of the business plan was prepared by Robson Rhodes and sent to several potential investors on 14 March.

In the week commencing Monday, 18 March there were several meetings with potential investors. There were meetings on 18 and 19 March, the first of which led to no interest in lending and the second of which led Robson Rhodes and Mr Murray to think that there was a prospect of 50% funding for the project from the investor concerned.

On Wednesday, 20 March there was a meeting with YFM, which was represented by its managing director, Mr Philip Cammerman, and Mr Hartley. The business plan was discussed and also the price to be paid for the assets, which had been reduced by negotiation from the initial asking price. After that meeting Mr Cammerman spoke on the telephone to Robson Rhodes. He said that YFM liked the proposals and would seriously consider support, but had serious question marks over Mr Murray, though that was not necessarily a deal breaker. On Friday, 22 March there was a meeting in London with another potential investor. Although the judge found that Mr Murray gave his best performance at that meeting, on Monday, 25 March the investor telephoned Robson Rhodes to say that they were interested in the proposal but did not feel that they could support it at all if Mr Murray was involved because they did not think that he would be an appropriate chief executive.

Also on Friday, 22 March there was contact between Mr Fielding and Mr Hartley when, as the judge found, they discussed the possibility of Mr Hartley's replacing Mr Murray as the proposed managing director of the new company and that overtures to the other members of the team began on that day and continued through the following weekend. That finding is challenged by Mr Hartley, but he accepts that its outcome does not affect the question of law. The judge also thought it far more likely that Mr Hartley, rather than Mr Fielding, initiated the proposal that Mr Hartley should become the managing director, and with it the idea that funding would be more likely to be available to a team led by him.

I proceed on the footing that Mr Hartley initiated the proposal and that he and Mr Fielding between them approached the other four members of the team over the weekend of 22 to 24 March. Mr Cammerman's evidence was that he received a telephone call from Mr Hartley on the evening of Sunday, 24 March, in which the latter suggested that he might offer himself in place of Mr Murray. Mr

a Cammerman said that he would consult his colleagues, which he duly did, and on Monday, 25 March he told Robson Rhodes that, without any suggestion or encouragement from YFM, Mr Hartley had offered to leave and get involved with the new company. Mr Cammerman told Robson Rhodes that YFM saw Mr Murray as a weak link and was unlikely to invest with him in the team, though he did not 'push' Mr Hartley by saying that if the team wanted money from YFM they would have to take him. The judge accepted Mr Cammerman's evidence that he b knew nothing of Mr Hartley's plan until the Sunday and then knew of it only as an idea in his mind.

On 27 March Mr Fielding told Mr Murray that he had been replaced as prospective managing director by Mr Hartley and he made Mr Murray an offer of compensation for his time and expense. Not surprisingly, Mr Murray was shocked and angered by what he heard. We were told that Mr Fielding paid him £5,000 on c that or the following day. On 28 March Robson Rhodes wrote to Mr Murray stating:

d 'We have received notification from Mr Mark Fielding that he no longer feels able to proceed with yourself in respect of the original proposal. Regrettably we consider this brings to an end our engagement as detailed in our letter of 7 March 1991. Giving consideration to the comments which we have received from funding institutions we are of the opinion that it is unlikely we would be able to effect the buy-in with respect to this proposal for a team headed by yourself and that it would not be in your best interests to e continue with this matter.'

Also on 28 March Robson Rhodes wrote a letter of engagement addressed to Mr Fielding and Mr Hartley.

f Mr Fielding and Mr Hartley prepared a new business plan, in which the financial projections differed from that of the March plan. It was submitted to YFM, which agreed to invest. The purchase from the administrative receivers went through and Mr Hartley became managing director of the new company. For a time he received substantial emoluments and fringe benefits. But by the end of 1993 the company was hopelessly insolvent and was placed in receivership. Mr Hartley lost his equity investment in it of over £40,000. YFM itself suffered an irrecoverable loss of some £1.474m.

g The judge found that the business plan, the information that Serviscope's assets could be purchased at below the original asking price, the sum for which they could be purchased and the fact that there was a team willing to work for and invest in the new project were highly confidential information which YFM and Mr Hartley did not know until it was communicated to them on 20 March by Robson h Rhodes, Mr Murray and Mr Fielding. He also found that Mr Murray's contribution to the section of the business plan which dealt with marketing was sufficiently significant to enable him to claim that he was a co-author of the plan and, further, that he adopted the whole plan. It followed from that, as the judge implicitly found, that Mr Murray, Mr Fielding and the other four members of the team each had equal rights in the confidential information. On the other hand, j there was no agreement between Mr Murray and the other members of the team as to the use to which the information might or might not be put. Indeed, no such agreement was alleged. Further, the judge accepted a submission made on behalf of Mr Hartley that there was no equitable obligation between the members of the team in relation to their individual use of the information. It is also important to emphasise that there was no allegation of a partnership between them. Furthermore, the judge rejected Mr Murray's alternative case that Mr Hartley

owed a fiduciary duty to him. Mr Murray has not sought to revive that case in this court. a

It follows that the case must be approached on the footing that the six members of the team were entitled to equal rights in the confidential information, in other words that they were co-owners of it, but that there was no contractual, fiduciary or other special relationship between them and that the information was not an asset of a partnership between them. That was the position as at Friday, 22 March, when, on the judge's findings, Mr Hartley started to make use of the information for his own benefit. Since the members of the team other than Mr Murray thereafter agreed to Mr Hartley's becoming managing director of the new company in place of Mr Murray, it follows that they effectively consented to Mr Hartley's using the information for his own benefit. The question is whether Mr Murray, not having agreed to the proposal and thus not having consented to Mr Hartley's use of the information, is entitled to relief against Mr Hartley. b c

As to the law, the convenient starting point is the judgment of Megarry J in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47, where he stated the three elements normally required, apart from contract, for an action for breach of confidence to succeed: first, the information must have the necessary quality of confidence about it; second, the information must have been imparted in circumstances importing an obligation of confidence; third, there must be an unauthorised use of that information to the detriment of the party communicating it. There can be no doubt that the first two elements were present in this case. Everything depends on whether there was an unauthorised use of the information. d

Mr Murray's case, as advanced by Mr Shannon on his behalf, is that the confidential information was disclosed to Mr Cammerman and Mr Hartley at the meeting on 20 March so that it could be used, and used only, for the purpose of deciding whether YFM should invest in the venture disclosed in the business plan. Mr Shannon submits that Mr Hartley was therefore not entitled to disclose the information to anyone else nor to use it for any other purpose; he did use it for another purpose, a purpose detrimental to Mr Murray, namely to replace Mr Murray by himself as the prospective managing director of the new company. e f

In my opinion, Mr Shannon's submissions are correct to this extent. The confidential information was disclosed to Mr Hartley so that it could be used, and used only, for the purpose of deciding whether YFM should invest in the business venture. The consequence of that was that Mr Hartley was not entitled to disclose the information to *any third party*. Clearly, it did not mean that he was not entitled to disclose it to the other members of the team, who had equal rights in it with Mr Murray and who, in any event, must be taken to have known it already. So his approach to them was not a breach of the obligation not to disclose it. It was, however, a *prima facie* breach of the obligation not to use the information for some other purpose. The question whether that gave Mr Murray a cause of action against Mr Hartley depends on what was the effect of the agreement of the other members of the team that Mr Hartley should replace Mr Murray and thus, effectively, that the confidential information could and should be used in the way in which it was used. g h

Mr Waksman, for Mr Hartley, relies on a line of authority starting with the decision of Lord Cranworth LC, sitting as the Court of Appeal in Chancery, in *Mathers v Green* (1865) LR 1 Ch App 29. That decision was approved by the House of Lords in *Steers v Rogers* [1893] AC 232, where it was held that one of two joint patentees who had made use of the patented invention for his own benefit without the consent of his co-owner was not liable to account to him for a share of the profits derived from articles manufactured according to the invention. In the j



a speech of Lord Herschell LC, in which Lord Halsbury, Lord Macnaghten and Lord Shand concurred, there is this passage (at 235):

b 'What is the right which a patentee has or patentees have? It has been spoken of as though a patent right were a chattel, or analogous to a chattel. The truth is that letters patent do not give the patentee any right to use the invention—they do not confer upon him a right to manufacture according to his invention. That is a right which he would have equally effectually if there were no letters patent at all; only in that case all the world would equally have the right. What the letters patent confer is the right to exclude others from manufacturing in a particular way, and using a particular invention. When that is borne in mind, it appears to me to be very clear that it would be impossible to hold, under these circumstances, that where there are several patentees, either of them, if he uses the patent, can be called upon by the others to pay to them a portion of the profits which he makes by that manufacture, because they are all of them entitled, or perhaps any of them is entitled, to prevent the rest of the world from using it.'

d *Mathers v Green* and *Steers v Rogers* were both decisions on the inability of one joint patentee of a patent to control its use by the other patentee or patentees. Since, as Lord Herschell LC observed, the right conferred by a patent is a right to exclude third parties from using an invention which, so far from being kept secret, is published by the patent, that might have been a ground for holding that a case of confidential information was distinguishable. However, in *Heyl-Dia v Edmunds* e (1899) 81 LT 579 Kekewich J applied a similar principle to a secret process and held that one co-owner could not, in the absence of contract, restrain the other from using it for his own benefit.

f In that case the plaintiff claimed that he was in partnership with the defendants. The defence was that there was no partnership and that the parties were simply co-owners of the process. Mr T R Warrington QC, for the defendants, submitted (at 580):

'One of several co-owners of an invention, whether patented or not, can use it for his own benefit in the absence of any contract or statute; nor can he be restrained by the other co-owners ...'

g In replying on behalf of the plaintiff, Mr P O Lawrence QC submitted (at 580):

h 'The inference is that there must be a partnership, because, if it be held to be a co-ownership, each of the co-owners, being entitled to deal with his share without the consent of the other co-owners, could destroy the value of the very asset itself.'

Kekewich J found that there was no partnership and that the plaintiff and the defendants were co-owners of the process. He said (at 580):

j 'What is argued on the part of the plaintiff is that this is a secret process, and that as regards a secret process of this kind, if any one of the three co-owners is allowed to use it—and if he use it I suppose he may assign it—apart from the others, he would destroy the very thing which is in co-ownership ...'

After referring to *Mathers v Green* and *Steers v Rogers*, the judge continued:

'Although a secret process is not strictly analogous to a patented process, because of course the patent itself discloses the invention ... and you get rid of the secrecy at once, yet there is this analogy, and it is a very close one.'

There is no question that each owner of an invention must have the right to use it unless he is restrained by contract with his co-owners or by statute law. Now, if that is true as regards a patented invention, it is true also, it seems to me, as regards a secret invention ...'

Having discussed an argument that the right to use the process must be treated as a chattel, the judge concluded:

'It suffices for the present purpose for me to say that Lord Herschell's language appears to be applicable to this case, and that, whether you may properly speak of a secret process as being a chattel or not, at any rate there is nothing to prevent each of these co-owners of this secret process from manufacturing the materials and using the knowledge which he possesses.'

The actual decision in *Heyl-Dia v Edmunds* was based on the ground that the pleadings alleged a partnership and nothing more, so that the plaintiff's claim was bound to fail with the finding that there had been no partnership between him and the defendants. Strictly speaking, therefore, the observations of Kekewich J were obiter. They are not binding on this court. Nevertheless, they were the product of a reasoned consideration of arguments advanced by eminent counsel on each side. Especially significant are Mr Lawrence's acceptance that each of the co-owners of a secret process was entitled to deal with his share without the consent of the other co-owners and the judge's apparent acceptance that if he was allowed to use the process he might assign it.

On the basis of these authorities Mr Waksman submits that each member of the team, being himself entitled, as against the others, to use the confidential information for his own benefit, was equally entitled to consent to Mr Hartley's using it for his benefit in the way that he did. The effect of the consents given by the members other than Mr Murray was a partial assignment of their rights in the information to Mr Hartley, a disposition which *Heyl-Dia v Edmunds* establishes that they were entitled to make. Thus Mr Murray would have had no cause of action against the other members of the team and, a fortiori, he has no cause of action against Mr Hartley.

While I believe that Mr Waksman's submissions represent a correct application of the reasoning of Kekewich J, I would not wish to rest my decision of this case on that ground alone. At the turn of the century the law relating to breach of confidence was not as well developed as it has since become. Now it might be said that a co-owner of confidential information ought to be in no worse a position than a co-owner of a copyright, as to whose rights: see *Powell v Head* (1879) 12 Ch D 686 and *Cescinsky v George Routledge & Sons Ltd* [1916] 2 KB 325.

It is necessary to consider the particular relationship between the parties with some care. The position was that the six members of the team got together in order to acquire the assets of Serviscope through the medium of a new company. Although there may have been an agreement or understanding as to the sums to be invested and the shareholdings to be taken if the acquisition came to fruition, with so much remaining to be agreed there can never have been a binding agreement that all the members would continue to participate and any of them could have withdrawn, at all events before a contract was concluded with the administrative receivers. Equally, the members other than Mr Murray were at liberty to decide amongst themselves that they would go ahead without him, either on their own or with others. That is what they did and, however incensed Mr Murray may have been at their conduct and at that of Mr Hartley, he was powerless to prevent it.

a It is in that context that the confidential information must be considered. It came into being for the purpose of facilitating the project. Initially it belonged to all the members of the team. But if one of their number could be excluded from the project, he could not, after his exclusion, prevent the others from using the information as they pleased. To put it in another way, the information, being an adjunct of a relationship whose continuation Mr Murray was incapable of  
b prolonging, ceased to be his property once the relationship was dissolved. On that ground I would decide the question of law in favour of Mr Hartley.

In deciding it in favour of Mr Murray, Judge Kershaw thought that the springboard principle was applicable; cf *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923. He said:

c 'In my judgment the principle that once information has been communicated in confidence the recipient of the confidence can never use it as a springboard is the relevant one here. I cannot find in any of the authorities relied upon by [counsel for the defendants] which forces, or even persuades, me to the contrary. It is, in my judgment, contrary to common  
d sense that a recipient of confidential information should be free to take advantage of it which is manifestly unfair to one of the providers of it, even with the agreement or encouragement of other providers.'

In my view the springboard principle can have no application where, as here, the information has ceased to be confidential.

In this court Mr Shannon has adopted the judge's reasoning and argued that Mr  
e Murray's consent was an essential prerequisite to Mr Hartley's use of the confidential information. But at every stage in his argument it has appeared clear that he could only have made it good if there had been some contractual, fiduciary or other special relationship or partnership between the members of the team. Since they were only co-owners, and only for the purposes of a project from which  
f one of their number could be excluded, Mr Shannon's argument is bound to fail.

I would allow the appeal and dismiss the action as against Mr Hartley.

**SCHIEMANN LJ.** I agree. Mr Murray's lack of any remedy arises from the undisputed fact that his relationship with the other five members of the original team was not regulated by contract. The arrangement between those who were  
g planning the management buyout was a loose one which they chose not to regulate by a contract. I see no reason or commercial logic for implying equitable obligations of uncertain extent.

The breach relied upon by the plaintiff is essentially the approach by Mr Hartley to the other five at a time when he was in possession of confidential information.  
h In so far as Mr Shannon submitted that the recipient of confidential information is not ever entitled to use it for his own benefit, that submission is clearly too wide. It is commonplace for intended lenders to receive information in confidence with a view to persuading them to lend. They are clearly free to do so notwithstanding that the commercial lender in these circumstances will only lend if he thinks the loan is for his own benefit.

j If Mr Hartley had said initially to the five 'I offer myself as Managing Director of a new company on condition that the Plaintiff plays no part in it', that offer would not, in my judgment, have been a breach of confidence. It might or might not have led the other five to break off negotiations. What happened at that point was out of Mr Hartley's hands and in the hands of the other five. As it seems to me, the crucial question in the present case is whether those five, in entering into the arrangement with Mr Hartley, were acting in a manner of which Mr Murray



could legally complain. In my judgment they were not. Mr Murray could have sought by contract to have put himself into a position where he could have restrained them from dropping him and taking someone else on board. We have no idea whether or not the other five would have been prepared to enter into any such contract. In any event they were not asked to and did not.

The essence of the plaintiff's complaint is that Mr Hartley was motivated by the prospect of seeing himself as the largest shareholder. Mr Shannon accepts that Mr Hartley was at liberty to advise the five that the plaintiff needed to go before they stood much chance of getting money. But, he submits, even if Mr Hartley had approached, or been approached by, the other five in the presence of Mr Murray, Mr Hartley was not free to accept any offer which they chose to make. I disagree.

I accept that some measure of confidence was indeed imposed upon him. But I do not accept that it is sufficiently wide to render that which he did a breach of it. It must be a common thing in management buyouts for the existing managers initially all to want to work together but then for some to work out a deal to the exclusion of others.

A different way of looking at the matter which brings one to the same result is this. Any damage to Mr Murray flows not from the request that he be removed but from the removal itself. Whether Mr Murray was removed did not depend on any decision by Mr Hartley. In so far as Mr Hartley received any subsequent benefit this was not itself causative of any damage to the plaintiff.

Mr Shannon faintly suggested that Mr Murray had made an investment in the project. So far as I can see none of the joint venturers had at the time of any alleged breach made any investment apart from their own time in the project. It seems that the original team agreed to pay £5,000 for the goodwill. As I understand it, in the event, the plaintiff has never paid anything. I accept that on 26/27 March a cheque drawn on Mr Fielding's account for £5,000 may have been transferred. But this could hardly be regarded by any of the other five as having been paid on the plaintiff's behalf and they have never suggested this.

I agree with the order proposed by Nourse LJ.

**SIR JOHN VINELOTT.** I have had an opportunity of reading the judgment of Nourse LJ. I agree with it and there is nothing I can usefully add.

*Appeal allowed. Leave to appeal to the House of Lords refused.*

19 March 1998. *The Appeal Committee of the House of Lords (Lord Slynn of Hadley, Lord Steyn and Lord Hoffmann) refused leave to appeal.*

Kate O'Hanlon Barrister.